

**GUARDIANSHIP AND ADMINISTRATION BOARD
LAUNCESTON**

Mr U.Q.F. on the application of Mr B.K.F.

REASONS FOR DECISION

Anita Smith (President)

Administration – review of administration – suitability of appointment of private administrator – best interests – conflicts of interest – suitability – inconsistency of proposed administrator claiming naivety as an excuse for certain actions and administrative expertise in same application

Guardianship and Administration Act 1995 (Tas), ss 51, and 54

Proceedings prior to review:

1. After receipt of an application dated 16 May 2008, the Board convened a hearing and appointed the Public Trustee as administrator for Mr U.Q.F. (‘the represented person’) on 6 June 2008. In doing so, it declined to appoint the represented person’s nephew, Mr B.K.F. (‘the applicant’). The applicant has sought a review of that decision.
2. Evidence before the Board on 6 June 2008 indicated that the applicant will inherit under the represented person’s will in preference to the represented person’s children. The Board saw potential in that testamentary arrangement for a conflict of interests and possible litigation after the represented person’s death. Therefore the Board appointed the Public Trustee to avoid that possible conflict.
3. The applicant sent emails to the Board’s offices on 16 June 2008 and on 18 June 2008 seeking a statement of reasons and a review of the Board’s decision. His emails questioned why the Public Trustee was appointed as administrator and not himself. The Board sent a statement of reasons to Mr B.K.F. on 25 June 2008.

The review application:

4. The formal application to review the order was received by the Board from the applicant on 24 June 2008, a day before the statement of reasons was delivered.
5. In response to the question "Has the person you are applying about made a will?" the applicant responded "Unsure". In the previous application dated 16 May 2008, he had answered "Unsure" and "Yes – States he has made me executor".
6. In the application, the applicant states:

"To date I am not aware why this order was given. Anne Perks Guardianship board supports my application (6233 XXXX). Stroke Asses (sic) Team support my application. Aged Assessment Team support my application. My father is prepared to travel to Tas to answer any questions required. ... Any documentation you require can be provided. Trustees will charge over \$11,000 to manage my uncle's affairs. Anything you require, please advise and we will bring with us. Please feel free for someone to actually visit my uncle and ask him if he is happy for me to manage his affairs. Had I known I could have gotten power of attorney, instead I followed advise (sic) knowing my application was being supported. Why should State Trustees charge my uncle \$11,000 when I am prepared to do the same for him free of charge."

The hearing:

7. The review hearing was convened at 11.30am on 1 August 2008 in Launceston. The applicant's flight was delayed. To accommodate this, the hearing was deferred to 1.30pm. The division was however altered from a three-member division to a one-member division because of other commitments of Board members.
8. It was uncontentious that there has been no change to the represented person's capacity to make decisions or his need for an administrator. Therefore issues pursuant to section 51 of the Act were treated as settled. The scope of the hearing was limited to a

review of appointment of the Public Trustee pursuant to section 54 of the *Guardianship and Administration Act 1995*.

9. However the Board notes that the represented person had at least \$16,000.00 in cash, has over \$95,000.00 in bank accounts and has a home in Northern Tasmania which was valued in 2006 as having land value of \$65,000.00 and capital value of \$154,000.00 and is likely to be sold in the near future. Therefore the represented person has a significant estate and, with sale of his house imminent, the potential for a large amount in cash.

New evidence:

10. The Board had available to it the file and decision from the previous proceedings and the following additional documents:

- Reports from the Public Trustee dated 7 July 2008 and 17 July 2008
- GAB File note by Anne Perks dated 18 July 2008
- Emails between Anne Perks and the applicant dated 16-17 July 2008
- Email from Office of Public Guardian dated 29 July 2008
- Submission from the applicant dated 29 July 2008
- Letter from Mr L.F. (represented person's brother and applicant's father) dated 22 July 2008 plus identification evidence
- Statement of Ms B.G. a friend of the represented person

11. Three new facts emerged from these documents:

- The represented person's family actively discourage any contact with or knowledge of the represented person's activities and wellbeing.
- No will has been located for the represented person.

- The represented person was interviewed by a member of the Public Guardian’s office and indicated his wishes as being that the applicant should manage his money.
12. There was no suggestion in the new evidence that the Public Trustee has mismanaged or otherwise acted inappropriately under appointment as the represented person’s administrator.

