

**GUARDIANSHIP AND ADMINISTRATION BOARD
HENTY HOUSE LAUNCESTON**

Mr WKX, on the application of **The Public Guardian**

GAB NO. XXXX of 2007

REASONS FOR DECISION

Anita Smith (Chair)
Sue Hill (Board Member)
Leon Peck (Board Member)

Hearing: 18 October 2007

Guardianship – 3 year review of guardianship – represented person’s father seeking appointment on basis of various complaints against Public Guardian – complaints not substantiated, wishes and best interests of represented person
Guardianship and Administration Act 1995 ss 6, 15, 20, 24, 67, 69

1. This is an application pursuant to section 67 of the *Guardianship and Administration Act 1995* (“the Act”) for review of the order made on 22 October 2004 appointing the Public Guardian as guardian for Mr WKX. This review arose by operation of law because section 24 of the Act deems that an order shall lapse upon the expiration of 3 years unless continued in a review hearing. The Public Guardian made a written application for review on 30 August 2007.
2. Mr WKX’s circumstances have been described in previous statements of reasons written by the Board from hearings on 22 October 2004 and 15 July 2005. He continues to reside at the same Accommodation Facility in Northern Tasmania where care is provided to him under the auspices of Anglicare.

6. Pursuant to section 69, the Public Guardian, Mr WKX, and all other persons that the Board was satisfied had a proper interest were sent notices of the hearing on 2 October 2007 for a hearing on 18 October 2007. A list of the persons sent notices appear at Appendix “A”. This list reflects the list of persons nominated by the Public Guardian in its annual report dated 20 September 2007.

7. The file held by the Board is voluminous. The Division hearing this review had available to it the fourth and latest volume of that file (starting on October 2006), but referred only to the documents listed at Appendix “B”. The relevant legislative provisions are recorded at Appendix “C.”

8. Mr WKX attended the hearing, as did the following persons:
 - Mr W, Mr WKX’s father
 - Mrs EX, Mr WKX’s mother
 - Mr Kevin Preece, Office of the Public Guardian
 - Ms ID, Manager of Accommodation Facility
 - Ms Teena Martin, Motor Accidents Insurance Board
 - Mr Phillip Livingstone, Motor Accidents Insurance Board
 - Mr Don McDonald, Personal Trainer

9. As with previous hearings in this matter, there was no dispute about each of the tests in section 20. On the basis of the reports received, the Board is satisfied that Mr WKX is a person with a disability and is incapable by reason of that disability of making reasonable judgments about his person and circumstances. The Board was also satisfied that the need for a guardian remains. That need has been historically, and is currently, established because of the high levels of criticism that Mr W

sustains against most professional persons involved in Mr WKX's care and accommodation and the ongoing possibility for conflict between Mr W and Mrs BX regarding decisions in Mr WKX's health care and accommodation.

10. The only contentious issue in this review is that Mr W again sought appointment as Mr WKX's guardian in place of the Public Guardian. With the possible exception of Mr McDonald and Mr WKX, all other parties at the hearing supported the reappointment of the Public Guardian as Mr WKX's guardian.
11. Mr W's submissions in support of his appointment as guardian were as follows:
 - (a) That he was the only applicant for guardian and should therefore be appointed. (The Public Guardian had, however, sought reappointment.)
 - (b) Mr W stated that as he had previously been successful as Mr WKX's guardian, a return to that guardianship will restore physical damage done. Plus appointment of Mr W would reflect Mr WKX's wishes. As it would eventually lead to "joint guardianship" between his parents, which is what Mr WKX desires.
 - (c) Arrangements to transport Mr WKX to the hearing nearly went completely awry, this would not happen if his father were his guardian
 - (d) Kevin Preece, as a representative of the Office of Public Guardian, is not competent to be the guardian as evidenced by the fact that Mr WKX has sustained 'lifelong injuries and deformities' while under that guardianship. Further, Mr Preece had appointed the MAIB as Mr WKX's case manager despite its conflict of interest and the inadequate assessments, planning and rehabilitation, calipers and shoes for Mr WKX.
 - (e) Mr WKX is imprisoned by insurance company contracted carers and those same carers have implemented restraint orders against Mr W.

