IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-001676
[2016] NZHC 672

BETWEEN	JOHN HILARY CORBETT Plaintiff
AND	ROBERT JAMES VOULK & IAIN MICHAEL HUTCHESON Defendants

Hearing: 4 March 2016

Appearances: Mr Corbett (on papers)
Ms Z Johnston for Crown Law - Counsel Assisting the Court
Ms F Divich for First Named Defendant
Mr P Napier for Second Named Defendant

Judgment: 13 April 2016

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE

This judgment was delivered by me on
***13.04.16 at 4 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Introduction

[1] Mr Corbett commenced the present proceedings in 2014 in relation to a long-running dispute over the administration of a family trust that was settled by Mr Corbett's late parents. I arranged for this matter to be called in the Chambers list on 4 March 2016 in order to hear from the parties regarding the possible appointment of a litigation guardian on behalf of Mr Corbett. I heard from counsel for the defendants, who did not support the making of an order; and from counsel assisting the court, Ms Johnston, who took a neutral stance on the issue. Mr Corbett did not appear but he filed a lengthy memorandum opposing the appointment of a litigation guardian.

[2] This is the second time that the court has considered the issue of Mr Corbett's competence to conduct proceedings. Mr Corbett previously filed proceedings in 2010 but the case came to a halt in the following year when Priestley J determined that Mr Corbett was mentally impaired under r 4.29 of the High Court Rules.[1] The Judge ordered a litigation guardian to be appointed to conduct proceedings on Mr Corbett's behalf in accordance with r 4.30. That decision was subsequently upheld by the Court of Appeal in 2014.[2]

The relevant provisions of the High Court Rules

[3] There are two provisions of the High Court Rules which are relevant to this issue. In the interests of convenience, those provisions are set out below. I will consider the rules in further depth at a later point.

[4] Rule 4.30 states the following:

> **4.30 Incapacitated person must be represented by litigation guardian**
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> (1) An incapacitated person must have a litigation guardian as his or her representative in any proceeding, unless the court otherwise orders.
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> (2) If a person becomes an incapacitated person during a proceeding, a party must not take any step in the proceeding without the permission of the court until the incapacitated person has a litigation guardian.

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1 *Corbett v Western* [2011] 3 NZLR 41, [2011] NZFLR 776, (2011) 20 PRNZ 492.
2 *Corbett v Patterson* [2014] NZCA 274, [2014] 3 NZLR 318, (2014) 22 PRNZ 206.

[5] The High Court Rules define an "incapacitated person" in the following terms:

> **4.29 Incapacitated person, litigation guardian, and minor defined**
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> For the purposes of these rules,—
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> **incapacitated person** means a person who by reason of physical, intellectual, or mental impairment, whether temporary or permanent, is—
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> (a) not capable of understanding the issues on which his or her decision would be required as a litigant conducting proceedings; or
>
> (b) unable to give sufficient instructions to issue, defend, or compromise proceedings[.]

The decision in *Corbett v Western*

[6] In his 2011 judgment, Priestley J identified a number of matters of concern. In particular, he noted that Mr Corbett had been involved in previous litigation concerning the same matter[3] and that the documents that Mr Corbett had filed were of wholly excessive length.[4] That pattern has been repeated in this case, in which questions about Mr Corbett's mental well-being have arisen from his inability to present focused, structured arguments and because he has filed a steady procession of immensely lengthy documents with little relevance to the case.[5]

[7] The Court in *Corbett v Western* had before it a psychiatric report which had been prepared by a Dr Brinded. Dr Brinded considered that the plaintiff was suffering from:[6]

> …an unstable mental state in the form of cyclothymic disorder which was significantly impacting on his capacity to represent himself in litigation.

[8] He further considered that Mr Corbett was mentally impaired with respect to the proceeding. In particular, Dr Brinded found that Mr Corbett was unable to

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3 At [32]–[37], referring to *Corbett v Bolesworth* HC Auckland CIV-2005-404-172, 9 September 2009.

4 At [25].

5 For example, the statement of claim is 94 pages long.

6 *Corbett v Western*, above n 1, at [61(a)].

understand the complex issues raised by the litigation, or to make decisions about those issues and more generally in relation to the affairs of the family trust:[7]

> His impairment extended to his ability to represent his rights or protect his position in a legal forum and to manage his financial affairs in the event of any distribution to him of trust monies[.]

