

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2019] NZEmpC 26
EMPC 281/2018**

IN THE MATTER OF proceedings removed from the Employment
Relations Authority

BETWEEN DIANE DELE MOODY
Plaintiff

AND SHANE CHAMBERLAIN by his litigation
guardian, L Meys
First Defendant

AND HER MAJESTY'S ATTORNEY-GENERAL
IN RESPECT OF THE MINISTRY OF
HEALTH
Second Defendant

EMPC 368/2018

IN THE MATTER OF proceedings removed from the Employment
Relations Authority

AND IN THE MATTER OF an application for the appointment of a
litigation guardian in respect of Marita
Robinson

BETWEEN CLIFF ROBINSON
Plaintiff

AND MARITA AND JOHN ROBINSON by
litigation guardian in respect of John
Robinson, L Meys
First Defendants

AND HER MAJESTY'S ATTORNEY-GENERAL
IN RESPECT OF THE MINISTRY OF
HEALTH
Second Defendant

Hearing: On the papers

Appearances: P Dale QC, counsel for plaintiffs
S McKechnie and C Boyce, counsel for the Attorney-General

Judgment: 12 March 2019

**INTERLOCUTORY JUDGMENT (NO 2)
OF CHIEF JUDGE CHRISTINA INGLIS
[Application for appointment of litigation guardian]**

[1] The application currently before the Court follows an earlier one in these proceedings, seeking the appointment of a litigation guardian for three adult children whose parents are the plaintiffs.

[2] I granted the application insofar as it related to Shane Chamberlain and John Robinson, and reserved leave for a further affidavit to be filed in respect of Marita Robinson.¹ That was because I was not satisfied, based on the evidence then before the Court, that there was a sufficient basis for making the order sought. An affidavit has now been filed. The affidavit, sworn by Ms Robinson's father (Cliff Robinson), details the nature and extent of her incapacity.

[3] The Attorney-General abides the decision of the Court on the application.

[4] The framework for dealing with an application for the appointment of a litigation guardian was set out in my earlier judgment. I repeat it here for convenience. The procedural route is via the Employment Court Regulations 2000, which provides that in any case in which no procedure has been provided for, the Court must apply the High Court Rules 2016 (HCR).² High Court r 4.30 provides that where a person is incapacitated they must have a litigation guardian unless the Court otherwise directs. A litigation guardian is authorised to conduct proceedings in the name of, and on behalf of, an incapacitated person.³ A litigation guardian may "do anything in relation to a proceeding that the incapacitated person could do if he or she were not

¹ *Moody v Chamberlain* [2019] NZEmpC 16.

² Employment Court Regulations 2000, reg 6(2)(a)(ii).

³ HCR 4.29 (definition of litigation guardian).

incapacitated.”⁴ A litigation guardian is expected to be partisan and to advance the interests of the incapacitated person.⁵

[5] The litigation guardian rules only disqualify those whose mental incapacity prevents them from conducting litigation. They are designed to facilitate access to the Courts where the incapacitated person will be seriously compromised without that help.⁶ The starting point is a presumption of competence. The inquiry then shifts to whether the person is able to understand the nature of the litigation, its possible outcomes and associated risks. If the Court is satisfied that a person lacks capacity they must be represented by a litigation guardian unless the Court orders otherwise.⁷

[6] An incapacitated person, for the purposes of disposing of the application before the Court, is a person who by reason of physical, intellectual, or mental impairment, whether temporary or permanent, is either:⁸

- not capable of understanding the issues on which his or her decision would be required as a litigant conducting proceedings; or
- unable to give sufficient instructions to issue, defend, or compromise proceedings.

[7] The Court must be satisfied of the requisite incapacity on the balance of probabilities.⁹ I am satisfied, based on the affidavit evidence before the Court, that Ms Robinson meets both limbs of incapacitation, and that it is appropriate to appoint a litigation guardian to represent her interests.

[8] Mr Meys was appointed as litigation guardian in respect of the other two incapacitated adult children. No issue has been taken with his proposed appointment in relation to Ms Robinson, and I consider such an appointment appropriate.

⁴ HCR 4.38 (powers of litigation guardian).

⁵ *Re Goldman* [2016] NZHC 1010, [2016] 3 NZLR 331 (HC) at [33].

⁶ *S v Attorney-General (in respect of the Ministry of Health)* [2012] NZHC 661 at [34].

⁷ See *Erwood v Maxted* [2008] NZCA 139 at [26].

⁸ HCR 4.29.

⁹ *Corbett v Western* [2011] 3 NZLR 41 at [98].

[9] Mr Meys is accordingly appointed litigation guardian to represent Ms Robinson's interests in these proceedings. He is appointed on the same basis attaching to his appointment as litigation guardian for Shane Chamberlain and John Robinson.

[10] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 4.10 pm on 12 March 2019