**OUTER HOUSE, COURT OF SESSION**

OPINION OF LORD CARLOWAY

in the cause of

I.C. and A.C., as guardians of A.C.

Pursuers

against

ARGYLL & CLYDE HEALTH BOARD

Defenders

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**Pursuers: Ivey QC; Thompsons**

**Defenders: Bell QC; R F Macdonald**

21 November 2002

**1. The Legislative and Common Law Background**

(1)The Children (Scotland) Act 1995 provides :

"1. - (1) ...a parent has in relation to his child the responsibility -

(a) to safeguard and promote the child's health, development and welfare...; and

(d) to act as the child's legal representative,

but only in so far as compliance with this section is practicable and in the interests of the child.

(2) "Child" means...a person under the age of sixteen years;...

(4) The parental responsibilities supersede any analogous duties imposed on a parent at common law;...

2. - (1) ...a parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right -

(d) to act as the child's legal representative.

(5) The parental rights supersede any analogous rights enjoyed by a parent at common law...

(7) In this section, "child" means a person under the age of sixteen years.

15 - (5) Any reference...to a person acting as the legal representative of a child is a reference to that person, in the interests of the child -

(a) administering any property belonging to the child; and

(b) acting in, or giving consent to, any transaction where the child is incapable of so acting or consenting on his own behalf."

So far, therefore, in the normal case, a parent of a child not only has the responsibility but, in order to carry out that responsibility, the right to act as the child's legal representative in the sense of administering any property of the child. In that respect, a parent continues to have the powers previously vested in him as tutor of the child at common law.

(2)At common law, the parent (initially the father and then the mother in the case of a legitimate child) was the child's tutor. As such, he had both the right and duty to administer his child's estate. If the child's parents were deceased then there might be a tutor-nominate (i.e. one named by testamentary writing) and, if none, then historically there might have been a tutor-at-law, that is succession as tutor by the nearest male relative by operation of law. If there was no tutor then the Court could appoint a factor *loco tutoris* (or, rarely, a tutor-dative). Furthermore, a tutor might be superseded by a factor *loco tutoris* in certain circumstances. These included where the tutor became or was *incapax* or where, in a situation of a conflict of interest, his actions in relation to the pupil's property became suspect. However, the mere existence of a potential conflict of interest or the parent's poverty was not enough. More important, at common law, a tutor was not superseded simply because the court thought it might be better for the child if his estate were administered by someone other than his tutor.

(3)In the case of tutors-at-law, tutors-dative or factors, the Pupils Protection Act (later called the Judicial Factors Act) 1849 (12 & 13 Vict c 51 sections 1 to 3, 10 and 25) came into play, notably in relation to the powers of the newly created office of Accountant of Court. Such persons were required to find caution and lodge accounts. The provisions did not apply to parents or tutors nominate but these did come under the general supervision of the Accountant under the Guardianship of Infants Act 1886 (49 & 50 Vict c 27 section 12) (cf the Scottish Law Commission Report No. 135 para. 4.14).

(4)It has long been competent under the Rules of Court to appoint a factor to the estate of children receiving large sums by way of damages either on consideration of a petition or *de plano* in a reparation process. The question was considered, following upon the advice of a jury, in *Boylan* v *Hunter* 1922 SC 80. In that case, over which the Lord President (Clyde) presided in the Outer House, the unsuitability of the mother (the widow of a man killed in a motor accident) had been "clearly established" in evidence. In considering whether to make an appointment in the absence of a petition, the Lord President remarked that there had been no similar appointments of a factor since 1882 although in some cases, trusts had been set up. He was of the view that, under the then law, a factor could be called for by circumstances affecting the capacity or suitability of the legal guardian and that such a factor could be appointed *de plano* in a reparation case but only with the consent of that guardian. Otherwise, at that time, a petition would be required (see also *Scott* v *Occidental Petroleum (Caledonia)* 1990 SLT 882.)

(5)The common law position was altered by express provisions in the Rules of Court following upon the powers given to the court in that regard by section 16(f) of the Administration of Justice (Scotland) Act 1933 (23 & 24 Geo V c 41) (see e.g. *McIntosh* v *Wood* 1970 SC 179 under reference to the old RCS (1965) 131-4; RCS (1948) 41-2). The 1948 rules applied where it appeared that there was no-one available to give a defender a valid discharge or if the Lord Ordinary was satisfied that the administration of the sum for the minor could not be "reasonably secured". In *Falconer* v *Robertson* 1949 SLT (notes) 56, a jury awarding a sum again raised the question of suitability and stated that it would prefer if the sum were administered by a factor rather than the child's father. This may have been because the child was not living with his father but being brought up by an aunt. The defenders, on the Lord Ordinary's invitation, lodged a minute proposing a named factor but making no averments against the father. It was contended that no appointment could be made without such averments but the Lord Ordinary (Sorn) disagreed. He said :

