

**GUARDIANSHIP AND ADMINISTRATION BOARD
HOBART**

Mr V.B.J., in an application by Aged Care Facility (“ACF”)

GAB No. XXXX of 2006

REASONS FOR DECISION

Anita Smith (Chair)
Gerard Dibley (Board member)
Lindi Wall (Board member)

Date of Hearing: 9 March 2007

Enduring Power of Attorney – incapacity – attorney denied that donor had lost capacity – attorney failed to provide adequate explanations for transactions – donor’s property squalid and condemned

Administration – suitability of former attorney - conflict of interests

Emergency orders – guardianship and administration

Powers of Attorney Act 2000, ss 30, 32, 33

Guardianship and Administration Act 1995, ss 3, 20, 51, 54, 65

1. Mr V.B.J. is a 92 year old man who in 2005 was moved from his home in Northern Tasmania where he lived with his daughter, Ms K.J., to the Transition Care Unit (TCU) of the Royal Hobart Hospital. After more than a year in the TCU he moved to ACF in late 2006. Mr V.B.J. is the subject of two applications, one for the appointment of a guardian under Part 4 of the *Guardianship and Administration Act 1995* and one for review of an enduring power of attorney pursuant to the *Powers of Attorney Act 2000*. The applications were heard together. Sections of the legislation relevant to these applications are annexed at Annexure ‘A’.

Proceedings before the hearing on 9 March 2007

2. On 19 October 2006 Dr I.R. from the TCU applied to the Board for the appointment of a guardian and an administrator under an emergency order. Dr I.R. indicated that Mr V.B.J. has dementia,

that he was at risk if he returned home to a squalid environment and that the Council had condemned his property. Dr I.R. sought the suspension of an enduring power of attorney (EPA) held by his daughter as well as the appointment of a guardian to make accommodation decisions on Mr V.B.J.'s behalf. Mr V.B.J. then agreed to move to ACF. Investigation staff of the Board negotiated with the parties and the application was subsequently withdrawn.

3. On 30 November 2006, the previous negotiations broke down. The Board received a fresh application for the review of the enduring power of attorney and an incomplete guardianship application from Ms B.V. of ACF together with a second application for the emergency appointment of an administrator and a guardian. On the same day, a single member of the Board made an emergency order suspending the EPA pursuant to section 33(4) of the *Powers of Attorney Act 2000* and appointing the Public Trustee as a substitute attorney. She also granted an emergency guardianship application and limited the powers of the guardian under the emergency order to decisions about accommodation and health care, with specific powers to keep and return the represented person to a particular place of residence.
4. A search of the Land Data Registration Branch revealed that by EPA number XX/XXXX Mr V.B.J. had appointed Ms K.J. as his appointed attorney, with enduring effect, and that this instrument was registered on 3 May 2000.
5. On 4th December, following a letter dated 30th November notifying her of the emergency orders, Ms K.J. was asked by the Investigation and Liaison Officer of the Board to supply a statement of account for the period June 2006 to December 2006.

6. Notices for the hearing of both applications were issued to all interested parties on 18 December 2006. Ms B.V. completed and signed an application for guardianship on 19 December 2006. Both emergency orders were renewed on the 20th December 2006.
7. On 12 January 2007 Ms K.J. sought an adjournment for the purpose of obtaining further medical information. Ms K.J. claimed that the power of attorney was not being utilised in an enduring phase and that her father, the donor, was still active in directing all financial decisions. She handed over to the Board some financial documents, being account slips and invoices and this was the extent to which she satisfied the request to supply a statement of account.
8. Interim orders were made pursuant to section 73A of the *Guardianship and Administration Act 1995* appointing the Public Trustee as the administrator in the interim between hearings. Ms K.J. indicated that Dr I would be more informed as to Mr V.B.J.'s mental capacity. Accordingly, the Board facilitated the request that Dr I complete a standard form Health Care Professional Report for each of the guardianship application and the review of the EPA. Dr I's reports were received on 31 January 2007 and copies sent to Ms K.J.. On 15 February 2007 interested parties were sent notices indicating the hearing date as 9 March 2007.

Findings Related to the Question of 'Person with a Proper Interest'

9. Ms B.V., on behalf of the ACF, being the facility with the responsibility for the provision of residential care for Mr V.B.J. was considered by the Board to be a fit and proper person to make an application for a review of the EPA.

Hearing:

10. The following persons attended the hearing on 9 March 2007:

Mr V.B.J.
Ms K.J.
Margaret Colville, Deputy Public Guardian
Ms B.V., ACF
Mr F.L, ACF
Kevin Clarke, Public Trustee
Lyn Millen, Advocacy Tasmania (as advocate for Ms K.J.and
Mr V.B.J.)