[9] Dr Brinded suggested that Mr Corbett would be disadvantaged unless a litigation guardian could be appointed who would be able to present his case for him in a comprehensive and rational way; comply with the rules of court; deal rationally and in a reasonable way with litigation; and understand and make rational decisions on the issues arising from and in addition to the litigation.[8]

[10] Priestley J considered that Dr Brinded's opinion of Mr Corbett's psychiatric state fitted squarely within the first limb of the "incapacitated person" definition in r 4.29(a). The Judge noted and agreed with the dictum of Chadwick LJ in *Masterman-Lister v Brutton & Co*:[9]

> The pursuit and defence of legal proceedings are juristic acts which can only be done by persons having the necessary mental capacity; the Court is concerned not only to protect its own process but provide protection to both parties in the litigation which comes before it.

[11] Priestley J further considered that while Mr Corbett was able to function at a certain level, he suffered under a lack of focus; an inability to articulate or identify objectives; an inability to ascertain matters of relevance and weight; a total inability to understand such concepts as *res judicata* and the function of the appellate courts; and an inability to present pleadings and documents in a concise and effective manner. As a result his case was a "seething incomprehensible mess".[10] Priestley J concluded that it was essential for a litigation guardian to be appointed.

[12] In my view it is not sufficient for this court to simply assume that the concerns identified by Priestley J should be applied in the circumstances of the present case. Nonetheless, it is significant that the present proceeding in many respects represents a repetition of that previous case.

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7 At [61(b)].
8 At [62].
9 At [87], citing *Masterman-Lister v Brutton & Co* [2003] 1 WLR 1511 (CA) at [65].
10 At [92].

Expert evidence

[13] In this case, I made an order appointing Crown counsel to assist the court. Counsel appointed, Ms Johnston, was asked to enquire into the question of whether a litigation guardian was required and to submit any evidence which was thought to be relevant on that issue.

[14] Counsel arranged for a psychiatric assessment concerning Mr Corbett and in due course Dr Anthony Djurkov reported on this issue.[11] I do not know the exact terms of the referral. However, Mr Corbett consented to the examination. Plainly, Dr Djurkov understood that his task was to consider whether Mr Corbett suffered from a psychiatric disorder. At an early juncture in his report he concludes:

> I am of the opinion that Mr Corbett has longstanding personality traits that could meet the criteria for a personality disorder but not a major mental illness. His personality has predominantly obsessive compulsive traits: he is pre occupied with details, he wants his writings to be perfect according to his standards so he never finishes them and updates them almost daily which interferes with task completion so he never finishes his legal writings, he has been excessively devoted to his work (he does nothing else but working on his court case), he is inflexible about the matters of morality and values (he could not accept my argument that it is possible that the lawyers were doing him good), he is reluctant to delegate tasks (he represents self in court, does not want any legal support). … [H]e shows rigidity and stubbornness in his discussions and actions. He also clearly has some traits of paranoid personality (lacking trust, suspecting that other[s] are exploiting him).

[15] He also noted that there were delusional aspects verging on paranoia present.

[16] Dr Djurkov summarised the position as follows:

> In summary although cross sectionally and on first impression Mr Corbett creates the impression that he has a major health issues [sic] after clarifying his long term history it becomes clear that his main problem is his personality not so much a major mental illness. His pattern of communicating and behaving has been long standing, not time limited and acute. There could be a counter argument that he has a chronic untreated mental illness but this is far less likely given that there has been a consistent and pervasive pattern of behavior and thinking and the natural course of major mental illness is typically fluctuating even when it is chronic.
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> His personality clearly creates major problems and distress to him but instead of being an illness we could define it as an extreme variant of human personality.

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[11] Dr Djurkov is a consultant psychiatrist at Te Rawhiti Community Mental Health Centre.

> His personality structure and his thinking stop him from realising and appreciating the damage to the trust from his ongoing court process. He might be able to use the legal terms and he might be knowledgeable of the legal procedures but I doubt that he is able to appreciate that what he does helps no one including him and is unlikely to come to any resolution the way he wants it.

[17] Dr Djurkov's report understandably approaches matters from a diagnostic perspective. The implications of the report need to be considered in the context of rr 4.29 and 4.30.

