

Guardianship and Administration Board
HOBART

JOHN DG, on the application of KG, his daughter

GAB No. 2237 of 2005

REASONS FOR DECISION

Anita Smith (President)
Kim Barker (Board member)
Malcolm Schyvens (Board member)

Date of Hearing: 26 August 2005

Guardianship and administration – person with dementia – threat to remove from nursing home abated – no ‘need’ for a guardian – expenses exceeding income - lack of clarity in person’s financial position contributing to expenses, informal arrangements insufficient in circumstances – appointment of an administrator

Guardianship and Administration Act 1995 (Tas), ss 3, 19, 20, 50, 51

1. This is an application under sections 19 and 50 of the *Guardianship and Administration Act 1995* (“the Act”) for the appointment of a guardian and an administrator for John DG, hereafter referred to as the ‘proposed represented person’.
2. The proposed represented person is a 56 year old married man, who has two adult daughters. He is currently a resident at X Nursing Home. His wife, Mrs LG, and daughter, M, live in the marital property at Sandy Bay. His other daughter, K (the applicant) and her partner live in a house in which the proposed represented person either has a life estate or owns at West Hobart.
3. An application from the proposed represented person’s daughter was received on 19 July 2005 and the matter was heard in Hobart on 26 August 2005. The hearing was attended by the applicant, Mrs G, Leigh Martin from the Public Trustee and Lee Perry and Alison Pears who are Investigation and Liaison Officers (ILO’s) for the Board.

4. The relevant part of the application states:

“The immediate threat to John’s quality of life is his wife’s intention to remove him from X Nursing Home on 31 July 2005. L has informed the CEO that she can ‘no longer afford’ to keep John as a resident (John’s income tested fee was recently increased to the top rate because L refused to provide income information requested by Centrelink), John’s daughters are contributing \$200 per month each to John’s fees, but L refuses to discuss any matter relating to her unilateral decision to remove John from X Nursing Home, or the fees paid.”

5. The applicant also alleged that if the proposed represented person did return home, there would not be a sufficient standard of care for him, due to his wife’s lack of perception of his disability.
6. In relation to the application, the Board received a Health Care Professional Report (HCPR) from Dr Davies, a report from the Board’s ILO, Lee Perry, copies of the proposed represented person’s bank statements and his Will.
7. Mrs LG opposed the application and rejected the need for a guardian or an administrator for the proposed represented person.

Does the proposed represented person have a disability?

8. The Board found that the proposed represented person has a disability for the purposes of section 3, section 20(1)(a) and section 51(1)(a) of the Act. The HCPR disclosed that the proposed represented person has had dementia for at least one year. Mrs G stated that she was not satisfied that he had been fully diagnosed, but stated his abilities are fluctuating. In part, it appeared that Mrs G was resisting a finding that the proposed represented person has a disability because it may have an impact upon his income

entitlements. The Board cannot take such matters into account, and was satisfied on the basis of Dr Davies' report.

Does the proposed represented person lack capacity to make reasonable judgments?

9. According to the HCPR, the proposed represented person's dementia impacts upon his recent memory and his capacity for new learning. Dr Davies reported that he needs guidance with all activities of daily living and is unable to make a decision.
10. When asked "*Do you think that John can make decisions?*" Mrs G stated, "*He can when I talk to him. We have been doing fine with many things.*" She said, "*He can make a joint decision.*" In contrast, Mrs G also stated, "*I am the decision maker*" and stated that as his wife, she had the authority to make all decisions on his behalf.
11. Interestingly, when asked during the hearing "*... has John been making his own financial decisions for a period of time?*" Mrs G answered, "*He never did during the marriage.*"
12. In discussion at the hearing, it appeared that there was broad agreement that the proposed represented person is unable, by reason of disability, to make decisions independently and that his ability to make decisions with support from others fluctuates from day to day.
13. The Board was satisfied that the proposed represented person, by reason of his disability, lacks the ability to make reasonable judgments for the purposes of section 20(1)(b) and 51(1)(b) of the Act.

The proposed represented person's wishes:

14. The ILO report notes that at first the proposed represented person agreed that his daughter, K, would do a good job if appointed as administrator. But

he also notes that “*However just a couple of minutes later he said that he wanted his wife to look after his finances even though he seemed to be aware that she had got into a bit of difficulty. He did not seem to be overly concerned about what may be the outcome of the hearing*”

15. Unfortunately, the proposed represented person was not available at the hearing to express himself to the Board. He was, however, given appropriate notice of the hearing. The Board is unable from the above information to ascertain his wishes.

The application for guardianship:

16. The application for the appointment of a guardian related only to matters concerning his continued accommodation at X Nursing Home, which was, at the time of the application, apparently under threat.
17. At the hearing Mrs G stated that she had considered moving the proposed represented person from nursing home care back to her home for financial reasons because she could not at that time afford the fees. However, she also indicated that she had now resolved the levels of fees to her satisfaction and while she was still investigating other accommodation options, she had deferred plans to move him until December 2005.
18. The applicant agreed that the threat to remove the proposed represented person from X Nursing Home was the catalyst for the guardianship application, but that was no longer an immediate problem.
19. Accordingly, the Board found that, for the purposes of section 20(1)(c) of the Act, there was no immediate need for a guardian to be appointed and the application so far as it related to guardianship was dismissed.