"In any case, I do not think it is only upon averments in a minute that an appointment can be made and, if it were so, the usefulness of the rule would be much curtailed. Who is to make the averments? Not the father himself; and the defenders, once they know a valid discharge is available, have no interest, and, so far as I can see, no duty, to go out of their way to protect the child. It seems to me that the second branch of the section was intended to confer a discretion on the Court, to be exercised *ex proprio motu* or otherwise, in

light of the whole circumstances as known to the court, to appoint a factor where this appears to be the only way in which administration for the benefit of the child can be secured. I believe, too, that, in the interests of pupils, this discretion should not be too closely fettered because, even since the passing of the rule, I have occasionally felt misgiving at the handing of awards to fathers, especially where the sum is large and a postponed application may be called for. I do not think that the view of the rule which I have expressed is at all at variance with the observations of Lord Mackintosh in *Fairley* v *Allan* 1948 SLT (notes) 81."

In *Fairley* v *Allan* (*supra*) Lord Mackintosh had held that it was not enough that the sum awarded was large and refused to appoint a factor where there were no averments of facts and circumstances suggesting that there would be a risk involved if the money were left with the natural guardians.

(6) The 1965 Rule of Court was in the following terms :

"131. (a) In any action of reparation in which decree is granted for payment of a sum of damages to, or in which decree of absolvitor has been pronounced following upon an extra-judicial settlement in favour of, any (i) pupil child, acting with the concurrence of a curator *ad litem*; or (ii) minor *pubes* acting with or without the concurrence of his or her father or of a curator *ad litem*; or (iii) parent acting on behalf of his or her pupil child, it shall be competent for the court granting such decree, if it appears that there is no person available to give a full and valid discharge for the damages, or if the court is satisfied that the administration of the damages for the benefit of such minor or pupil cannot otherwise be reasonably secured, to appoint *de plano* some responsible person as factor..."

The Rule also provided that the court could vest particular powers of disbursement of capital and income in the factor, who would be bound to find caution.

(7)The Rule of Court and the different Sheriff Court rule were both superseded by the direct effect of the primary legislation in section 13 of the 1995 Act following upon the recommendations of the Scottish Law Commission (Report No. 135 Part IV). This section reads :

"13 (1) Where in any court proceedings a sum of money becomes payable to, or for the benefit of, a child under the age of sixteen years, the court may make such order relating to the payment and management of the sum for the benefit of the child as it thinks fit.

(2) Without prejudice to the generality of subsection (1) above, the court may in an order under this section -

(a) appoint a judicial factor to invest, apply or otherwise deal with the money for the benefit of the child concerned;

(b) order the money to be paid -

(i) to the sheriff clerk or the Accountant of Court; or

(ii) to a parent or guardian of that child,

to be invested, applied or otherwise dealt with, under directions of the court, for the benefit of that child; or

(c) order the money to be paid directly to that child

(3) Where payment is made to a person in accordance with an order under this section, a receipt given to him shall be a sufficient discharge of the obligation to make payment."

(8)This section appears to afford the Court a wide discretionary power in relation to awards of damages but makes no reference to the circumstances in which it might be exercised. In particular, it is not said in what

circumstances the responsibility and rights of a parent to act as legal guardian should be superseded by an order under this section. This section is also mentioned in the earlier section 9 which stipulates that :

"(1) Subject to section 13 of this Act, this section applies where -

(a) property is owned by or due to a child ;

(b) the property is held by a person other than a parent or guardian of the child; and

(c) but for this section, the property would be required to be transferred to a parent...

(3) ...where this section applies and the person holding the property is a person other than an executor or trustee, then, if the value of the property is not less than £5,000, that person may apply to the Accountant of Court for a direction as to the administration of the property."

The section goes on to provide that the Accountant can, on receipt of such an application, apply for the appointment of a judicial factor or administer it himself or direct it to be paid to the parents to be administered on behalf of the child on conditions, if so advised, relative to the capital or annual vouching of the state of the estate.

**2. Facts and Submissions**

(9)The pursuers raised an action against the defenders on behalf of their child A, who had been born on 24 January 1992. The basis of the action was that the defenders' medical staff had been negligent in delivering the child at birth as a result of which he now has severe spastic tetraparesis, microcephaly, severely impaired cognitive abilities and gastro-oesophagal reflux. He has seizures. He is incapable of supporting his own head or executing any voluntary movement. He is incontinent and requires total care and support in respect of all his needs. Much of the care has been provided, and will continue to be provided, in the form of services from the pursuers but otherwise professional help, including a Case Manager, may be required. The action settled for a very large sum indeed sometime in advance of the proof set down for 24 September 2002. It is not disputed that the mental condition of the child, now aged 10, is such that a guardian will have to be appointed to him under the Adults with Incapacity (Scotland) Act 2000 (asp 4), when he reaches the age of sixteen.

