



The Law Reform Commission

INTRODUCTION OF THE OFFICE OF THE ADMINISTRATOR-GENERAL IN THE CAYMAN ISLANDS

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INTRODUCTION OF THE OFFICE OF THE ADMINISTRATOR-GENERAL IN THE CAYMAN ISLANDS

INTRODUCTION

1. Pursuant to a referral by the Attorney-General of January this year, the Commission agreed to examine the feasibility of the introduction of the post or office of Administrator General.
2. An Administrator- General carries out duties and functions similar to those of a public trustee and of a public guardian and in some jurisdictions the office is known as the Administrator- General/ Public Trustees office.¹ There is a variety of nomenclature for such office, such as public guardian, official solicitor and official receiver depending on the duties assigned to the office.
3. In 2009, when the Law Reform Commission was reviewing the need for enduring powers of attorney in the Cayman Islands, the Commission concluded that such powers should only be introduced if there was an oversight body such as a Public Trustee or Administrator- General to guard against abuse. The Legal Department stated that there was a need for the office of Public Guardian generally and more particularly if enduring powers of attorney were introduced. In his response to the review, the Chief Justice recommended the establishment of the office of Official Receiver whose duties would include ensuring that donors get proper legal advice before granting an EPA; assessing whether the incapacity triggering the operation of the EPA has occurred; monitoring the actions of attorneys; and bringing court proceedings to protect the donor's or any beneficiary's interests.
4. The purpose of this review is to discuss briefly the role of an Administrator-General and to provide draft legislation establishing such an office. Offices in other jurisdictions, such as Jamaica, will be examined in order to determine the best model for the needs of the Cayman Islands.

FUNCTIONS OF AN ADMINISTRATOR- GENERAL/ PUBLIC TRUSTEE

Brief History

5. As indicated above, the duties of an Administrator-General are similar and, in some jurisdictions, the same as those of the more familiar Public Trustee. These types of offices may focus on either financial and property management or on decision making and personal care for those who are unable through age or infirmity to look after themselves.

¹ Kenya, Uganda

6. The first Public Trustee is that of New Zealand where it was proposed as early as 1870² and established in 1873. It was proposed by E.C.J. Stevens, a member of parliament, to resolve the difficulty colonists had in finding reliable private trustees in the colony³. The society was a young, mobile one and colonists found it difficult to find friends or relatives willing and qualified to undertake the duties of trustees.⁴ This was a matter of great concern particularly where beneficiaries were minors. To combat this and to find a permanent and qualified person to act a Bill establishing the Public Trustee was introduced in 1870 and after much criticism⁵ and opposition was passed on 25 October 1872.⁶

7. The first duty of the New Zealand Public Trustee was to administer estates of deceased persons where such persons had named him executor in their wills. After an amendment to the Act in 1873 powers were widened to include administering the estates of persons who died intestate, acting as trustee of settlements and undertaking the management of properties on behalf of living persons; administering the estates of mental patients and carrying out certain functions in respect of estates or moneys due to minors, the aged and the infirm.

8. Jamaica followed shortly thereafter with the enactment of the Administrator-General's Act which was passed in August 1873. When the office was established the authorised officer was bound to administer the estates of which the personalty amounted to £50 and upwards and of persons who died intestate without leaving a widower, widow, brother or whose relatives would not take out letters of administration within three months of the death of the deceased. The Administrator-General was made subject to the control of the Supreme Court of Judicature and, being an officer of that Court, was accountable to it for the discharge of his duties.⁷

9. Australia faced similar problems to New Zealand in the early days of settlement and proposals for the establishment of a state trustee were made as early as 1860 in Victoria. South Australia was the first Australian state to follow New Zealand in 1881.

10. The post is a well known one in many other Commonwealth jurisdictions- it was established in England in 1906 and the need for such an office in England appeared to have arisen because of concern in the late 1880's about the frauds carried out by trustees and solicitors⁸. There are also public trustees in most Australian states and in Caribbean countries such as Bahamas Barbados and Trinidad. There are Administrator General's offices in countries such as India, Kenya, Uganda and Zambia.