(f) A physiotherapist of whom Mr W approved has left the MAIB because the MAIB will not approve her ideas

12. These submissions had very similar themes to the arguments outlined by the Board in its decision on 23 June 2006, such decision having been approved by the Chief Justice on appeal. Those submissions were (i) a failure by the guardian to appropriately communicate, (ii) that the Public Guardian was subject to the “control of the MAIB, (iii) that there had been a failure to provide a rehabilitation plan, (iv) that the appointment of the Public Guardian had to a large extent removed his parental rights, (v) that his access to Mr WKX had been restricted by the imposition of a restraint order, and (vi) criticisms of services provided to his son by the Public Guardian and others.
13. In essence, Mr W attempted to make the same arguments that have been put before the previous two Board hearings and the Supreme Court. It is clear that Mr W remains staunchly opposed to and suspicious of the role of the MAIB and the Public Guardian in Mr WKX’s life. While all other parties agreed that there remains and possibly will always be room for improvement in the care arrangements for Mr WKX, none of them supported the assertion that the period of guardianship has resulted in ‘lifelong injuries and deformities’ or indeed that there are any insurmountable deficits in Mr WKX’s present care arrangements.
14. It appears that Mr W lacks perspective on the balance between positive and negative events in Mr WKX’s life. A relatively minor event, (e.g. at one stage being double booked with a medical appointment for the time of the hearing) to Mr W, becomes evidence of the gross misconduct of all persons involved in Mr WKX’s life, except Mr W. Positive aspects of Mr

WKX's life (e.g. that he is in frequent contact with a range of fully funded specialists who regularly review his care in a coordinated and professional manner under the supervision of an independent guardian) appear to be insignificant to Mr W. In intensity and frequency, Mr W's criticisms go beyond the reasonable or even strident advocacy of a concerned parent. Unfortunately for Mr W, this focus upon constant criticism has affected his relationship with those who provide Mr WKX's residential care to the extent that he remains banned from those premises.

15. Ironically, it is Mr W's constant criticism that has created the need for a guardian and while that criticism remains so too does that need. It is clear therefore that the fundamental role of the guardian is to be independent and be able to evaluate with the benefit of a little distance and, where necessary, act upon Mr W's regular allegations of mistreatment or neglect. Mr Preece gave evidence that he investigates each of Mr W's complaints and that sometimes those complaints require action and sometimes they do not.
16. Mr W indicated that if appointed guardian, he would live with Mr WKX in an independent unit and become his full time carer. The Board saw no justification for such a wholesale change in Mr WKX's circumstances.
17. As to the view that appointment of Mr W as guardian would have the effect of unifying his parents in guardianship, Mrs BX responded as follows:

MS SMITH: ... Mr W is proposing that you and he are going to have a harmonious relationship where you can agree on all aspects of Mr WKX's care.

MRS BX: We haven't been –

MR W: No, that's –

MS SMITH: Don't interrupt her answer, please.

MRS BX: It's just probably going to be very hard to – if the therapist cannot work harmoniously with Mr W how much more myself.

18. The Board agrees with Mr W's statements to the extent that during the hearing Mr WKX appeared to favour his father's appointment and to desire a closer relationship with his father. While the Board takes Mr WKX's wishes into account, given the difficult relationships Mr W has with the range of professional persons involved in Mr WKX's care, we do not believe that appointing Mr W his guardian would be in his best interests, nor would it promote his freedom of decision and action. Equally, the proposed change of accommodation and care arrangements would not represent Mr WKX's best interests or promote his freedom of decision and action.

19. Mr McDonald submitted to the Board that the Public Guardian was inadequate in its role and sought to make submissions about the performance of the guardian in its role as demonstrated in Mr Preece's letter dated 20 September 2007 to Mr W. Essentially, Mr McDonald wanted the Board to hear performance issues about the Public Guardian and the care team with respect to particular decisions outlined in that letter. Mr McDonald admitted, however, that he had very little understanding about the role of the Board or of a guardian. He also stated that he had not raised any of these performance issues with Mr Preece or anyone else prior to the hearing.

20. The Board determined that in a review hearing, day-to-day performance issues about the Public Guardian are largely irrelevant where there is no suitable alternative guardian available to consider for appointment. Further given the structure of section 15 and section 21 of the Act, the Public Guardian is available for appointment as the 'guardian of last resort'. Therefore, day-to-day performance issues are subject to review by the usual grievance structures, e.g. Mr Preece, his superior Ms Warner, the Ombudsman, the Departmental structures and any legal avenues, but are not necessarily relevant to be aired, for the first time, in a review hearing. The role of the review hearing is to ensure that the elements of sections 20 and 21 are still made out.
21. In this case the Board was satisfied that the elements of sections 20 and 21 were made out.

The Board orders:

1. That the Public Guardian continue as the represented person's guardian;
2. That the powers and duties of the guardian be those conferred by Division 3 of Part 4 of the *Guardianship and Administration Act 1995*; and
3. That the order remains in effect until 17 October 2010.

