SPECIAL NEEDS FINANCIAL PLANNING

Countries around the world are facing pressing needs to enhance financial planning mechanisms for individuals with cognitive impairment. The book provides the first comparative study of the three most common of such mechanisms, namely guardianship, enduring/lasting powers of attorney and special needs trusts. It involves not only scholarly overviews of the mechanisms in the jurisdictions studied, but also thorough, structured and critical reviews of their operational experiences.

This book aims at providing a useful source of reference for scholars, students, law and policymakers and practitioners in the fields of mental disability, healthcare and elder law. It is widely recognised in the field that books like this one are needed.

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SPECIAL NEEDS FINANCIAL PLANNING

A Comparative Perspective

Edited by

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DENZIL LUSH Former Senior Judge of the Court of Protection, UK. Judge Lush was formerly a partner in Anstey & Thompson (now known as Foot Anstey), Solicitors, Exeter, and was a part-time chairman of the Social Security Appeals Tribunal from 1994 to 1996, before being appointed master of the Court of Protection in 1996. He became the senior judge of the Court of Protection when the Mental Capacity Act 2005 came into force in 2007. He is the author of Elderly Clients: A Precedent Manual (1996; 3rd edition, 2010), Cohabitation: Law Practice and Precedents (1993; 5th edition, 2012) and Cretney & Lush on Lasting and Enduring Powers of Attorney (6th edition, 2009). He is a judicial member of STEP (the Society of Trust and Estate Practitioners) and was presented with the Geoffrey Shindler Award for Outstanding Contribution to the Profession at the STEP Private Client Awards 2009/10. He is a patron of SFE (Solicitors for the Elderly), was formerly a trustee of the PEOPIL Foundation (Pan-European Organisation of Personal Injuries Lawyers) and was a member of the international team of lawyers who drafted the Yokohama Declaration on Adult Guardianship Law in 2010.

TREVOR RYAN Associate Professor, University of Canberra, Australia. Dr Ryan’s research narrative evaluates law’s response to an ageing society, drawing primarily from Japan’s experience as the most rapidly ageing society in the world. His publications include adult guardianship, family trusts, retirement income disputes within families and the workplace, welfare entitlements of non-citizens and the contractualisation of welfare. He is currently working on tortious liability for accidents caused by dementia-related behaviours such a wandering, the political rights of persons with mental impairment and legal issues surrounding the housing supply for seniors. Dr Ryan’s recent research publications include Trevor Ryan, Andrew Henderson and Wendy Bonython, ‘Voting with an “Unsound Mind”? A Comparative Study of the Voting Rights of Persons with Mental Disabilities’ (2016) 39 University of New South Wales Law Journal; Trevor Ryan, Bruce Baer Arnold and Wendy Bonython, ‘Protecting the Rights of Those with Dementia through Mandatory Registration of Enduring Powers? A Comparative Analysis’ (2015) 36(2) Adelaide Law Review; and Trevor Ryan, ‘Administering Welfare in an Ageing Society’ in Leon Wolff (ed.), Who Judges Japan? (2015), 108.
ESTHER TAN General Manager, Special Needs Trust Company Ltd, Singapore. Ms Tan works at Special Needs Trust Company Ltd (SNTC), a registered charity, and she has been with the organisation since its inception in 2009. She brought with her years of experience with multinational companies in the area of legal and compliance. Under SNTC, Ms Tan journeys alongside caregivers with special needs dependents, empowering them with information that helps to safeguard their loved ones’ financial security and welfare. As of 31 March 2017, 460 SNTC trust accounts have been set up. SNTC also administers the Special Needs Savings Scheme which allows parents to nominate their children with disabilities to receive monthly disbursements from the nominating parents’ Central Provident Fund Savings Accounts after their death. As of 31 March 2017, 381 parents have applied for Special Needs Savings Scheme.

TANG HANG WU Professor, School of Law, Singapore Management University, Singapore. Professor Tang’s research interests include property law, restitution, equity, trusts, charity and non-profit law. He has published widely, and his work has been relied on by all levels of the Singapore courts, the Federal Court of Malaysia, the Royal Court of Jersey, the Caribbean Court of Appeal, law reform committees in the Commonwealth, major textbooks and law journals. He is also frequently instructed to act as counsel and expert in contentious and non-contentious matters. He was described in a judgment by the Singapore Court of Appeal as ‘a leading expert’ who is ‘well-known locally and internationally’ in unjust enrichment and equity. Outside his work in academia and practice, Hang Wu is a member of the Strata Titles Board, a director of the non-profit Special Needs Trust Company and a volunteer assistant director at the Legal Aid Bureau.