² See Raymond Joseph Polaschek "Public Trust", Encyclopaedia of New Zealand 1966

³ Wikipedia

⁴ Ante, note 2

⁵ The Colonial Secretary, in opposition to the Bill, noted that the idea of a public trustee was "one of the most extraordinary that ever entered into the imagination of any persons out of the limit of those buildings which were appointed for the custody of persons not able to take care of their own property- Wikipedia

⁶ Ibid;

⁷ Information obtained from website www.agd.gov.jm

⁸ "The Public Trustee in England, 1906-1986: The Failure of an Experiment?"- Patrick Polden

11. In Canada, the first Public Trustee Office was established in 1919 in Ontario and there are offices in most other provinces. The primary purpose behind the establishment of the Public Trustee in Canada has been to provide a public body to administer the financial affairs of adults unable to look after their own property or legal interests or others unable to protect their own interests such as children. Prior to the establishment of such an office, in many provinces the financial affairs of inpatients of an institution were managed by an official of that institution or a government body. For example, in 1853 the Bursar of Toronto Lunatic Asylum became the automatic committee of the estate of any persons who was committed. In British Columbia, the public official responsible for the administration of mentally incapable adults before 1963 was the Official Committee.⁹

12. The Public Guardian also plays a prominent part in the Canadian provinces. The first established office of Public Guardian was in Alberta in 1975 and Alberta is the only large province to have separate Public Trustee and Public Guardian offices. In some other provinces such as British Columbia and Ontario the combined office is known as the Public Guardian and Trustee. The focus of the office of the public guardian is to provide a body which makes decisions for the personal care of those who cannot make those decisions for themselves or who have no one else to do so.

Functions of an Administrator-General/ Public Trustee Generally

13. What services would the Cayman Islands require from an Administrator-General/ Public Trustee office based on its own circumstances? Should the Administrator-General be a public officer, a corporation sole or an independent entity? To whom would such officer/office be accountable and what would be the regulatory controls? In answering these questions it would be useful to examine the functions and duties of an Administrator-General/ Public Trustee in a few other jurisdictions and identify those functions and duties which are similar to all.

Jamaica

14. In Jamaica, in accordance with statute, the Administrator-General must apply for letters of administration where a person dies without leaving a will and a minor is entitled to a share of the estate of the deceased; where he is appointed the executor under a valid will; where a valid will was made, but no executor was named or the named executor has died before acting or during the course of the execution of his/her duties, renounces or refuses to act; where the deceased person is not survived by any eligible relatives and consequently, the residue of such a person's estate falls to the Crown as bona vacantia and where the whereabouts of beneficiaries are unknown.

15. The functions of the office are wide and are governed not only by the Administrator-General's Act but also by the Intestates' Estates and Property Charges Act, the Status of Children Act, the Wills Act, the Executive Agencies Act and The Trustees Act. Administration includes investigating and confirming the assets of the deceased;

⁹ See "Canadian Trends: Guardianship in British Columbia And Other Provinces"- Jay Chalke, Law Reform Commission Annual Conference Dublin, Ireland, December 2, 2005

applying for the grant of letters of administration from the relevant court; paying debts; managing, investing and preserving assets until all minors attain the age of majority and distributing the estate once a minor reaches the age of majority.

16. Other duties of the office include paying for funeral expenses of an intestate deceased person who has left cash assets held with an institution and these funds are needed for his burial; transferring a motor vehicle to a surviving spouse; monitoring certain charitable trusts; managing, renting and selling estate properties and filing actions under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act.

17. Although it is a function not currently undertaken by the Administrator-General, in accordance with the Act, he may, with his consent only, be appointed a guardian of a child or of a mentally incapacitated person. He may also be appointed, with his consent, as guardian or committee ad litem of a child or a mentally incapacitated person.

18. Section 29 of the Act also gives the Administrator-General the function of official receiver and the section provides that no person, except the Administrator-General, shall be appointed receiver in any suit in the Supreme Court unless it is proved to the satisfaction of the Court that it would be beneficial to the estate that some other person should be appointed receiver.

