

VULNERABLE PARTIES AND SETTLEMENT APPROVALS

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In approving settlements involving parties with a legal incapacity the court must be persuaded that the settlement is in the best interests of the vulnerable party: *Civil Procedure Act 2005* (NSW) ss 75-76; *Yu Ge v River Island Clothing Pty Ltd* [2002] NSWSC 28. The definition of 'persons under a legal incapacity' includes children, involuntary patients as provided by the *Mental Health Act 2007*, persons under guardianship, and: 'an incommunicate person, being a person who has such a physical or mental disability that he or she is unable to receive communications, or express his or her will, with respect to his or her property or affairs'. While the opinion of legal advisers will be taken into account, it is for the court, not the parties, to determine whether the settlement will be beneficial to the vulnerable party (*Permanent Trustee v Mills* [2007] NSWSC 336).

Determining the best interests of the vulnerable party

Matters which inform whether the settlement is in the best interests of the vulnerable party include:

- whether it would be in the interests of the vulnerable party to reject the offer and continue in the action in the hope of receiving a larger amount (see *Fisher by her tutor Fisher v Marin* [2008] NSWSC 1357);
- the importance, to the vulnerable party, of terminating the proceedings;
- the costs of continuing the proceedings; and
- in cases where a trial has not proceeded to an extent to enable the court to make its own assessment of the propriety of the settlement, any opinion from the vulnerable party's legal advisers about the settlement (*Yu Ge v River Island Clothing Pty Ltd* [2002] NSWSC 28);

Settlement negotiations

In many cases, the factors indicating legal incapacity will be obvious and a solicitor will immediately need to consider whether a tutor should be appointed.

Snapshot

- Courts can be called upon to approve settlements which involve parties who do not have legal capacity as defined under the *Civil Procedure Act 2005* (NSW).
- Although courts have a protective role in such settlement approval applications, particular care must nonetheless be taken by those acting for vulnerable parties.
- Whilst there are well established procedures for obtaining court approval for parties with a legal incapacity, the identification of such a party may not always be clear or obvious, and it may not always be possible to obtain the protection of court approval for a settlement entered into by that party.

This consideration should be given whether the solicitor is advising on a transactional matter or acting in proceedings. The solicitor must also give careful consideration to the choice of tutor. Whilst there is usually a desire to appoint a family member or a close friend, there are many examples where such an appointment has turned out to be inappropriate and in fact compounds the vulnerability of that party.

After the solicitor has identified and appointed the tutor, there may be changes in the nature of the relationship between the tutor and the vulnerable client. There may also be changes in the extent to which the tutor might have a personal interest in the proceedings or transaction, particularly so at the time of any settlement. Thus it is important for the solicitor to continue to review the suitability of the appointment.

In negotiating the settlement of proceedings, the solicitor should be cautious to ensure they can present to the court that the settlement is in the best interests of the plaintiff, in light of the decided principles. It may be said that this level of consideration is no different to that which applies in respect of a settlement with a client who has capacity, however the need to demonstrate to the court that the settlement is in the best interests of the plaintiff is likely to place greater rigour on the advisors.

Claims against solicitors involving vulnerable plaintiffs

Settlements of personal injury claims involving serious injuries can involve large awards of damages. Some of these cases involve plaintiffs who obviously lack mental capacity, but in other cases the plaintiff's lack of capacity is less obvious. In particular, this may be an issue for a new solicitor who may not have been involved in the original personal injury case and who is later retained to act in transactions involving the settlement funds. Unfortunately there are occasions where relatives, friends or caregivers seek to access the damages awarded, even where a trust has been established by court order.

The types of claims Lawcover has seen involve cases where a plaintiff has applied to set aside a trust, and where the trust property was then transferred to relatives; or where a plaintiff has applied to take out a loan secured against their property, which was later used for the benefit of others.

In other cases, plaintiffs have claimed that their lawyer should have protected them against exploitation by a parent who lost the money gambling or who was paid monies awarded for gratuitous care or home improvements from their damages award. The courts in these situations are likely to regard the solicitor as responsible for protecting the interests of a vulnerable plaintiff and particular care should be taken when acting for such client, even where a settlement has been approved by a court. **LSJ**