(10)On 18 October 2002 the case called on the defenders' motion for the appointment of a judicial factor but the pursuers wished the cause continued for a week to enable them to carry out certain enquiries. It called again on 29 October. The defenders maintained that it was their duty to bring the matter to the court's attention since, if no order were made under section 13, they would require to proceed under section 9 of the 1995 Act as they were persons covered by that section. However, the defenders expressly stated that they were not impugning the ability of the pursuers in relation to their care of the child. They said that their primary objective was to obtain a discharge. Nevertheless, the defenders suggested that a judicial factor might be appropriate in respect of all estates in excess of £50,000. The defenders thought that the cost of a factor had been included in the damages schedule upon which settlement was, to a degree, based.

(11)The pursuers, on the other hand, sought an order directing payment to them as the child's parents. They maintained that a judicial factor should only be appointed where the parents were unfit. In that regard the old law of tutory remained relevant. Section 9 did not apply to the situation here. There was no conflict between the parents and the child even although past and future services had formed a part of the claim. The existence of a factor would increase the costs of administration to the estate. That possibility had not been included as an element in the schedule for damages, although the costs of administering and investing the funds had been taken into account.

(12)The pursuers produced certain letters [Pro 34/1-4] relative to their proposed courses of action. The first, from a private banking manager of the Royal Bank of Scotland, confirmed that the pursuers had sought investment advice from the Bank and that they planned to deposit a large portion of the settlement figure

(slightly more than one third) with the Bank for investment on deposit rather than in the equity or other markets. The second, from the chief executive of West Dumbartonshire Council, confirmed that the second pursuer was a Head of Information Services with the Council, in charge of some 70 staff and an annual revenue budget of £2.2 million, quite apart from capital projects. The third, from the first pursuer's general medical practitioner, confirmed that the first pursuer's phobic anxiety disorder, which had resulted in his evidence being taken on commission, was being resolved and that the doctor had no reason to suppose that either pursuer would have difficulty in administering the award. The fourth was from the Bank of Scotland and again confirmed that low risk investments were being considered for the award. Finally, I noted in relation to the Commission that the first pursuer, an electrician and later a building inspector to trade, worked as a full time carer of the child.

(13)Having considered all the material, I remitted the case to the Accountant of Court for his views on what arrangements would be most suitable for the future management of the award and, on the pursuers motion, *ad interim* authorised payment of a sum to the pursuers which was said to be needed as a matter of urgency to buy a car. In his report, the Accountant noted that it was particularly important to guard against any mismanagement or misappropriation of the funds given their purpose; the level of funds had not taken into account the possibility of a judicial factor or, in adulthood, a guardian being appointed to manage the funds; and there was a need to avoid any conflict of interest between a parent as carer providing services requiring remuneration and as financial manager of the funds paying for those services. The Accountant carried out certain investigations, including interviewing the pursuers. He then considered the various options under section 13 of the Act.

(14)In relation to the appointment of a judicial factor, the Accountant said that it would be possible to appoint one of the pursuers as such a factor but experience showed that the parent would have difficulty in securing a Bond of Caution. If a professional person were appointed then the costs per annum would be between 1 and 11/2 per cent of the fund. Set against these substantial costs, the advantage would be in protecting the fund and carrying out the necessary Inland Revenue and accounting work. In light of the cost, the Accountant did not recommend this course. Payment of the funds to the Accountant would, like the appointment of a factor, have the advantage of protecting against mismanagement by a parent. However, the Accountant was not pro-active in his identification of expenditure in respect of funds which he did hold for children. These funds were all sums inherited by children and followed upon applications under section 9 of the Act. The Accountant did not make investment decisions other than to entrust the matter to one of the major banks who would charge some 0.6 % per annum. Furthermore, he did not become involved in the necessary Inland Revenue work. On the basis that the court considered the risk of mismanagement to be negligible, the Accountant did not deem payment of the fund to him to be necessary. Payment of the sums to the parents was in accord with what the parents had been expecting. The documentation provided had pointed towards the parents being prudent in their investment decisions. They also had the assistance of the child's aunt, a chartered accountant by training. However, the disadvantage of paying the funds to the parents was that they could make alternative investment choices without any form of supervision. The Accountant noted :

"There is always risk when transferring funds to a third party for them to manage. Mistakes or abuse must be guarded against in all cases. This is particularly so where those funds are all that a child...will have to provide for the necessary services to maintain any quality of life. However, the Accountant does not believe that this, of itself, means that cases where the funds are of high value must be passed to a professional manager in the form of a Judicial Factor."