19. The Administrator-General's Department became an Executive Agency on April 1, 1999, under the Public Sector Modernisation Programme. The Modernisation Plan Framework Document (MPFD), and the Medium Term Financing Plan (MTFP), set out the environment within which the Department operates. The Framework Document establishes the basis upon which the Department, and its Chief Executive Officer (CEO), should operate and defines how they will relate to the Minister and Ministry of Justice (Portfolio Ministry), the Ministry of Finance and Planning, and the Office of the Prime Minister.¹⁰ While the Administrator-General's Department has greater autonomy over its daily administration, it is required to file quarterly and annual reports on its performance. The Department employs over 70 persons¹¹ and consists of six Departments i.e. Operations, Legal Services, Finance and Asset Management, Human Resource, Information Technology and Internal Audit.

Barbados

20. In Barbados, the Public Trustee Act 1937, which is based on the 1906 UK Act, provides that the Public Trustee, may if he thinks fit, act in the administration of estates of a value of less than \$15,000; act as custodian trustee; act as an ordinary trustee and be appointed as a judicial trustee. Under the Act, the Solicitor General is the designated Public Trustee. He is a corporation sole who may sue and be sued like any other corporation.

¹⁰ *ibid*

¹¹ *Ibid*- last updated 2008

21. As custodian trustee,¹² the trust property must be transferred to the Public Trustee as if he were the sole trustee. He has the custody of all securities and documents of title relating to the trust property but the managing trustees have free access to them and are entitled to take copies and extracts; he has the same power as any other trustee of applying to the court for the appointment of new trustees.

22. The High Court has power to appoint the Public Trustee to administer an estate even if it is above the \$15,000 value if it appears to the court that the estate can be more economically administered by the Public Trustee.

23. Under the Succession Act where a person dies intestate or dies testate but leaving no executor surviving him, his real and personal estate shall, until administration is granted, be vested in the Public Trustee.

New Zealand

24. In New Zealand the Public Trust (renamed in 2001) administers 50,000 estates, trusts, funds and agencies and has a wide variety of duties and functions. Public Trust¹³ has administrative responsibility for the Public Trust Act and the Howard Estate Act 1978 under which the Public Trust holds property as a permanent endowment.

25. The principal functions of the Public Trust include the following-

- (a) the development, promotion, conduct of, or otherwise participation in, comprehensive estate management and administration services, including associated legal, financial, and other services;
- (b) acting as executor, administrator or trustee either alone or jointly;
- (c) in respect of family trusts, advising on, making, establishing or accepting appointments as trustee;
- (d) in respect of charitable and other trusts, advising on, making, establishing or accepting appointments as trustee;
- (e) making enduring powers of attorney or accepting appointment as agent for individuals or corporate entities over a wide range of property/asset management related activities;
- (f) managing and promoting pooled investment schemes for internal (estate and trust) and external (public) customers; and
- (g) managing unclaimed property generally.

26. The Public Trust is also given functions under a variety of other statutes including legislation which deal with the administration of specific missing or absentee owner property and with mortgages where an owner is missing or unknown under the Property Acts. It deals with surpluses and manages the Liquidation/Bankruptcy Surplus Accounts under the Companies Act 1993 and Insolvency Act 1967. The Public Trust acts as guardian trustee; manages awards of damages for minors and incapacitated persons under

¹² Section 6

¹³ Information obtained from website www.justice.govt.nz

various legislation and acts as administrator under the Administration Act, 1969 where executors fail to act.

27. Public Trust was a corporation sole until 2001, when it was moved to a company-like structure called a 'crown entity'. Public Trust has 492 staff operating from 28 customer centres and a number of part time offices looking after the interests of 251,000 New Zealanders. It is governed¹⁴ by a board of eight members appointed by the responsible minister acting with the agreement of the Minister of Finance. The Board is required to supervise or direct the management of the affairs of Public Trust. The Chief Executive of Public Trust is appointed by the Board and may not be a member of the Board. The Chief Executive is responsible to the Board for the management of the affairs of Public Trust.