The hearing proceeded in an informal way in accordance with the usual procedures of the Board.

11. The Board had access to the following documents:

- Applications as listed above (including attachments, ACAT report, psychologists report etc)
- Interim order dated 12 January 2007
- Correspondence and accounts slips for nursing home, rates, telephone pharmacy, bank statements as supplied by Ms K.J. at first hearing date
- Results of Search Land Data Registration Branch
- Health Care Professional Report (EPA) Dr I 26 January 2007
- Health Care Professional Report Dr I 26 January 2007
- Letter from Board to Ms K.J. dated 31 January 2007
- Letter from Board to Public Trustee dated 31 January 2007
- Investigation and Liaison Officer Report dated 4 January 2007
- Investigation and Liaison Officer File notes dated 9 January 2007 and 26 February 2007
- Fax dated 9 January 2007 from Aged Care Complaints Scheme
- Report of Public Trustee dated 7 March 2007
- Copy of Closure Order for property in Northern Tasmania dated 31 January 2005

Evidence and Findings Related to the Question of Disability

12. A Health Care Professional Report by Dr I.R. states that Mr V.B.J. has dementia displaying particular problems with recall and attention and a lack of insight into his memory deficits. Ms B.V. also described his disability as dementia and 'physical frailty'. Ms K.J. initially disputed the presence of a disability. However after

receipt of Dr I's report, which also confirmed the presence of Alzheimer's Disease, that dispute was not sustained.

13. The Board is satisfied that Mr V.B.J. experiences a lack (resulting from the loss of mental or psychological function) of ability to perform an activity in a normal manner in that he has dementia of the Alzheimer's type.

Evidence and Findings Related to the Question of Capacity to Make Financial Decisions

14. Dr I.R.'s report indicated that Mr V.B.J. has poor memory and learning and was below the 15th percentile in this regard. She also stated that he cannot reliably make plans and follow them through nor determine cause and effect relationships. As an example she indicated that Mr V.B.J. had stated that he would take himself home, although he is reliant upon a wheelchair for mobility, needed help to transfer to the wheelchair and his house does not have wheelchair access. He cannot identify risks. In particular she stated that Mr V.B.J. cannot retain information long enough to balance pro's and con's and had no ability to undertake day to day financial operations.
15. Dr I generally took a slightly more positive or cautious view of Mr V.B.J.'s abilities but also described his abilities to undertake day to day financial operations as "poor".
16. Mr V.B.J. said very little during either appearance at hearings. He did express a preference that Ms K.J. manage his money, but did not always appear to be following the conversation. Mr V.B.J.'s presentation and demeanour at the two hearing dates tended to confirm the contents of the medical reports.

17. Ms K.J. indicated, at the first hearing date when proceedings were adjourned, that Mr V.B.J. was still making all of his own financial decisions and that she had been acting merely as his agent. The Board rejected this view.

18. There was no question about whether the EPA had been validly executed. However the Board was satisfied that Mr V.B.J. has subsequently lost the capacity to manage his own financial affairs. The review concentrated upon the operation of the EPA and the behaviour of the attorney, Ms K.J..

Evidence and Findings about the Operation of the Power of Attorney

19. Firstly, it was of concern to the Board that Ms K.J. did not acknowledge that her father had experienced any loss of capacity. Dr I.R. inferred that this may be a result of Ms K.J.'s own inability to make reasonable judgments. Ms K.J. disputed that.

20. Secondly, evidence supplied by the nursing home confirmed that Ms K.J. had taken an oppositional stance to many of the day-to-day requirements of the nursing home, such as payment of fees, provision of adequate clothing, provision of basic financial information, adherence to reasonable laundering routines, payment for pharmacy items and payment for haircuts.

21. Ms K.J. offered a number of reasons for why payments had not been arranged for nursing home fees and pharmacy items. Some were that she had demanded itemised accounts that had not been supplied. Another was that she had insufficient money at the time due to other liabilities. (This contention was premised upon the very firm idea that a joint account that holds over \$20,000 was strictly only for the purposes of paying for their two funerals.) Yet another

reason was that she had had her own health problems and these had interfered with her ability to manage the accounts.

22. While some of the accounts may have been properly the subject of an enquiry, the Board did not accept that all of the excuses for non-payment of essential accounts were reasonable. Ms K.J.'s reiteration that her father had retained control over his own finances was at odds with the level of control that she had demonstrated with regards to all of these issues.