He observed that the Court could attach conditions to the payment of the funds to the parents including those whereby: (i) the parents confirmed to the Accountant that the funds had been invested in accordance with the advice disclosed; (ii) the parents lodged with the Accountant a voucher demonstrating the level of initial investment; (iii) the funds would be held in joint names of the pursuers on behalf of the child; (iv) any withdrawals of in excess of 2.5% of the capital would require the approval of the Accountant; (v) all revenue would be expended for the benefit of the child; and (vi) each year, the parents would lodge with the Accountant a report on the state of the funds and a summary of the level and nature of expenditure during the

course of the year. Although he would not normally have considered it prudent to transfer large sums to non-professionals, the circumstances here were sufficiently special as to merit such an action if the conditions set out above were attached to any order made.

**3. Decision**

(15)Ultimately, when the case called again after receipt of the report from the Accountant, the defenders stated that they were content that an order be made whereby the funds could be transferred to the parents on the conditions stated and on the basis that the receipt of the parents be made a sufficient discharge of their obligations. The pursuers also stated that they would accept such an order and consented to it. On the basis of that consent, I made an order under section 13 of the Act that the funds be paid to the parents and attached to it the conditions recommended by the Accountant along with that relative to the discharge sought by the defenders. However, in light of the submissions made and the potential effect of this type of application where substantial sums are payable to children, the following general observations may be made.

(16)First, especially where there is no criticism or suspicion relative to the ability of parents to look after their child's funds, I do not consider that there is any obligation upon a defender to raise section 13 with the court. I share the views of Lord Sorn (*supra*) which doubt whether a defender, once he knows a valid discharge can be obtained by decree or otherwise, has any interest in going out of his way to protect the child. Indeed, where a defender has been successfully sued for causing substantial damage to a child in the first place, it might seem to some, especially the parents, somewhat misplaced for a defender, albeit possibly in the form of an intervening insurance company, to attempt to assume the mantle of the child's protector at the end of a litigation, especially if that litigation has been prolonged or hard fought. Where the child has legal representatives, there should be no difficulty regarding the operation of a receipt as a discharge of any obligation under a settlement.

(17)Secondly, so far as a defender is concerned, I do not consider that this type of case falls to be considered under the provisions of section 9 of the Act. That section relates to the situation where property, including money, is owned by or due to a child and that property is held by a person other than a parent or guardian of the child. A defender, against whom a decree exists or who has agreed a settlement in respect of damages, does not "hold" property owned by or due to a child. He may be under an obligation to pay money to that child but that is an entirely different matter. Section 9 is intended to deal with the situation where a child is due property under inheritance, trust or similar circumstances and that property is being held for the child. That is not a situation akin to the one currently under consideration. It follows that I do not consider that a defender is under any obligation, under section 9 of the Act, to make an application to the Accountant in respect of damages payable, or which he has agreed to pay, in respect of a child.

(18)Thirdly, so far as the circumstances in which the Court may make an order are concerned, the terms of section 13 are wider than those under the former Rules of Court in two major respects. First, they provide a discretion to the Court which is not fettered by the need for the Court to be satisfied that the administration of the damages cannot be reasonably secured except by the appointment of a factor. Secondly, they provide options other than the appointment of a factor, including the attachment of conditions to any order for payment of the sum to a parent. These conditions can include those of the type imposed in the present case. However, a question remains in relation to the identification of circumstances under which the Court, either *ex proprio motu* or, for example, on the application of the law agents acting for the child's representatives, might appoint a factor, order payment to the Accountant or attach conditions to any payment made to the child's parents. No doubt it is not possible to lay down any hard and fast rules. However, unless there is at least some basis for supposing that the parents or guardians might misappropriate or misapply the child's funds, it would seem an extreme and costly remedy to appoint a judicial factor (especially if such an appointment has not been taken into account in the award of damages or settlement figure). At the other end of the spectrum, even where the parents appear reliable and trustworthy, it may be prudent to attach some form of reporting requirement, such as is contained in the conditions attached in this case, at least where the sum involved is very large and upon which a child, who will require a guardian as an adult, may be largely

dependent in later life. These are matters, however, which may require more detailed consideration and argument than was possible in this case, standing the eventual consents to the order made. It should not be assumed, however, that the Court will consider it necessary to impose conditions in every case involving a substantial award or settlement to a child even where that child may require a guardian upon reaching adulthood.