Interpreting rules 4.29 and 4.30

[18] Rule 4.30 of the High Court Rules restricts incapacitated persons from undertaking proceedings unless represented by a litigation guardian. In order to make a finding that a person is incapacitated, the court must find that the person suffers from an "intellectual, or mental impairment" which affects his or her capacity to conduct proceedings. This is a wider and more flexible definition than the previous version of the rule, which required the court to find that a person was mentally disordered.

[19] I have already made reference to *Masterman-Lister v Brutton & Co* which recognised that the appointment of a litigation guardian is for the purpose, amongst other things, of protecting the court's processes and also to achieve a balance between the rights of the party in question and the rights of the other parties to the litigation.[12] The objectives of appointing a litigation guardian also include the protection of the litigant's interests.[13]

[20] In the Court of Appeal decision in *Corbett v Patterson*, Randerson J held that the capacity to conduct legal proceedings required something more than merely being able to understand in broad terms the matters involved in a decision to prosecute, defend or compromise the proceedings:[14]

> The person must be able to understand the nature of the litigation, its purpose, its possible outcomes and its risks, including the prospect of an adverse cost award.

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12 *Masterman-Lister v Brutton & Co*, above n 9.
13 *Corbett v Patterson*, above n 2, at [49].
14 At [43(d)].

[21] A person who is incapacitated lacks this understanding. Unless a litigation guardian is appointed in appropriate cases, an incapacitated party who may have a good claim or defence will not be able to put forward the case in an intelligible and effective way. Not only may detriment arise from the failure to advance the litigant's interests effectively but there may also be secondary consequences such as an adverse costs award being made against the litigant. Exposing a litigant who does not properly appreciate the process in which he or she is involved to such outcomes would be unfair and contrary to his or her interests.

Mental impairment

[22] Rule 4.29 provides that "mental impairment" may cause a person to become incapacitated. However, the term "mental impairment" is not defined in the High Court Rules.

[23] The concept of mental impairment has been adopted in other procedural legislation, namely the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CP(MIP)A). Even though the subject matter of that enactment is concerned with criminal rather than civil procedure, both the CP(MIP)A and the High Court Rules are concerned with assessing a person's fitness to participate in litigation without the assistance of a third party. Prior to the enactment of the CP(MIP)A in 2003, it was necessary to determine that a person suffered from a mental disorder in order to make a finding that the person was unfit to stand trial.[15] Similarly, the High Court Rules stated that a litigation guardian was only required in civil proceedings if a person was mentally disordered; or alternatively if a person was incapacitated under the Protection of Personal and Property Rights Act 1988.[16] In both cases, the term "mental disorder" was defined by reference to the Mental Health (Compulsory Assessment and Treatment) Act 1992.

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15 Criminal Justice Act 1985, s 108.

16 Section 6 of the Protection of Personal and Property Rights Act 1988 grants the court jurisdiction over a person who "lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare" or a person who "has the capacity to understand the nature, and to foresee the consequences… but wholly lacks the capacity to communicate decisions in respect of such matters."

[24] The way in which the concept of mental disorder is enacted in the Mental Health (Compulsory Assessment and Treatment) Act reflects the framework within which psychiatrists operate when seeking to identify whether there is a mental disorder present and if so, what kind thereof. The legislative definition refers to "an abnormal state of mind", which is then subject to a considerable degree of exegesis in order to discover which particular abnormal states of mind will come within the definition.

[25] By contrast, the expression "mental impairment" does not come with any further expressed qualification as to the quality or nature of the mental impairment. It was possibly for this reason that in the context of the criminal provision, the Court of Appeal in *Solicitor-General v Dougherty* stated:[17]

> [43] The reasons underlying the change from disorder to impairment are well known. There was concern that the existing concept of mental disorder did not cover those whose lack of fitness to stand trial was sourced solely in intellectual disability. The new concept of mental impairment was considered to be flexible enough to embrace not only the intellectually disabled, but also others whose mental health issues, sourced in whatever cause, raised concerns about their ability to present a defence.