23. The third issue that caused the Board concern was that Ms K.J. had not supplied the Board with a statement of accounts, or even provided the Board's staff members with adequate responses to such requests. She simply did not respond to requests for information apart from handing over an assortment of random account and invoice slips at the adjourned hearing.

24. The Board found that the EPA had not been operated in its enduring phase. This was, of itself, a dereliction of an attorney's duty. With Mr V.B.J.'s level of mental deficit observable to an untrained eye, any reasonable attorney would have taken steps to invoke the enduring phase of the donor in his best interests. Ms K.J.'s failure to do that was inimical to the suggestion that she had been an adequate attorney. Further her failure to properly attend to payment of basic accounts also demonstrated that even if she was only acting as his 'agent' she was not performing those tasks in his best interests.

25. It is also relevant to the application to review the EPA that prior to admission to the TCU, Mr V.B.J. was living with Ms K.J. in their house. This premises has been the subject of a Closure Order, since January 2005, from the relevant Council, who had deemed that the

premises is so unhealthy that no one can safely occupy or inhabit them. Ms K.J. remains living in the premises and has taken no steps to rectify any of the 10 items listed by the Council necessary to make the premises safe for human occupation.

26. As far as the Board understood her argument, Ms K.J. states that the Council inspector had trespassed to make the inspection and that the report is therefore unlawful. For the Board's purposes the actions of the Council's officers are largely irrelevant. What the certificate means for the Board's purposes is that Mr V.B.J.'s major asset is the subject of serious action by the Council and that no appropriate action has been taken by Ms K.J. or Mr V.B.J. to address that action in a period in excess of 2 years.

27. Consistent amongst all of the issues raised about Mr V.B.J.'s financial management and Ms K.J.'s explanations for them was an issue of hostility from Ms K.J. to any outside interference or demands. That hostility is reflected in numerous complaints to statutory bodies about the Nursing Home. Ms K.J. and her father have lived in rugged circumstances that most people would find unacceptable. While Mr V.B.J. had capacity, that was his choice and accordingly the Board's file notes a history of applications rejected on that basis. Now that he has lost capacity and his health is deteriorating, Ms K.J. and her father find themselves needing to rely on other people and agencies who demand different standards of hygiene and compliance with usual societal norms. Many of the difficulties that they now face together are as a result of those clashes of values.

28. For all of the above reasons the Board was satisfied that Mr V.B.J.'s estate is being inadequately managed under present arrangements and that Ms K.J. presently lacks the level of skill to address the

pressing financial issues in the estate. The Board was satisfied, for the purposes of section 50(1)(c) of the *Guardianship and Administration Act 1995*, that Mr V.B.J. is in need of an administrator.

Appropriateness of an Administrator

29. It was clear that Mr V.B.J.'s wishes were that Ms K.J. remains in financial control of his estate. On the basis of statements made by Ms K.J. and Mr V.B.J., the Board assumed that Ms K.J. would seek appointment as administrator. However, given that Ms K.J. had been exercising a level of financial control and that the outcome of that was a number of financial problems and liabilities or disputes about liabilities that had not been resolved in a timely fashion, the Board did not consider that Ms K.J. is a suitable person for appointment as administrator.

30. The Public Trustee is a qualified administrator pursuant to section 54(1)(a) of the Act.

31. Taking into account Mr V.B.J.'s expressed wishes, the Board believes that the appointment of the Public Trustee as administrator is well and truly in his best interests and is in the circumstances the least restrictive alternative for his freedom of decision and action.

32. The Board was cognisant of the fact that Mr V.B.J. and Ms K.J.'s finances were mixed in a number of ways, most particularly in the future of the property. Therefore, it was important that Ms K.J.'s interest be carefully assessed in any decision of the administrator. Accordingly the Board believed it would be necessary for the administrator to undertake the following assessments:

- (i) the extent of the represented person's assets and liabilities,
- (ii) the cost of repairs to the property ('the property'),
- (iii) the range of possible decisions regarding the property,
- (iv) assessment of the extent of Ms K.J.'s interest (if any) in (a) his bank accounts and (b) the property.

The Guardianship Application

33. All parties at the hearing agreed that Mr V.B.J.'s placement at ACF was geographically inappropriate and that a placement at a nursing home closer to their home for convenience of visits would be preferred. It was also clear that, while there had been initial resistance to placement in a nursing home, it was likely that Mr V.B.J. would now stay at ACF (subject to overdue fees being paid) until a more suitable placement had been found. Without the threat of his removal from the Home, it appeared that guardianship issues related to accommodation had been resolved without the need for an order.