28. There are four major components of the operational structure of Public Trust and these are sales and service, operations, corporate trusts and finance and planning. In addition, there are separate, dedicated teams in corporate office responsible respectively for programme management, legal, compliance and risk management, secretarial, products and segments, information services, marketing and communications, human resources and internal audit.

United Kingdom

29. The duties and functions set out above are performed in the UK by three different and separate offices- the Public Trustee, the Official Solicitor and the Office of the Public Guardian.

30. In 1906 the Public Trustee was established in England by statute. The office was set up to carry out the functions similar to those listed above in Barbados but it has had a very chequered history. The role of the Office grew considerably within its first years of operation- the number of trusts and estates administered¹⁵ by the Office in 1907-8 was 63 valued at £384,000 and by 1913-14 it had accepted 1,573 cases valued at £13, 500,000. Its duties were increased in 1914 but the office had started to have funding problems from as early as 1916. It merged with the Courts Funds Office in 1986 and with the Official Solicitor in 2001. This last merger ended in 2009 and the Public Trustee is now an independent body with a limited jurisdiction.

31. The Public Trustee¹⁶ is appointed by the Lord Chancellor under the Public Trustee Act 1906, and is a corporation sole under that name. The Public Trustee may act as executor when requested to do so, but may also act as administrator of an estate of a deceased person (with or without a will), or as trustee of a trust whether as original or substitute trustee, usually only as a last resort, and in the interests of vulnerable individuals or persons under disability, or where there are differences between executors, trustees, or beneficiaries. Thus the Public Trustee may by that name-

¹⁴ *ibid*

¹⁵ Classic Encyclopedia, based on 11th Ed. Encyclopedia Britannica

¹⁶ Information obtained from www.officialsolicitor.gov.uk

- be appointed executor in a will or codicil and accept probate of the will;
- accept letters of administration (with or without will annexed);
- with the sanction of the court, after representation has been obtained, accept the transfer of an estate for administration from the executor(s) or administrator(s), acting either solely, or jointly with any continuing executors or administrators.

32. If the Public Trustee thinks fit, he may, alone or jointly with any person or body of persons act in the administration of estates of small value¹⁷, act as custodian trustee, as ordinary trustee or be appointed to be a judicial trustee.

33. The Public Trustee deals with all the administration required under the terms of a will or trust in which the Public Trustee is acting, or is being asked to act as executor, trustee or administrator. Once the estate or trust assets have been transferred to the Public Trustee, arrangements are made for income, or capital, to be distributed to the beneficiaries, for any necessary investment and tax work to be carried out, and for accounts of the administration to be prepared.

34. Clients of the Public Trustee include those who have an interest in the wills or trusts, either as beneficiaries entitled to receive the income or capital of the will or trust, or as co-trustees or co-executors.

35. The Official Solicitor¹⁸ is appointed by the Lord Chancellor under section 90 of the Supreme Court Act 1981. The office has its origins in the 18th century and there are overlaps in functions as both the Public Trustee and the Official Solicitor may act as trustees or personal representatives of an estate. However, the functions of the Official Solicitor are wider.

36. The Official Solicitor acts for people who, because they lack mental capacity and cannot properly manage their own affairs, are unable to represent themselves and no other suitable person or agency is able and willing to act. He usually becomes formally involved when appointed by the Court, and he may act as his own solicitor, or instruct a private firm of solicitors to act for him.

37. In exceptional circumstances and in accordance with last resort criteria established by the Ministry of Justice, only the Official Solicitor can consider accepting new matters in which-

- an estate is, or is likely to be, insolvent;
- a trust arises exclusively for religious or charitable purposes;
- the administration of an estate or trust involves managing a business;
- a trust arises under a creditors' deed of arrangement; and
- the deceased died domiciled outside England and Wales.

¹⁷ Estate with a gross capital value of £1000

¹⁸ *ibid*

38. Under the Civil Procedure Rule 21.12 only the Official Solicitor can consider accepting matters where the appointment of a guardian of a minor's estate is required. Thus, the court has power to appoint only the Official Solicitor to be the guardian of a minor's estate-

- where money is paid into court under CPR (21.11);
- for the purpose of dealing with Criminal Injuries Compensation Authority Funds;
- for dealing with monies awarded to a minor in a foreign court;
- for dealing with pension fund proceeds; and
- where the court deems it desirable to make such appointment.