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As a result of growing longevity and rapidly ageing populations, countries worldwide are facing a pressing need to enhance their planning instruments for individuals with cognitive impairment. Whether that impairment is inborn or the result of illness or accident, such individuals share the common need for assistance in managing financial assets available for their benefit. However, the growing prevalence of nuclear and single-parent families has rendered it increasingly difficult to rely solely on the families of the individuals concerned to provide the necessary support. Also, improvements in life expectancy for individuals born with intellectual disability such as Down Syndrome mean that they are more likely to survive their parents for longer periods of time than in the past and, thus, to face disruption to the care they previously enjoyed. Further, individuals with dementia are increasingly vulnerable to inheritance impatience, if not financial abuse, from their children. On top of these developments, signatory countries are grappling with implementation of Article 12 of the UN Convention on the Rights of People with Disabilities (CRPD), which moves away from substitute to supported decision-making for these individuals. All of these developments have generated healthy debate and, in some jurisdictions, innovative reforms that have attracted the attention of scholars, practitioners and policymakers alike.

This book seeks to provide a timely response to these developments. It examines the three most prominent legal tools that are affordable for individuals with modest wealth, namely statutory guardianship, lasting (or enduring) power of attorney and special needs trusts. The book provides a comparative perspective by reporting on jurisdictions in which the law concerning each of these tools is most advanced or in which new innovations have been or are being introduced. The chapters in each of the book’s three parts focus predominantly on the legal tool addressed in that part, although comparison with other legal tools is also made where appropriate.
The book begins in Parts I and II with an examination of the traditional and internationally established financial planning tools of guardianship and lasting/enduring power of attorney. Part I focuses on statutory adult guardianship. A statutory guardianship order gives a guardian decision-making powers over the personal, healthcare and financial affairs of the individual with cognitive impairment. The respective chapters in Part I provide a general analytical understanding of the adult guardianship regimes in Australia, Canada, Japan and Taiwan. In addition to the major features of the respective adult guardianship regimes, two recurrent themes can be discerned. First, the authors locate their examination of this legal mechanism within the context of the legal, political and socioeconomic conditions of the jurisdiction in question. For example, in the chapter on Australia, Terry Carney compares adult guardianship to other available financial planning mechanisms for people with cognitive impairment in that country and demonstrates superbly how the configuration of these various mechanisms is a product of the values, strengths and limitations of the welfare state on the one hand and the acceptance of state responsibility for the funding of services for disabled people on the other. In a similar vein, in examining the use of the trust in the adult guardianship system in Taiwan, Tai Yu-Zu scrutinises the legal basis for the application of the trust, as well as the practical difficulties involved.

The second recurrent theme in the chapters in Part I is international developments in this field. As noted, the CRPD has served as a catalyst for guardianship reform around the world, prompting many jurisdictions to explore the potential of supported decision-making as a means of increasing the self-determination of individuals with cognitive impairment. Against this backdrop, James Gillis examines the law and practice of guardianship in the Canadian province of Saskatchewan, including its interplay with Henson Trusts (absolute discretionary trusts created for beneficiaries with a disability) and its attempts to balance the 'best interests' with the 'will, preferences and rights' of the subjects of guardianship orders. In a similar vein, Makoto Arai offers a critical examination of the Japanese adult guardianship system. In light of international developments in this field, he encourages the adoption in Japan of a human rights perspective on guardianship that emphasises self-determination rather than the traditional healthcare policy perspective, and further proposes a combination of the trust and adult guardianship systems to provide care for the country's greying population.

Part II focuses primarily on lasting/enduring powers of attorney. The donees of a lasting/enduring power of attorney can be given the power to
manage the financial affairs of the donor when the latter no longer has
the mental capacity to do so. Lasting/enduring power typically involves
less formality and supervision than guardianship and, hence, is even
more easily accessible. However, its convenience and utility also facilitate
the exploitation of lasting/enduring powers as a vehicle for financial
abuse, as Denzil Lush demonstrates in his critical assessment of lasting
powers of attorney (LPAs) in the United Kingdom, which were intro-
duced with the enactment of the Mental Capacity Act 2005. Since the
enactment of that legislation, the number of LPAs has increased signi-
cantly. Lush reviews the policy considerations underpinning the legisla-
tion, critiques the developments in this area and explains his preference
for deputyship to LPAs.