34. Other guardianship issues about provision of clean clothes and pharmacy items could be addressed if an independent party undertook the financial management, therefore other aspects of the guardianship application also appeared to have been resolved.

35. The issues that motivated the application for appointment of a guardian had clearly been subsumed under the general issues of financial management and for that reason the Board did not give serious consideration to the continuation of the emergency guardianship orders into final orders.

36. The application for guardianship was dismissed.

SUMMARY OF ORDERS AND DECISIONS:

After hearing an application in relation to an Enduring Power of Attorney dated 1st May 2000 (hereinafter 'the power') made by Mr V.B.J. of ACF (hereinafter 'the donor') appointing Ms K.J. as his attorney

The Board was satisfied (i) that it is not in the donor's best interests for the power to continue, and (ii) that the donor is unable to make reasonable judgements in respect of his estate and is in need of an administrator

THE BOARD ORDERS

1. That the power is revoked from the date of this order.
2. That The Public Trustee be appointed administrator of Mr V.B.J..
3. That the powers and duties of the administrator be those conferred by Division 4 of Part 7 of the *Guardianship and Administration Act* 1995.
4. That the administrator report to the Board within 6 month as to:
 - (v) the extent of the represented person's assets and liabilities,
 - (vi) the cost of repairs to the property ('the property'),
 - (vii) the range of possible decisions regarding the property,
 - (viii) assessment of the extent of Ms K.J.'s interest (if any) in (a) his bank accounts and (b) the property.
5. The administrator is to apply to the Board for advice and direction before proceeding to implement any decisions in relation to order 4 (iii) and (iv) above.
6. That the administration order remains in effect to 8 March 2010.

For and on behalf of the Board:

Anita Smith
PRESIDENT
1 June 2007

Appendix “A”

Provisions of the *Guardianship and Administration Act 1995*:

Section 3 Interpretation:

"disability" means any restriction or lack (resulting from any absence, loss or abnormality of mental, psychological, physiological or anatomical structure or function) of ability to perform an activity in a normal manner;

Section 6 Principles to be observed

A function or power conferred, or duty imposed, by this Act is to be performed so that –

- (a) the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted; and
- (b) the best interests of a person with a disability or in respect of whom an application is made under this Act are promoted; and
- (c) the wishes of a person with a disability or in respect of whom an application is made under this Act are, if possible, carried into effect.

Section 20 Guardianship order

(1) If the Board, after a hearing, is satisfied that the person in respect of whom an application for an order appointing a guardian or an order appointing an administrator is made –

- (a) is a person with a disability; and
- (b) is unable by reason of the disability to make reasonable judgements in respect of all or any matters relating to his or her person or circumstances; and
- (c) is in need of a guardian –

the Board may make an order appointing a full or limited guardian in respect of that person and any such order may be subject to such conditions or restrictions as the Board considers necessary.

(2) In determining whether or not a person is in need of a guardian, the Board must consider whether the needs of the proposed represented person could be met by other means less restrictive of that person's freedom of decision and action.

(3) The Board must not make an order under subsection (1) unless it is satisfied that the order would be in the best interests of the proposed represented person. ...

Section 51 Administration orders

(1) If, after a hearing, the Board is satisfied that the person in respect of whom an application for an order appointing an administrator or an order appointing a guardian is made –

- (a) is a person with a disability; and
- (b) is unable by reason of the disability to make reasonable judgements in respect of matters relating to all or any part of his or her estate; and
- (c) is in need of an administrator of his or her estate –

the Board may make an order appointing an administrator of that person's estate.

(2) In determining whether or not a person is in need of an administrator of his or her estate, the Board must consider whether the needs of the proposed represented person could be met by other means less restrictive of the person's freedom of decision and action.

(3) The Board must not make an order under subsection (1) unless it is satisfied that the order would be in the best interests of the proposed represented person.

(4) Where the Board makes an order appointing an administrator of a person's estate, the order is to be that which is the least restrictive of that person's freedom of decision and action as is possible in the circumstances.

(5) ...

(6) The Board may exercise its powers under this section on an application under Part 4 of *Powers of Attorney 2000*.

Section 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

...

(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.

Section 65 Emergency orders

(1) Where the Board considers it proper to do so by reason of urgency, the Board may in respect of a represented person make any order or give any direction considered appropriate in the circumstances.

(2) Where the Board considers it proper to do so, by reason of urgency, the Board may, in respect of a person who is not a represented person but in respect of whom the Board considers that there may be grounds for making a guardianship order or an administration order make an order appointing –

- (a) the Public Guardian as his or her guardian; or
- (b) The Public Trustee as administrator of his or her estate –

and in either case the Board may make any order or give any direction considered appropriate in the circumstances.