39. The Official Solicitor also carries out in England and Wales the operational functions of the Lord Chancellor as the Central Authority under the Hague and European Conventions on Child Abduction through the International Child Abduction and Contact Unit (ICACU), and functions as the Central Authority for international maintenance claims through the Reciprocal Enforcement of Maintenance Orders (REMO) Unit. The Official Solicitor is appointed, in place of a parent, to act as the registered contact in the administration of the Government's Child Trust Fund scheme for those children in care in England and Wales when there is no other suitable person to do so.¹⁹

40. The third office of mention relevant to the types of duties and functions being considered by this review is that of the Office of the Public Guardian. In 1986 the duties of the Public Trustee had been widened to include the administration of the properties and affairs of mental patients. However, in 1999, the Public Trustee's Office, was criticised by both the National Audit Office and the Public Accounts Committee for failing to ensure that a large proportion of receivers submitted annual accounts and failing to ensure, through its visits programme, that patients' funds were being used for their benefit. The Public Trust Office was also criticised for serious weaknesses in financial and management information across its activities. In 2001 most of the duties relating to the administration and guardianship of mental patients were transferred to the Public Guardianship Office. The Office of the Public Guardian, an agency of the ministry of Justice, replaced the Public Guardianship Office in 2007.

41. Essentially the role of the Public Guardian is to protect from abuse people who lack capacity. The Public Guardian and the Office helps protect people who lack capacity by-

- setting up and managing a register of Lasting Powers of Attorney (LPA);
- setting up and managing a register of Enduring Powers of Attorney (EPA);
- setting up and managing a register of court orders that appoint Deputies;
- supervising Deputies, working with other relevant organisations (for example, social services, if the person who lacks capacity is receiving social care);

¹⁹ www.justice.gov.uk

- instructing Court of Protection Visitors to visit people who may lack mental capacity to make particular decisions and those who have formal powers to act on their behalf such as Deputies;
- receiving reports from Attorneys acting under LPAs and from Deputies; and
- providing reports to the COP, as requested, and dealing with cases where there are concerns raised about the way in which Attorneys or Deputies are carrying out their duties.

42. The Public Guardian is also personally responsible for the management and organisation of the OPG, including the use of public money and the way it manages its assets. A separate Public Guardian Board scrutinizes the work of the Public Guardian and then reports to the Lord Chancellor.²⁰

PROPOSALS FOR THE ESTABLISHMENT OF THE ADMINISTRATOR-GENERAL'S OFFICE IN THE CAYMAN ISLANDS

Functions

43. Based on an examination of the above jurisdictions, it may be concluded that the usual functions of an Administrator-General/ Public Trustee include acting as administrator/ manager of small estates, of estates of intestate deceased persons and of bona vacantia property; acting as custodian, judicial or ordinary trustee; acting as guardian or legal representatives of children, elderly and the incapacitated and acting as the official receiver of the Court. What functions do the Cayman Islands require?

44. In considering the functions which would be required in the Cayman Islands it is essential that sufficient staff and resources are allocated to carry out the functions to be provided and that those functions are carried out and supervised in such a way to ensure that any such office does not encounter the pitfalls suffered by the Public Trusts/Administrator-General offices in jurisdictions such as Jamaica, New Zealand and UK.

45. For example, in Jamaica several years ago, there were many complaints about the Administrator-General's office's delay in carrying out its duties. In 2000 there was a backlog of 50,000 cases some of which dated back to the 1960's. There were allegations that in some cases the Department had taken 10 or more years to settle an estate²¹ and in at least one case the Department had been taken to court for failure to carry out its functions.

46. Similarly in the UK, while, as indicated above the first years of the establishment of the Public Trustee Office saw a rise in cases handled from 63 in the first year to over 1,500 cases five years later, issues of underfunding and understaffing raised their troublesome heads from as early as 1916. In 1972 its abolition was recommended by a

²⁰ Information obtained for www.publicguardian.gov.uk

²¹ Gleaner, June 4, 2000

Committee of Enquiry and the office has seen its duties changed or lessened considerably over the years.