[26] In the 2015 decision *R v R*, Winkelmann J noted her agreement with an earlier decision where it had been held that:[18]

> [9] "Mentally impaired" is undefined in the Act. On reflection I think it must encompass more than just "mental disorder" (as defined in the Mental Health (Compulsory Assessment and Treatment) Act 1992) and "intellectual disability" (as defined in the Intellectual Disability (Compulsory Care and Rehabilitation Act) 2003). It is possible it includes, therefore, other mental impairments, such as those caused by degenerative neurological condition, substance abuse or acquired brain injury, involving short term memory and frontal lobe deficits, low intelligence or impaired cognition, any of which lead to difficulty in organising or processing information and responding. The focus of the undefined term should be on whether the defendant has a condition that impairs mental function to the extent it may seriously affect the defendant's ability to comprehend charges, consider options and consequences, plead or mount a defence.

[27] In their present states, both the CP(MIP)A and the High Court Rules make specific reference to how mental impairment might impact the ability of the impaired

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[17] *Solicitor-General v Dougherty* [2012] NZCA 405, [2012] 3 NZLR 586 at [43] (footnotes omitted).

[18] *R v R* [2015] NZHC 815 at [5], citing *R v RTPH* [2014] NZHC 1423, per Kos J (footnotes omitted).

person to manage the litigation. In the criminal procedure provisions, the mental impairment is linked to unfitness to stand trial, which is defined in the CP(MIP)A to include matters such as whether the defendant is unable to adequately understand the nature or purpose or possible consequences of the proceedings.[19] In r 4.29 the relevant disability, including mental impairment, must be such as to result in an inability to "give instructions to issue, defend, or compromise proceedings".

[28] The inherent flexibility of the term "mental impairment" means that its application should not be trammelled by limiting its application to cases where the mental impairment arises from some specific causes but not others. If that conclusion is valid, it does not matter whether the mental impairment arises from causes other than clinically recognised mental disorders. Even if it is valid to maintain a distinction between such disorders on the one hand and personality disorders on the other, that distinction does not seem to matter when construing the rule. There would not seem to be any reason that a person who has impaired thinking as a result of a personality disorder could just as readily be viewed as being an incapacitated person.

Application to the present case

[29] That brings me to the heart of the present problem that the court has encountered.

[30] Dr Djurkov's report reflects the fact that Mr Corbett is incapable of making succinct presentations of issues relevant to his case. He feels compelled to discuss the entirety of the case whenever there is an engagement with the court. He cannot isolate out specific issues. That phenomenon is not restricted to his oral presentations in court but is plainly a problem with the documents that he files. Some of them are immense in length and all are rambling, disorganised and often incomprehensible. These incidentally are the same factors that Priestley J identified when he made an order appointing a litigation guardian some years ago.

[31] The evidence in the form of Dr Djurkov's report therefore discloses that the problems that Mr Corbett manifests result from the intersection of his personality

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[19] Criminal Procedure (Mentally Impaired Persons) Act 2003, s 4.

structure and his method of thinking. The result is plainly that he is mentally impaired, in my view.

[32] Understandably, perhaps, Dr Djurkov approached the question from the diagnostic perspective of seeking to identify a mental disorder. The presence of a mental disorder is in my view not determinative when considering the question of whether the party to the litigation should have a litigation guardian appointed. It would seem that it is no longer necessary even under the Mental Health (Compulsory Assessment and Treatment) Act for there to be evidence of a mental illness as a prerequisite to a conclusion that the patient is mentally impaired. Elias CJ in *Waitemata Health v Attorney General* stated:[20]

> It is unfortunate that some of the expert opinions in the present case continue to refer to a distinction between mental illness and behavioural disorders which may not sufficiently mirror the definition of mental disorder and which perpetuates the former arid debate about the difference between the "mad" and the "bad". The language of the [Mental Health (Compulsory Assessment and Treatment) Act] attempts to avoid that simplistic division. A recognised and severe personality disorder which has the phenomenological consequences identified in the definition of mental disorder (delusions, disorders of mood, perception or volition or cognition) of the severity indicated in the definition … would in normal speech be "an abnormal state of mind".

[33] I consider that that passage lends support to the view that a personality disorder of a sufficient degree can amount to a mental impairment if it impacts the thinking of the party in such a way that he cannot think about or consider rationally the matters that are relevant and which are posed as criteria in r 4.30. In my view, Mr Corbett suffers from a mental impairment of this kind.

[34] The next issue concerns whether Mr Corbett's incapacity is of a kind that has the functional consequences set out under the definition of incapacitated person; that is, whether his mental impairment has the result that he is:[21]

> (a) not capable of understanding the issues on which his or her decisions would be required as a litigant conducting proceedings; or
>
> (b) unable to give sufficient instructions to issue, defend or compromise proceedings[.]