The application for administration:

20. According to Mrs G, the proposed represented person's estate is currently receiving less income than it expends. The proposed represented person earns over \$1400 per month from Comsuper. Because of the shortfall, Mrs G stated that she pays \$260 per month and there was clear evidence that his two daughters were each contributing \$400 per month but that is now \$200 per month. Therefore, according to that evidence at one stage over \$2000 per month was being paid into his estate from various sources.
21. The following matters relating to the proposed represented person's estate were discussed in the hearing:
 - His source of income whether from an entitlement to a ComSuper pension, to Centrelink benefits or a private sector superannuation fund
 - The extent of his ownership or interest in properties at Sandy Bay and West Hobart
 - A potential entitlement to rental from one or both properties
 - Liability for expenses for one or both properties
 - The daily fees charged for his accommodation at X Nursing Home
 - Potential reimbursement of overpayment of fees paid to X Nursing Home
 - The payment of money by his daughters to part-fund his accommodation fees
22. Mrs G has informally managed each of these matters since the proposed represented person lost capacity and possibly before. It was alleged by the applicant that Mrs G did not share information with her regarding these matters, even though she was making a contribution to the estate, and Mrs G agreed. Mrs G also appeared reluctant to share information about the financial estate with the Board. Accordingly, the Board had difficulty in coming to a clear picture of the estate, but the following problems emerged in so far as the assets and liabilities listed above are concerned.
23. Firstly, Mrs G believed that the proposed represented person's ComSuper benefits and his entitlement to a private sector fund would be jeopardised if

it were found, by the Board, that he has a disability. She believed that he would be forced onto the Disability Support Pension, which would be insufficient to cover the nursing home fees. She also asserted that he would not be eligible for part or full Centrelink benefits. However, the sources and accuracy of all of the above information were difficult to gauge from Mrs G's responses, as evidenced from the following two exchanges:

Early in the hearing while the Board was discussing evidence of the proposed represented person's disability:

Mrs G: *There's an important and technical point I need to make: if John is regarded as having a disability he will lose his Com Pension and then he won't be able to pay for the nursing home.*

And later in the hearing while discussing financial administration:

Ms Smith: *Right. Can you just tell me, have you actually investigated his entitlements to a Centrelink pension?*

Mrs G: *He's not eligible for a Centrelink pension.*

Ms Smith: *So have you investigated that?*

Mrs G: *No I don't need to.*

Ms Smith: *So how do you know that he's not entitled?*

Mrs G: *Well he's on a ComSuper pension he's way above their limits.*

... (and later)

Ms Smith: *But have you investigated whether there was a disability benefit payable on [private super fund] as well?*

Mrs G: *No. I haven't. It's a very private sector super fund that has changed a bit since he got into it. But it's a – it's a type of rollover but he's not free to take bits out, he has to take it or leave it.*

Ms Smith: *So you're not sure whether there's a disability –*

Mrs G: *Well I suspect, private sector, if disability is mentioned the thing will end, because a lot of those things are based on your being okay physically.*

24. Mrs G clearly believes that her husband's source of income is under threat because of his disability. The only strategy that she appeared to employ to protect the source of income from the perceived threat was to deny that he has a disability, even in the face of clear evidence to the contrary.
25. Accordingly, the Board did not have clear information about the proposed represented person's ongoing entitlements to a pension, a benefit or his private superannuation. Further, the Board could not be satisfied that Mrs G had made appropriate enquiries about his continuing entitlement to income, benefits or superannuation.
26. There was clear evidence that the proposed represented person and his wife jointly own the premises at Sandy Bay. The ILO report states that the other property in West Hobart is solely owned by the proposed represented person. At the hearing, however, Mrs G disputed this, saying that he had only a life interest in the property according to the terms of his mother's Will. Apparently contrary to this proposition, she also stated that the property was registered in the proposed represented person's name.
27. Mrs G was unable to detail whether the terms of her mother-in-law's Will would prevent the proposed represented person from renting out the property. Importantly, Mrs G was unable to inform the Board as to how his interest in the property had been declared for the purposes of assets testing for the pension or for the setting of nursing home fees, that is whether the purported limitations upon his use had been noted or whether the assessors had assumed it was owned outright.
28. The Board discussed with the applicant whether she and her partner should be paying rental for their occupation of the West Hobart property. The applicant agreed that it might be reasonable to levy a rental and that arrangement might be more equitable and accountable than present arrangements where she and her sister (who lives with her mother at the other property) are paying \$100 per month each towards their father's care. For a considerable period they were each paying \$200 each per month.