47. The Office was also the subject of criticism both by the National Audit Office and by the Public Accounts Committee of the House of Commons. The House of Commons Committee twice, in 1993 and in 1999, was highly critical of the then Public Trust Office. In 1993/4 the Committee published a critical report²² expressing particular concern about the protection of patients' income and assets, the level of visits to patients and the Public Trust Office's costs and fees. As indicated at paragraph 40, in the 1999 report the Committee's findings were also similarly negative.

48. In New Zealand, the Public Trust Office from early days of its existence faced the problems which come with a wide variety of functions and insufficient staff. The original duties set out in the 1872 Act²³ included the management of far flung estates in the colony; guardianship of estates of mental patients; guardianship of minors; taking over the estates of absent heirs until their rights had been established; administering the estate of convicts and managing vacant allotments of native land. The Office quickly became overwhelmed as estates were held over until they lost value and losses by native owners resulted in a Royal Commission of Investigation. It also became very unprofitable in the late 1990's as the office pursued business activities such as conveyancing and unit trust investments which incurred much financial loss.

49. The Commission is advised that Crown Counsel in the Legal Portfolio of the Cayman Islands deal with guardianship cases assigned by the Grand Court under section 14 of the Grand Court Law (2008 Revision). Section 14 empowers the Grand Court to appoint guardians of persons and estates of persons of unsound mind or suffering from mental illness. Under section 13 of the Mental Health Law the court is also empowered to administer the property and affairs of a patient or person under guardianship and may, pursuant to section 14 of that Law, appoint a receiver or other person to manage sell, acquire or otherwise deal with the property of such a patient or person under guardianship or act as trustee or conduct legal proceedings on behalf such person.

50. Order 80 of the Grand Court Rules deal with the power of the Grand Court in relation to disabled persons who are patients under the Mental Health Law or persons under guardianship pursuant to the Grand Court Law. Rule 18 of that Order provides that where in the opinion of the court an application ought to be made for the appointment or discharge of a receiver or a guardian under section 14 of the Mental Health Law (2007 Revision) or for the exercise of any other power conferred on the Court with respect to the property and affairs of a patient, and there appears to the Court to be no other suitable person able and willing to make the application, or the Court for any other reason thinks fit, the Court may direct that the application be made by the Solicitor General.

51. Under Rule 3 of the order, the court may appoint the Solicitor General as next friend or guardian ad litem for a person under a disability if it appears to the court that

²² 39th Report HC 308- 1993-4

²³ Genealogy New Zealand, History of the Public Trust 1872-1895,

there is no fit and proper person who is willing and able to act. Also, Rule 19 provides that where in any proceeding the Court considers that the interests of a patient are not adequately represented, the Court may direct the Solicitor General to act as attorney for the patient either generally or in the proceedings or for any particular purpose connected with the proceedings.

52. The Solicitor General's office has also been called upon on several occasions to sign consents for mentally incapacitated hospital patients where there are no local relatives. However, the Solicitor General rarely acts in the cases.²⁴

53. The limited role of the Solicitor General was highlighted in the case of *Goldemberg v. Rotmistrovsky*²⁵. In that case the applicants sought a declaration recognising them as co-guardians of the movable and immovable property in the Cayman Islands of Mr. Robert L. Goldemberg. The applicants were co-guardians in New Jersey of the property of Mr. Robert L. Goldemberg who lived there and was mentally unfit to manage his own affairs. He also owned property in the Cayman Islands, some jointly with the respondent, Ms. Rotmistrovsky. The applicants had previously applied for an order authorising them to recover the movable and immovable property of Mr. Goldemberg and to obtain disclosure of all information concerning it. The respondent did not have any objection to their recognition as co-guardians of the Cayman property of Mr. Goldemberg, but did question their need and desire for the recovery of that property, some of which was jointly owned by her.