(3) The Board may make an order under this section of its own motion or on request by any person whom the Board considers to have a proper interest in the matter.

(4) In the exercise of its powers under this section –

(a) the Board is not required to give notice to any person or to hold a hearing before making an order but the Board must make such inquiries or investigations as the Board may think appropriate; and

(b) the Board may act on a request made, or information received, by telephone or any other means that the Board considers appropriate in the circumstances; and

(c) the Board may make an administration order in respect of the estate of a person who is the donor of an enduring power of attorney in force under Part 4 of the *Powers of Attorney Act 2000*, if he or she is of or over the age of 18 years.

(5) An order under this section –

(a) remains in effect for such period as the Board determines but not exceeding 28 days; and

(b) may be renewed but only once for a further period not exceeding 28 days.

Provisions of Part 4 of the *Powers of Attorney Act 2000*:

Section 30 Creation and effect of enduring powers of attorney

(1) ...

(2) A deed or instrument is not effective to create an enduring power of attorney unless –

(a) the donor understands the nature and effect of the deed or instrument;
and

(b)...

(c) ...

(3) For the purposes of subsection (2)(a), a donor is taken to understand the nature and effect of a deed or instrument only if he or she understands the following matters:

(a) that the donor may, in the enduring power of attorney, specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power;

(b) when the power begins;

(c) that, once the power for a matter begins, the attorney has power to make, and will have full control over, the matter subject to terms or information about exercising the power included in the enduring power of attorney;

(d) that the donor may revoke the enduring power of attorney at any time when he or she has the mental capacity to do so;

(e) that the power the donor has given continues even if the donor subsequently loses his or her mental capacity;

(f) that the donor is unable to oversee the use of the power if he or she subsequently loses mental capacity.

(4) ...

32. Duties of attorney under enduring power of attorney

(1) An attorney under an enduring power of attorney, during any period of mental incapacity of the donor –

(a) is taken to be a trustee of the property and affairs of the donor according to the tenor of the power; and

(b) must exercise his or her powers as attorney to protect the interests of the donor –

and, if he or she fails to do so, is liable to compensate the donor for any loss occasioned by the failure.

(2) ...

(3) ...

33. Power of Board to make orders in respect of enduring power of attorney

(1) The Board may –

(a) ...

(b) ...

(c) ...

(d) on application by any other person who the Board believes has a proper interest in the matter –

hold a hearing in accordance with Division 1 of Part 10 of the *Guardianship and Administration Act 1995* to review an enduring power of attorney.

(2) On the review, the Board may, by order –

(a) vary a term of, or a power conferred by, the enduring power of attorney; or

(b) appoint a substitute attorney; or

(c) appoint an administrator of the estate of the donor if he or she is over the age of 18 years; or

(d) declare that the donor did or did not have mental capacity to make a valid enduring power of attorney; or

(e) declare that the enduring power of attorney is invalid if the Board is satisfied that –

(i) the donor did not have the mental capacity to make it;
or

(ii) it does not comply with the other requirements of this Act; or

(iii) it is invalid because the donor was induced to make it by dishonesty or undue influence or invalid for any other reason; or

(f) revoke the enduring power of attorney and, if the donor is over the age of 18 years and the Board thinks fit, appoint an administrator of his or her estate; or

(g) make such other order as to the exercise of the power, or the construction of its terms, as the Board thinks fit.

(3) An appointment of a person as administrator under subsection (2)(f) has the same effect as if it had been made under Part 7 of the *Guardianship and Administration Act 1995*.

(4) When the Board considers it proper to do so by reason of urgency, the Board may suspend the operation of an enduring power of attorney and, on doing so, the Board may –

(a) appoint the Public Trustee or any other person as a substitute attorney; and

(b) make such other orders, and give such other directions, as to the exercise of the power as it thinks fit.

(5) In the exercise of its powers under subsection (4)–

(a) the Board is not required to give notice to any person or to hold a hearing before making an order but the Board must make such inquiries or investigations as may be appropriate; and

(b) the Board may act on a request made, or information received, by telephone or any other means that the Board considers appropriate in the circumstances.

(6) An order under subsection (4)–

(a) remains in effect for such period as the Board determines but not exceeding 28 days; and

(b) may be renewed but only once for a further period not exceeding 28 days.

(7) An order under this section may be made subject to such terms and conditions as the Board thinks fit.

(8) On making an order under this section, the Board must forward a copy of the order to the Recorder who must register it.