29. Mrs G was unwilling to consider, on behalf of her husband, levying a rental over either the West Hobart property or board for M's occupation at the Sandy Bay property, which may legitimately generate income and obviate the need for charity from his daughters. The Board has not made any finding that the occupants should or should not be paying rent. However, the Board does consider that it is in the proposed represented person's best interests that all options regarding income generation are seriously considered.
30. The proposed represented person's ComSuper pension is paid to an account in his name, where Mrs G has authority to withdraw funds. According to her evidence she uses those funds to pay \$100 per quarter to pay 'utility bills' for the Sandy Bay property, and he pays additional amounts for 'operating the house bills, like rates, taxes and so on.' There appears to be a circularity that Mrs G and her daughters are financially supporting his accommodation in a nursing home, but he continues to financially support Mrs G and M to live at Sandy Bay. Such circularity does not appear to be in the proposed represented person's best interests.
31. The issue that prompted the application and the issue that concerned the Board the most at the hearing was why the proposed represented person had been deemed to pay a very high rate at the nursing home, when such a rate is inappropriate given his assets and income.
32. The applicant asserted that the high rate was deemed because Mrs G failed to supply within time the appropriate asset and income information to Centrelink to enable them to make a proper assessment. Mrs G gave the following reasons for the delay in providing information to Centrelink and the subsequent assessment at the higher daily accommodation rate:
- *'It took us a while to get to Centrelink'*
 - At the time of assessment she was busy dealing with paying a hospital bill, where she had been overcharged.

- X Nursing Home did not follow Commonwealth Government policy and sets its own rates and charges what it can.
 - The nursing home has to renovate 'the older part' by 2008 and is raising money for that in any way it can.
 - During the period she was dealing with 'Health' and applying to other nursing homes.
 - The CEO was trying to deter them from going to X Nursing Home, as he seemed to believe that they could not afford to pay the fees.
 - The nursing home had not required payment straight away; a financial adviser had also advised that payment was not due for 6 weeks.
 - She and her lawyer could not understand the account.
 - She was busy paying pharmacy, hospital, doctors and specialists bills.
 - X Nursing Home management is incompetent and the standard of their accounts is appalling.
33. When asked how long it took to supply the correct asset and income information to Centrelink to revise the daily fees Mrs G variously answered that it was only one month but then it got drawn into back pay.
34. Mrs G provided an invoice from X as proof of the fees charged for the period leading up to 8 June 2005. It appeared that he had been charged an 'extra income fee' of \$40.43/day for 115 days. Mrs G stated on numerous occasions that she was entitled to be reimbursed for the payment at the higher rate (and the Board assumed that by 'higher rate' she was referring to this fee). However, it was clear that she was still in the early stages of negotiation and that reimbursement was by no means a certainty. It appears that the appropriate accommodation charge is \$16.25/day, which he is currently paying. However, the Board would agree with Mrs G that charging schedule on the invoice is by no means clear.
35. Given all of the above the Board was satisfied that there was a need for the appointment of an administrator to:
- Clarify the sources of income available to the proposed represented person

- Clarify the proposed represented person's ownership or interest in the property at West Hobart
 - Ascertain whether it is feasible and otherwise in the proposed represented person's best interests to charge rental on the West Hobart property, or to otherwise generate income from the properties in which he has an interest.
 - Clarify the proposed represented person's liability for expenses for one or both properties.
 - Settle the rate of the daily fees charged for his accommodation at X Nursing Home
 - Pursue the potential reimbursement of overpayment of fees
36. Usually informal arrangements will be encouraged by the Board as a less restrictive alternative than the appointment of an administrator. However, the Board was not satisfied that the informal arrangements presently in place have been effective in protecting the best interests of the proposed represented person or his estate.
37. The Board found that Mrs G was unable to competently manage the exchange of information with Government agencies and the nursing home, or to cope with the payment of accommodation and medical accounts. It was this inability that contributed to the overpayment of accommodation charges. It may also explain why the estate is currently overextended.
38. While the applicant had nominated herself as a potential administrator in the application, she acknowledged a potential conflict of interests in deciding whether or not to levy a rental over the West Hobart property and therefore did not pursue the appointment. Mrs G did not seek appointment.
39. In the circumstances, the Public Trustee is the only available and appropriate administrator.

CONCLUSION:

The Board was satisfied that the represented person

- is a person with a disability, and
- is unable by reason of the disability to make reasonable judgements in respect of his estate, and
- is in need of an administrator;

THE BOARD ORDERS:

1. That The Public Trustee be appointed as administrator of the estate of the represented person.
2. That the powers and duties of the administrator be those conferred by Division 4 of Part 7 of the *Guardianship and Administration Act 1995*.
3. That the order remains in effect until 25 August 2008.

AND FURTHER, the Board being satisfied that there is no need for the appointment of a guardian, the application for guardianship is dismissed.

Anita Smith
CHAIRMAN

Kim Barker
MEMBER

Malcolm Schyvens
MEMBER