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[20] *Waitemata Health v Attorney-General* [2001] NZFLR 1122, (2001) 21 FRNZ 216 at [71].

[21] High Court Rules, r 4.29.

[35] Given that Mr Corbett is self represented, the references in subpara (b) to his giving instructions are not apt for consideration in the present application. As an aside, I note that the rules would seem to reflect the state of affairs where the normal position is that a litigant in civil proceedings is represented by a lawyer to whom he has to give instructions. Such an assumption is not necessarily appropriate where retrenchment of legal aid means that many litigants come to the court without a lawyer.

[36] Due to his gross non-compliance with the High Court Rules, Mr Corbett is at risk of having his proceedings struck out. There is currently an application to that end awaiting disposal. He could circumvent such an application if he were to comply with the rules of the court and file pleadings that conformed to, inter alia, r 5.17. From my observations of Mr Corbett and after reviewing the history of the matter as disclosed by the pleadings file and having regard to the difficulties that Priestley J observed when he considered an earlier application to appoint a litigation guardian, I am satisfied that Mr Corbett cannot understand the importance of complying with the High Court Rules. Dr Djurkov's report is explicit on this point. If Mr Corbett remains in control of the proceeding, the result will almost certainly be that the proceedings will be struck out and costs orders will be made against Mr Corbett. I should add that in the light of this comment, if a strike out application is ever brought to hearing it will need to be dealt with by another Judge.

[37] Apart from Mr Corbett's interests, the interests of the other parties to the proceedings and the wider concerns relating to the proper administration of justice also support the appointment of a litigation guardian.[22] The way in which Mr Corbett pursues his litigation means that the opposing parties are engaged in an unnecessarily complicated legal contest in which one side does not comply with the rules of engagement. The continuation of the proceedings under the control of Mr Corbett will lead to the incurring of very considerable legal costs. It will also engage a much greater amount of the court's time than is justified, to the prejudice of other persons who have cases to be dealt with.

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[22] See *Corbett v Patterson*, above n 2, at [4]; *Corbett v Western*, above n 1, at [40]–[41] and [98]–[99].

[38] Counsel for the defendants were understandably unenthusiastic about the prospects of the proceedings being further protracted while the issue of a litigation guardian was enquired into. Mr Napier expressed his party's preference that the strikeout application that is presently on hold be dealt with. However, once issues of mental impairment emerge, the High Court Rules impose mandatory requirements to arrange a litigation guardian. There would be no warrant for deferring that step in the proceeding until after the strikeout application had been dealt with. By definition, a mentally impaired person is at a disadvantage. The appointment of a litigation guardian is designed to protect persons so disadvantaged. Mr Corbett should not be deprived of that potential protection while any further steps in the proceedings which are more than strictly procedural in nature are taken.

[39] In conclusion, I consider that Mr Corbett is an incapacitated person who suffers from the inabilities defined in the definition section of "incapacitated person" in the High Court Rules. There will be an order that a litigation guardian is to be appointed.

[40] The litigation guardian will have the final say and control of the proceeding. It may be that the litigation guardian will determine that the proceedings should go ahead because Mr Corbett has a just cause of action and will take steps to plead it in compliance with the High Court Rules and otherwise ensure that Mr Corbett's responsibilities as plaintiff are met. No doubt when considering whether the proceeding is a viable one, the litigation guardian will have regard to the evidence that is available and whether such evidence could discharge the burden of proof that Mr Corbett will bear. The litigation guardian may be required to make an assessment of the overall prospects of success and the cost consequences that would be incurred by Mr Corbett if he were to fail in the litigation. There may even be a possibility that a litigation guardian would wish to come to a binding compromise with the defendants. All of those matters lie in the future. But it needs to be stressed that a litigation guardian by accepting appointment would not necessarily be committing him or herself to having to manage what would be difficult court proceedings through the trial process.

[41] The costs of the present application are reserved.

Practical steps that need to be taken from this point

[42] Having raised the question of my own motion, I have come to the view that an order ought to be made for the appointment of a litigation guardian. The next stage in the process raises some difficult practical issues that need to now be confronted. The principal difficulty is identifying a person who would be willing to accept appointment. That issue is tied up with the question of who would pay for any legal representation and what protection the litigation guardian would have in the event that a costs order is made against the plaintiff.