The UK Mental Capacity Act has served as a model law for jurisdic-
tions in Asia to emulate. For example, Tang Hang Wu reviews, in
addition to various financial planning mechanisms, Singapore’s Mental
Capacity Act 2010, which follows the English model closely and explains
how the Singaporean Act has been refined to adapt to local culture.
Although visionary at the time of its enactment, the UK Act adopts the
‘best interest’ model, which raises questions as to whether it complies
with Article 12 of the CPRD. Such questions make comparison with
state-of-the-art legislation in Ireland and the Australian state of Victoria
particularly interesting. Áine Hynes examines how the Assisted Decision-
Making (Capacity) Act 2015 of the Republic of Ireland complies with the
CPRD and has introduced sweeping changes that align the duties and
supervision of enduring powers with guardianship. Trevor Ryan then
demonstrates how the innovative concept of ‘supportive attorney’
recently introduced to enduring powers in Victoria implements the
principle of supported decision-making and examines its interplay with
competing policy considerations concerning autonomy and protection.

After exploring the inherent limits of the more traditional legal tools of
adult guardianship and enduring/lasting power of attorney, the book
turns in Part III to examination of a recent and innovative alternative,
namely the special needs trust. In the past few decades, particularly in the
United States, special needs trusts have been created to provide afford-
able trust service by pooling assets together for investment to reduce
administrative and investment costs. Only individuals with special needs
are eligible to become beneficiaries under such trusts, which operate as
pooled trusts with individualised accounts for clients. The pooled assets
of the individual trust accounts are transferred to a trustee, who either
manages the assets itself or does so with the help of a fund manager.
The trustee devises a care plan and budget for the special needs dependent in consultation with his or her caregiver. The budget provides the basis for the caregiver to apply for distributions for the dependent’s maintenance. Dana Katherine Birkes’s and Roy Froemming’s chapters closely examine exemplary special needs trust models in the United States, namely the Midwest Special Needs Trust in Missouri and WisPact Trust in Wisconsin, respectively. Birkes’s chapter offers practical insights of the background and operation of the Midwest Special Needs Trust, whereas Froemming also identifies best practices for jurisdictions considering setting up such a trust.

While the special needs trust originated in the United States, it has been adopted by other jurisdictions, most recently in Singapore and Hong Kong. Esther Tan and Amelia Leo’s chapter reviews the issues and challenges involved in the creation, administration and monitoring of a special needs trust in Singapore. Drawing on the US and Singaporean experiences, Lusina Ho and Rebecca Lee’s chapter investigates the latest developments and challenges in Hong Kong in launching a special needs trust. Given the developments in these two Asian jurisdictions, it is not surprising that there has been a burgeoning interest in special needs trusts in other jurisdictions in the region, including the Republic of Korea.1 Cheolung Je considers an alternative approach adopted in that country, namely developmental disability trusts, and compares their relative advantages with those of special needs trusts in the United States.

The editors hope that this edited collection provides not only a detailed comparative study of the recent trends and developments in special needs financial planning mechanisms in Asia and the West, but also an understanding of the legal and operational difficulties involved in designing the ideal mechanism for the fiduciary management of the property of individuals with special needs. The book represents a modest attempt to highlight the significance of financial planning for such individuals and the insights of comparative analysis to encourage law and policymakers and practitioners in the fields of mental disability, healthcare and elder law to take the experience of other jurisdictions into account when reviewing and reforming their own laws.

This book could not have been produced without the goodwill and commitment of expert contributors from Australia, Canada, Ireland, Japan, Singapore, Korea, Taiwan, the United Kingdom and the United

1 The Republic of Korea is also known as South Korea. For ease of reference, ‘Korea’ is used in this book.
States. We are extremely grateful to them for their thorough research and dedicated efforts. Most of the chapters were presented as papers and discussed at a symposium held in October 2017 at the University of Hong Kong. We have benefited tremendously from these engaging discussions and the contributors’ generous sharing of their knowledge and expertise with us. We are also grateful to our student, Oscar Chan, who assisted with subediting work in a most meticulous and professional manner. Finally, we thank Joe Ng and Gemma Smith from Cambridge University Press, and gratefully acknowledge the financial support we received from the Research Grants Council of Hong Kong (GRF project number 17612916).
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