54. The Grand Court allowed the application in part, recognising the applicants as co-guardians of only the movable property of Mr. Goldemberg. It refused, however, to recognize their right to control his immovable property, although there was no Cayman statutory provision to preclude such recognition. So that the applicants would not be left without a remedy, the court referred the matter to the Solicitor General under the Grand Court Rules, O.80, r.18, which it believed enabled her to apply for the appointment of a suitable person to exercise powers over the property and affairs of the patient. The Solicitor General nevertheless declined to act, on the basis that her department lacked the resources to do so, that it had never done so in the past and that upon a correct reading of O.80, r.18 the court was not even empowered to direct such an application to her department. The court allowed the application and agreed that O.80, r.18 of the Grand Court Rules was inapplicable, as it only applied in cases concerning applications for the appointment or discharge of Cayman receivers, and this case involved the recognition of the powers of foreign guardians. The Solicitor General was therefore correct in her assertion that the procedure envisaged in the earlier order of the court was not available.

55. In the light of the fact that private trust business is a major part of the financial services of the Cayman Islands it is probable that a Public Trustee would only be a trustee of last resort in respect of private trust matters. The need in the Cayman appears to be for a Public Guardian more so than a Public Trustee. The issue of a need for a public

²⁴ Information provided by the Legal Department

²⁵ 2008 CILR 36

guardian also arose in the case of *In the Matter of an Enduring Power of Attorney*²⁶ where Mrs. L had executed a valid enduring power of attorney (“EPA”), under the laws of the Bahamas, where she was domiciled, and was subsequently deemed to have become mentally incapacitated. The EPA gave the attorneys the power to administer Mrs. L’s assets wherever they might be situated and they sought its recognition under Cayman law to allow them to administer her beneficial entitlements under Cayman trusts.

56. The court held that under the Bahamian legislation, the EPA derived from a purely administrative process, with no declaration by a Bahamian court that any form of curatorship or receivership was created. It was not a procedure known to Cayman law; indeed, under Cayman law an agency became inoperative on the mental incapacity of the principal and international comity did not therefore oblige the Cayman court to recognize it. However, although the Cayman court did not recognise the EPA, as a matter of private international law, jurisdiction over the property of a mentally disordered person could be exercised by the court since the property was situated here. The court therefore invoked its powers under s.14 of the Grand Court Law (1995 Revision) and s.14 of the Mental Health Law (1997 Revision), which allowed it to appoint a guardian for a person of unsound mind. Since the EPA purported to have worldwide effect under Bahamian law, the court considered it appropriate to appoint the attorneys under the EPA as Mrs. L’s guardians in the Cayman Islands without the need for a separate application by them on her behalf. In their capacity as receivers, they would be required to account to the court for the receipt and disposition of her property.

57. Section 14 of the Mental Health Law and Order 80 sets out the types of functions which may be given to an Administrator-General. They are narrow however as they apply only to persons who are patients under the Mental Health Law or under guardianship. What further functions should there be- should the administration of small estates be included; the power to act as custodian trustee for any person; the power to deal with bona vacantia property; the power to administer the estates of intestates where next of kin fails to do so?

Safeguards

58. Regulatory safeguards have also to be considered. Examples of statutory safeguards are found in British Columbia where Public Trustee and Public Guardian services are provided by one organisation. The office is accountable both to the executive and to the legislature. The Public Trustee/ Guardian is required by section 22 of the Public Guardian and Trustee Act to deliver to the Attorney-General a service delivery plan not later than 3 months before the beginning of each fiscal year. The plan must, among other things, specify the nature and scope of activities to be undertaken for the fiscal year and the following 2 fiscal years, the forecast of revenues to be collected and the performance targets and other measures by which performance may be assessed. If this plan is approved by the Attorney-General it must be submitted to the Treasury Board for approval. The Lieutenant Governor, on the recommendation of the Treasury Board,

²⁶ 2006 CILR Note 3

prescribes fees including commissions and charges payable to the office for services provided.

59. The Public Guardian and Trustee must also report in each fiscal year to the Attorney-General on the operations of the office for the preceding fiscal year. This report must contain audited financial statements on the stewardship of trusts and estates under administration, audited financial statements on the operations of the office of the Public Guardian and Trustee, a statement of the extent to which the office of the Public Guardian and Trustee has met the performance targets and other objectives established in the service delivery plan and an auditor's report on the extent to which the office has met such performance targets and other objectives. The office may be audited by the Auditor General or by an auditor appointed by the Public Guardian and Trustee.