Interpretation of section 54:

13. Section 54 of the Act determines the criteria for eligibility:

“54. Persons eligible as administrators

(1) The Board may appoint as an administrator of the estate of a proposed represented person –

(a) The Public Trustee; or (b) ... (c) ...or

(d) any other person, including the guardian of the proposed represented person, who consents to act as administrator if the Board is satisfied that –

(i) the person will act in the best interests of the proposed represented person; and

(ii) the person is not in a position where his or her interests conflict or may conflict with the interests of the proposed represented person; and

(iii) the person is a suitable person to act as the administrator of the estate of the proposed represented person; and

(iv) the person has sufficient expertise to administer the estate.

(2) In determining whether a person is suitable to act as the administrator of the estate of a proposed represented person, the Board must take into account –

(a) the wishes of the proposed represented person, so far as they can be ascertained; and

(b) the compatibility of the person proposed as administrator with the proposed represented person and with his or her guardian, if any.”

14. It would appear that subsection 54(1)(a) establishes legislative approval for appointment of the Public Trustee as administrator without need for the Board to make enquiries into its suitability, compatibility or competence to undertake the role. It is only when the Board embarks upon consideration of a private person that the Board is required to assess the suitability, compatibility or competence to act as an administrator. The Board must assess a person for the purposes of section 54(1)(d) and (2) according to the principles in section 6.
15. Therefore the consideration of the Board in this matter is not a consideration of whether the applicant or the Public Trustee would be a better administrator for the represented person. It is only a consideration of whether the applicant meets the criteria in section 54(1)(d).

Assessment of the applicant against criteria in section 54(1)(d):

16. The applicant has consented to appointment as administrator for the represented person.

54(1)(d)(i) – Will the applicant act in the best interests of the represented person?

17. The applicant asserts that he only has the interests of the represented person in mind. Other persons purportedly support his appointment on this basis. The Board has no doubt that the represented person and his nephew are close and that the applicant

cares for his wellbeing, as evidenced by the applicant's actions to find appropriate residential care and support for the represented person.

18. The applicant gave evidence to the Board, on 1 August 2008, that the represented person had once showed him how to access his home safe and told him that money in the safe was intended for the applicant 'if anything should happen to me'. Evidence was received that subsequent to the represented person's stroke in early May 2008, the applicant had removed around \$16,000.00 in cash from the represented person's safe and placed it into his own account. He stated he did so because he did not know where the represented person banked. It was assumed that the funds were unsafe remaining where they were.
19. The applicant then had the represented person's mail re-directed to himself before the first hearing. Anne Perks' report of 29 May 2008 states that the applicant was made aware of the represented person's bank accounts from mail received. When asked why he had not deposited the represented person's funds in his own account at that point, the applicant initially said it was because the Public Trustee had "frozen the accounts." The Board pointed out that the accounts could not have been "frozen" until after the appointment of an administrator on 6 June 2008. The applicant then said that his inexperience and naivety had meant that he did not consider transferring the funds prior to the hearing. The Public Trustee subsequently agreed not to require return of these funds pending the outcome of the review hearing.
20. Further, the applicant had given three different explanations as to the nature of the funds from the safe. Firstly, he stated that the funds were available to cater for the represented person's needs (and gave evidence that some of the funds had been used to pay accounts in the represented person's name). Secondly, it was described as a gift to the applicant and, thirdly, that it would be used to purchase

flights for the applicant's father and step-mother to travel to Tasmania to see the represented person. At the hearing, the applicant described an amalgam of the first two explanations, admitting that the third was clearly inappropriate. Again, the suggestion that the represented person's funds might be used for a third party was explained as coming from the applicant's lack of understanding about the role of an administrator. Ultimately the applicant's evidence about his dealings with the cash from the safe caused the Board to doubt the credibility of the applicant.

21. The Board questioned the applicant about his statement in the review application, which was also evident from the Public Trustee's report dated 7 July 2008, to the effect that he ought not to have applied for administration but should have gotten a power of attorney instead. The applicant denied that this evinced an intention 'to take the law into his own hands' and seemed equivocal on the point of whether or not the represented person had capacity to execute a power of attorney. The Board would not consider the execution of a power of attorney as being in the best interests of the represented person in circumstances where his capacity to do so is seriously in doubt. The applicant's statements in this regard do cause the Board concern.
22. The applicant and his wife appeared to believe that the extent to which the represented person's offspring are estranged from him was relevant to this aspect of the application – in other words, that the fact that, of the family, only the applicant and his father had an interest in the represented person gave some primacy to the appointment of the applicant. While the Board on 6 June 2008 was concerned that other family members had not been contacted in relation to this hearing, this issue did not particularly impact upon the issues under review on 1 August 2008.