Signed:

APPENDIX "A"

Persons sent notices of hearing on 2 October 2007:

Mr WKX

The Public Guardian

Mr W – Mr WKX's father

Mrs BX – Mr WKX's mother

Ms Maggie McKenzie – West Tamar Physiotherapy

Ms Sue Brown – The Speech Centre

Mr Don McDonald – Lifestyle Fitness

Ms Linda Gourlay – Motor Accidents Insurance Board

Ms KT – Staff Member at Accommodation Facility, (Mr WKX's Home and Supported Accommodation Facility)

APPENDIX "B"

Documents considered by the Board:

Applications:

- (g) Application dated 8 September 2007 for review of guardianship by Mr W including a letter in support
- (h) Application dated 30 August 2007 by Public Guardian for the 3 years review of the order

Previous relevant decisions:

- (i) Copy of the Guardianship Order dated 22 October 2004
- (j) Statement of reasons dated 22 October 2004
- (k) Copy of the Guardianship Order dated 23 June 2006 and decisions sheets
- (l) Supreme Court decision in *W v Guardianship and Administration Board LCA no. 32/2006*
- (m) Copy of decision of Board member to reject application to review dated 27 April 2007
- (n) Copy of decision of 3 Board members reviewing the rejection dated 18 May 2007

Reports:

- (o) Report prepared by the Office of Public Guardian dated 19 June 2006
- (p) Pro forma Health Care Professional report completed by Dr Andrew Jackson dated 5 September 2007
- (q) Annual report of Public Guardian dated 20 September 2007
- (r) Letter from Public Guardian to the Board dated 26 September 2007 including attachments:
 - (i) Copy of a letter from Public Guardian to Mr W dated 20 September 2007,
 - (ii) Report by Dr Andrew Jackson dated 5 September 2007,

- (iii) Linda Barker, Occupational Therapy report dated 31 August 2007,
- (iv) Confidential reports by Dr Mark Slatyer dated 26 November 2004, 13 June 2005, 10 January 2006, 14 September 2006, 28 February 2007, 7 August 2007 and 20 September 2007.

Other documents:

- (s) Unsigned GAB file notes dated 15 June 2006 and 19 June 2006
- (t) Letter from GAB to Mr W dated 3 May 2007 rejecting his application to review dated 23 April 2007
- (u) Letters dated 22 August 2007 (2), 23 August 2007, 25 August 2007, 28 August 2007, 29 August 2007, from Mr W to the Public Guardian
- (v) Letters dated 24 August 2007 25 August 2007, from Mr W to the Board

APPENDIX “C”

Legislation:

The provision for review of orders is section 67 of the Act:

67. Review of orders

The Board may at any time –

- i. of its own motion; or
- ii. on application by, or on behalf of, a represented person; or
- iii. on the application of any other person –

hold a hearing to review a guardianship order or administration order.

The requirements for appointment of a guardian are contained within section 20 and 21 of the Act:

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–

1. is a person with a disability; and
2. 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
3. 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.

- a. 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.
- b. 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.
- c. The Board must not make an order appointing a full guardian unless it is satisfied that an order for limited guardianship would be insufficient to meet the needs of the proposed represented person.
- d. Where the Board makes an order appointing a limited guardian in respect of a person the order to be made is

that which is least restrictive of that person's freedom of decision and action as is possible in the circumstances.

- e. Two or more guardians of a person, each with different functions, may be appointed under one or more limited guardianship orders.

21. Persons eligible as guardians

(1) The Board may appoint as a full guardian or limited guardian any person who is of or over the age of 18 years and consents to act as guardian if the Board is satisfied that that person –

- (a) will act in the best interests of the proposed represented person; and
- (b) is not in a position where the person's interests conflict or may conflict with the interests of the proposed represented person; and
- (c) is a suitable person to act as guardian of the proposed represented person.

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

- (a) the wishes of the proposed represented person so far as they can be ascertained; and ...
- (d) whether the person proposed as guardian will be available and accessible to the proposed represented person so as to fulfil the requirements of guardianship of that person.

Once appointed the following provision regulates the exercise of the guardian's authority:

27. Exercise of authority by guardian

- (1) A guardian must act at all times in the best interests of the person under guardianship.
- (2) Without limiting subsection (1), a guardian acts in the best interests of a person under guardianship if the guardian acts as far as possible –
 - (a) in consultation with that person, taking into account, as far as possible, his or her wishes; and
 - (b) as an advocate for that person; and
 - (c) in such a way as to encourage that person to participate as much as possible in the life of the community; and
 - (d) in such a way as to encourage and assist that person to become capable of caring for himself or herself and of making reasonable judgments relating to his or her person; and
 - (e) in such a way as to protect that person from neglect, abuse or exploitation.