Identifying a suitable litigation guardian

[43] Rule 4.35 empowers the court to appoint a litigation guardian on behalf of an incapacitated person. However, the rule does not contain any provisions identifying individuals or any class of persons whom the court might be able to appoint as litigation guardians. That issue needs to be considered.

[44] One way in which the role of litigation guardian could be established in this case would be the appointment of a non-legally qualified person as guardian. On the assumption that the resources were available to do so, the prudent way of dealing with the matter would be for the litigation guardian to engage a legal adviser. Another possibility, one that is not uncommonly followed and that Priestley J followed in the earlier proceeding, would be to appoint a litigation lawyer to the role of litigation guardian. The person in question would then take responsibility for decisions about the future of the litigation, no doubt after consulting with Mr Corbett. The litigation guardian might also assume the role of counsel in the proceedings. So far as I am aware, no objection has been expressed to a litigation guardian being appointed on this basis. It is a relatively simple procedure and it has the potential to reduce the costs involved.

[45] The issue of appointing an appropriate non-lawyer was considered in the case of *M v S*, which concerned the appointment and payment of a litigation guardian in the context of the Care of Children Act 2004.[23] The Court made the following observations which are helpful in the context of the present case even allowing for

[23] *M v S* [2008] NZFLR 120, (2007) 18 PRNZ 681.

the different statutory background concerning the responsibility for costs of a litigation guardian:

> [45] The availability of an independent relative or person to be appointed as litigation guardian (a person whom Mr Jefferson colourfully described as "Great Aunt Ethel") cannot be assumed, particularly since r 91 places the burden for costs squarely on the litigation guardian of the incapacitated person, albeit with entitlement to be reimbursed out of the property of the incapacitated person for any costs paid.
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> [46] The problem of costs also faces a lawyer who consents to being appointed as litigation guardian. There is no provision in the Act or elsewhere for the costs of a litigation guardian to be met from any designated source. Thus, the responsibility and the burden of carrying out the work associated with the appeal and seeking appointment as a litigation guardian, falls on the proposed appointee, subject to any recourse that may be available to any property the children may have.
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> …
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> [89] Section 13 of the Legal Services Act 2000[24] specifically addresses the situation where legal aid is required to fund a proceeding brought by a guardian ad litem on behalf of the minor. It provides for the application to be made by an intending litigation guardian, thus contemplating application being made in advance of the ex parte application to the High Court for appointment of the litigation guardian and the costs of the appointment being met by the Legal Aid fund in qualifying circumstances. The financial circumstances assessed for legal aid purposes presumably will be those of the minor, not those of the litigation guardian or intending litigation guardian.

[46] I would be assisted by any further information that counsel assisting the court (or indeed any other party) is able to provide which might lead to the identification of a suitable non-lawyer who would be prepared to act as litigation guardian. Hand-in-hand with the question of identification there arises the issue of how such a person would fund the legal advice which (unless the guardian him/herself was a lawyer) would be essential so that an informed decision can be made about whether the proceeding should be continued and if so in what form.

[47] In order to facilitate these enquiries I have given brief consideration to the question of legal aid.

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[24] That section is equivalent to s 15 of the Legal Services Act 2011.

A source of payment for legal assistance and for payment of any adverse costs order made

[48] This issue is likely to arise, whether there is a two-pronged approach in the sense of there being a litigation guardian and separate counsel or whether the two roles are coalesced. Unless there is a trusted confidant of Mr Corbett who is prepared to act gratuitously, there will need to be a source of payment available to meet the costs of the litigation guardian. In any case, funding to pay for professional charges of counsel would be necessary. As well, there is the consideration that a litigation guardian is vulnerable to a costs order under r 4.42. Any person who is appointed in the quasi-party position of litigation guardian will therefore be in a position which is unusual in that added to the obligations that go with appointment is that of potentially being required to pay costs in regard to another person's litigation.

[49] It appears that the family trust has previously funded the cost of a litigation guardian on Mr Corbett's behalf. An enquiry ought to be made as to whether such funding is available again in the present circumstance.

[50] The court would also be assisted by submissions on the question of whether a litigation guardian is a person who is eligible to apply on behalf of or in conjunction with the person that he/she represents for legal aid. A grant of legal aid might be the means by which the professional costs of the legal practitioner concerned can be met. Such a grant may not, however, provide assurance concerning indemnity for the litigation guardian in regard to any adverse costs order that might be made.