23. Another issue that the applicant asserted to be relevant to the question of the represented person's best interests was the fact that the Public Trustee's initial commission will be \$11,000.00 or \$13,000.00 and smaller annual sums thereafter. This is relevant because the applicant is not eligible to charge the estate for remuneration as administrator.

54(1)(d)(ii) – Does the applicant have conflicts of interest or possible conflicts of interest?

24. The reasons for the Board's concern in its decision on 6 June 2008, about possible conflicts of interest, have dissipated now that it seems unlikely that the represented person has a will or at least that the will cannot be found.
25. A conflict of interests may arise with regard to the funds taken from the represented person's safe and deposited in the applicant's account. Whether the represented person intended that the applicant should take those funds in the event of incapacity or in the event of death and whether the represented person meant those funds to be used for represented person's interests or the applicant's interests is unclear from the applicant's evidence. The applicant states that he now understands that the funds can only be used for the represented person.
26. Although it is of minor concern to the Board, the applicant's interest in these funds may conflict with the represented person's interests to the unlikely extent that the applicant might assert that those funds were a gift to him and are his property.

54(1)(d)(iii) – Is the applicant a suitable person to act as the administrator?

27. It is clear from the report of the office of the Public Guardian that the represented person wishes for the appointment of the applicant. It is also clear that the applicant and the represented person are compatible. These are factors that the Board takes into account.
28. However the Board is also concerned as to whether the applicant will act with probity towards the represented person's funds and if, in light of statements about obtaining a power of attorney, he understands the role of an administrator with relation to the Board. I will, however, consider these matters further in relation to the applicant's expertise, below.

54(1)(d)(iv) – Does the applicant have sufficient expertise to administer the estate?

29. The applicant states in the application that he has the support of a range of other persons, most importantly the represented person, in nominating for appointment as administrator. While the Board must take into account the represented person's wishes, it cannot delegate the question of appointment to another person or group of people. The Board must be satisfied of the appointment of a private person according to the criteria.
30. On one hand, the applicant gave evidence that he is employed as a Group Manager. He has a budget of \$15,000,000.00 for which he is responsible. Evidence of prior experience in fiscal management is relevant. However, different levels of accountability and supervision apply to such a role compared to management by an administrator of a private estate of approximately \$300,000.00.
31. In response to two important issues raised above, the applicant claimed naivety or a lack of understanding as the basis for some

fundamental errors when handling or intending to handle his uncle's funds since the represented person lost capacity to make financial decisions. In both cases, the applicant asserts that he has learned his lesson. Further, the applicant's response to the Board's order, being that he ought to have obtained a power of attorney, showed to the Board a very limited level of expertise regarding responsible management of the funds of an incapacitated person and a propensity to prefer mere functionality over probity and due process.

32. Anne Perks' report on 29 May 2008 stated that the applicant was obtaining a 'police check' in accordance with the usual procedures of the Board, but noted that he had only speeding fines on such a record. He stated at the hearing on 1 August 2008 that he had not obtained one yet, but that he was required to have no convictions to undertake his employment and could be obtained very quickly.
33. The Board has concerns though that the applicant's desire to be appointed as administrator has become elevated in his mind to a right to appointment based on his uncle's wishes and the views of other persons. This impression has not only been gleaned from written statements by the applicant and the failure to produce the police check during two months and two applications, but also from 'instructions' given to the Public Trustee not to inspect the premises in Northern Tasmania without his attendance (meaning that an inventory of chattels has not been made) and in the bargaining with them not to return the funds from the safe prior to the review. In both instances the Board is of the opinion that the Public Trustee ought not to have acquiesced to his requests, even in light of the review.

Conclusion

34. The features of this case in favour of appointing the applicant are:

- (i) The compatible family relationship between the applicant, his father and the represented person,
- (ii) The represented person's wishes, and
- (iii) The fact that the applicant will not levy a commission and fees for work done.

35. The features of this case against appointing the applicant are:

- (i) Concerns about the applicant's credibility in explanations regarding handling of funds taken from the represented person's safe,
- (ii) A limited propensity for a conflict of interest, and
- (iii) The applicant's assertions of naivety in administration matters.

36. On balance, where the Board has any concerns at all, it should not proceed to appoint a private administrator when Parliament has automatically endorsed the appointment of the Public Trustee in the legislation. Accordingly I see no reason to alter the appointment made by the Board. The application to review the order is dismissed.

THE ORDER:

The application to review the order is dismissed.

Anita Smith

President

4 August 2008