60. The British Columbia Act also details how trust and other monies held by the Public Guardian and Trustee are to be kept and invested. In accordance with section 9 of the Act a trust fund account is established and the Public Guardian/ Trustee must place in it all monies received by him on behalf of a person or estate under the Act or under any other enactment, deed or court order. The money in the account must be invested in a common fund unless it is immediately required for payment. The Act stipulates that until money in the trust fund account is invested, the Public Guardian and Trustee may deposit the money in a single account in a bank, trust company or credit union, in any other corporation that is authorized under the laws of British Columbia to accept money for deposit and that has been approved for that purpose by the Lieutenant Governor in Council, or with the Minister of Finance.

61. The Act provides for an investment advisory committee whose duty it is to advise the Public Guardian/ Trustee on developing and implementing strategic policies for investing money placed in the trust fund account, to monitor investment performance and evaluate investment results on a regular basis and perform other related functions and duties.

62. In Jamaica under the Administrator-General's Act, the Administrator-General must place all monies in an account with a commercial bank or specified financial institution or invest the monies in securities issued by the Government of Jamaica. The Administrator-General is required to keep proper books of account of all transactions with respect to all estates and trusts vested in or administered by him. These books of account are open to inspection by any person upon payment of the prescribed fee.

63. The Barbadian and Bahamian legislation provide that the accounts of any trust may be investigated by any attorney or accountant appointed by a trustee and beneficiary or by an auditor appointed by the Public Trustee. Further, every beneficiary under a trust shall, subject to any rules and to payment of any prescribed fee, be entitled at all reasonable times to inspect and take copies of the accounts and audit reports relating to such accounts.

Overview of draft Administrator-General Bill, 2011

64. A draft preliminary Administrator-General Bill, 2011 is attached as the Appendix to this paper for preliminary comments by the Attorney-General and the Chief Justice. The main precedents are Order 80 of the Grand Court Rules and the legislation of British Columbia and Jamaica.

65. The Bill provides inter alia, for the following-

- (a) the appointment of an Administrator-General, his deputy and other officers. Clause 3 provides that the Administrator-General should be an attorney-at-law of seven or more years call to the Bar and that his deputy should have at least 3 years call. The Administrator-General shall be deemed to be an officer of the court and would be supervised in his duties by the Chief Justice;
- (b) the functions and duties of the Administrator-General which would include the following-
 - the administration of small estates i.e. estates with a value of less than \$5,000;
 - the administration of estates of intestates with no next of kin or where next of kin has not taken out letters of administration within a specified time period;
 - acting as executor under will of any person;
 - acting as trustee appointed by the court or under a will, settlement or other instrument;
 - acting as a court appointed receiver; acting as next friend or guardian ad litem or legal representative of person under physical or legal disability;
 - appointing the guardian of child;
 - acting as guardian of estate of child; and
 - investigating and auditing the affairs, dealings and accounts of a trust, of an attorney under a power of attorney or those of a decision maker or guardian of a person under a disability.
- (c) the keeping of books of account by the Administrator-General and the audit of such accounts in accordance with the Public Management and Finance Law; and
- (d) the submission of an annual report to the Attorney-General on the operations of the office of the Administrator-General.

66. In considering the Bill the following questions should be addressed-

- (a) does the Bill cover all of the functions which an Administrator-General should carry out in the Islands? If not, what other functions should be included? Or, are the functions set out too many for our purposes?
- (b) in a jurisdiction where there is a thriving private trust industry, would there be a need for an Administrator-General to provide private trust services not ordered by the court?
- (c) are the provisions of the Bill relating to the accounts of the office and funds held by the Administrator-General sufficient to protect the interests of beneficiaries? If not, what other protection should there be?

67. The Commission welcomes views on the matters discussed above and on the attached Bill.

APPENDIX - ADMINISTRATOR-GENERAL BILL, 2011