[51] Section 15(3) of the Legal Services Act 2011 provides that grants of legal aid under that legislation can extend to meeting the costs of mentally disordered persons who are represented by litigation guardians:

> (3) If the rules of court require proceedings to be brought or defended by a next friend or guardian *ad litem*, then an application for legal aid in respect of a civil matter for a person who is aged under 16 or is mentally disordered must be made by the person's next friend or guardian *ad litem*, or by a person intending to act in that capacity.

[52] The use of the phrase "mentally disordered" rather than "mentally impaired" creates a inconsistency between the application of s 15(3) and the High Court Rules

relating to litigation guardians. On the one hand, my finding above that Mr Corbett is mentally impaired means that the rules of court require these proceedings to be brought by a guardian *ad litem* (a litigation guardian) and therefore s 15(3) would seem to require that any application for legal aid should be made by the litigation guardian, rather than Mr Corbett himself. On the other hand, Mr Corbett is not mentally disordered and therefore s 15(3) does not seem to apply to him. A possible explanation for this confusion is that s 15(3) of the Legal Services Act 2011 is identical to s 13(3) of the Legal Services Act 2000. When the earlier legislation was first enacted, the wording of s 13 would have been consistent with the High Court Rules. However, the wording of the provision has not been updated to reflect the amended wording of r 4.29 of the High Court Rules. This lacuna in the legal aid legislation cannot be resolved on the basis of the material presently before the court; however the inconsistency is concerning and should ideally be resolved sooner rather than later.

[53] Generally, an award of costs made against an incapacitated person may be enforced against any person who is the litigation guardian of the incapacitated person.[25] However, if a litigation guardian is legally aided on behalf of the incapacitated person, then the guardian has the benefit of s 45 of the Legal Services Act 2011.[26] Section 45 relevantly provides:

> **45 Liability of aided person for costs**
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> (1) If an aided person receives legal aid for civil proceedings, that person's liability under an order for costs made against him or her with respect to the proceedings must not exceed an amount (if any) that is reasonable for the aided person to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.
>
> (2) No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.
>
> (3) In determining whether there are exceptional circumstances under subsection (2), the court may take account of, but is not limited to, the following conduct by the aided person:
>
> (a) any conduct that causes the other party to incur unnecessary cost:

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25 High Court Rules, r 4.42.

26 Legal Services Act 2011, s 45(6).

(b) any failure to comply with the procedural rules and orders of the court:

(c) any misleading or deceitful conduct:

(d) any unreasonable pursuit of 1 or more issues on which the aided person fails:

(e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution:

(f) any other conduct that abuses the processes of the court.

…

[54] There does not appear to be any provision which would enable a costs order against a litigation guardian to be paid by way of a legal aid grant.

Summary

[55] The position can therefore be summarised as follows. It is to be inferred from the provisions of section 15(3) that legal aid is available to a person notwithstanding that they are represented by litigation guardian. As a matter of principle, it is difficult to see how the matter could have been satisfactorily dealt with otherwise. Persons are able to bring viable claims even though they are represented by a litigation guardian and they should not be shut out from legal aid because of that circumstance.

[56] If the plaintiff here was to be granted legal aid, it is unlikely that any costs order would be made against him but that is a matter for the court to determine.[27]

[57] Enquiries ought to be therefore made of Mr Corbett to ascertain whether he intends to make an application for legal aid or whether he has the financial resources to pay the costs of a proposed litigation guardian and provide a worthwhile source of indemnity against any costs order, in the event that legal aid is not applied for or is not granted for whatever reason.

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[27] Legal Services Act 2011, s 45(2).

Orders

[58] The proceeding is to be listed for mention in the Chambers list at **2:15pm on 13 May 2016.** If counsel for the first and second defendants do not consider that they can usefully contribute to the discussion, they will not be under any obligation to attend at the mention. I would anticipate a further report from counsel assisting the court at that time on the matters which are raised in this judgment.

[59] With the exception of listing this matter for hearing and the filing of any memorandum of submissions concerning the matters to be discussed on 13 May 2016, the proceeding is, in all other respects, stayed until further order of the court.

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J.P. Doogue
Associate Judge