

GUARDIANSHIP AND ADMINISTRATION BOARD  
LAUNCESTON

**J.M.P., on the application for review by W.S., Administrator.**

GAB No. 1834 of 2004

**REASONS FOR DECISION**

Anita Smith, President (Chair)  
Rod Lester (Board member)  
Philippa Whyte (Board member)

21 May 2004

Administration – family conflict over sale of house prompted administrator’s resignation – one faction of family putting wishes of deceased father ahead of best interests of mother – need for an independent administrator

*Guardianship and Administration Act 1995 (Tas), ss 54, 67*

1. This is an application under section 67(c) of the *Guardianship and Administration Act 1995* for a review of an order of the Board dated 31 October 2003 when the Board appointed WS as administrator for her mother, JMP.
2. The represented person is an 83-year-old widow who lives in a nursing home. She has dementia, which has been evident for 5 to 6 years. She has 7 adult children, RP, BP, KP, WS (administrator), JK, AM and VB.
3. The order dated 31 October 2003 conferred upon the administrator all the powers and duties provided in Division 4 of Part 7 of the Act. Paragraph 2 of the order was a direction that the administrator report to the Board within six months of the date of the order with advice as to the merits or otherwise of retaining a property owned by the represented person in a coastal town.

4. Following the hearing on 31 October 2003, the Board received requests for a statement of reasons, which were supplied. On 29 March 2004, the Board received a report from the administrator indicating that the represented person's vehicle had been sold and that a funeral bond had been purchased. The Board was also supplied with accounts for the estate and a copy of advice from Clarke and Gee, solicitors, regarding the feasibility of a sale of the property in the coastal town. These documents satisfied the direction contained in paragraph 2 of the order dated 31 October 2003.
5. On 7 April 2004, the Board received a letter from the administrator together with an application for review, indicating that she no longer consented to appointment as administrator citing emotional conflict within the family as her reason for resigning as administrator. The Board acknowledges that Mrs S's action in seeking a review when she felt she could no longer cope with the conflict her role created was a responsible action and consistent with her duties as administrator to act in her mother's best interests. It is, however, disappointing that an otherwise competent administrator feels compelled to resign because of internal family disputes.
6. A hearing of the application for review was convened on 21 May 2004. Mrs P's daughters, AM, VB and WS and her son KP attended the hearing. AM indicated that she represented, by proxy, the interests of the remaining family members, RP, BP and JK. The Board had received a letter from RP stating that he was unable to attend but nominating himself for appointment as alternative administrator. Dianne Joyce and Penny Glover from the Public Trustee also attended the hearing.
7. The statement of reasons supporting the order made 31 October 2003 showed that the represented person was incapable, by reason of her disability, of making

reasonable judgments about her estate. It indicated that the seven siblings were divided over many issues since the recent death of their father and that the dealings with a property at the coastal town were the source of much disagreement between the family members. The Board also found that any member of the family would have had the integrity and capability to carry out the duties of an administrator.

8. Ultimately, the Board had appointed WS as administrator because the Division was impressed that she was able to consider the wishes of her mother when most other members of the family confused those with the wishes of their recently deceased father. Another important factor in the Division's decision regarding appointment of an independent administrator, such as the Public Trustee, was that:

“The Board considered this an easy option but decided against this option due to the possible charges involved; due to the likelihood of a purely commercial decision being made as to a quick sale of the house at the coastal town...”

9. At the hearing on 21 May 2004, it was agreed that the only change in circumstances requiring revision within the order was the nomination of an administrator, or factors arising from section 54 of the Act. Two potential administrators were considered: RP and the Public Trustee.
10. The Public Trustee is deemed an appropriate administrator by section 54(1)(a) of the Act. It is therefore not necessary to consider that organisation's expertise or interests in a potential appointment.

***Section 54 (1)(d) – Appointment of a Private Administrator***

11. The other potential administrator, RP, was not present at the hearing; the Board was merely informed that he was “unable to attend”. His absence denied the Division an opportunity to observe his demeanour, put questions about conflicts of interests or his expertise and qualifications for such a role. AM, however, stated that she represented his interests.

***Section 54(1)(d)(i) – Best interests of the proposed represented person:***

12. In letters to the Board original hearing, BP and JK stated that RP’s appointment was most suitable because it reflected their father’s wishes. According to AM, that still accurately represents their views.
13. In putting the views of the members of the family who supported the appointment of RP, there was a repetition of matters described in the previous reasons for decision, that it was the late Mr P’s wish that RP be appointed to look after his mother’s financial affairs. These members of the family saw that proof of acting in their mother’s best interests was acting according to their father’s wishes.
14. Other members of the family present at the hearing preferred the appointment of an independent person to manage the affairs away from the internal tensions of the family members. It is clearly not in the represented person’s interests that the members of her family are so deeply divided over her financial estate.

***Section 54(1)(d)(ii) – Potential Conflicts of Interest***

15. It was clear throughout the hearing that the family is divided into two factions with AM, RP, JK and BP in one faction and WS, VB and KP in the other. Certain

statements during the hearing disclosed that the first faction believed that an administrator's duty to consult should mean that they accept the decision of the majority. It is clear that their evident dissatisfaction with the present administrator resulted from that misunderstanding of the administrator's role.

16. The Board was concerned that a new appointment of any member of the family will see that member act according to the wishes of their faction of the family (or the posthumous wishes of their deceased father) as opposed to making an independent assessment of the best interests of their mother. Given the assumption of the majority faction that a majority decision should direct the actions of the administrator, the Board was concerned that such an appointment may mean that an administrator abrogates duties in favour of a majority decision. Such an approach is completely inconsistent with the fiduciary duties imposed under law.

*Section 54(1)(d)(iii) and 54(2) – Suitability of the Proposed Administrator*

17. Mrs P's wishes could not be ascertained. AM submitted that given the long marriage and the fact that her husband had attended to all financial matters during their marriage their deceased father's wishes were paramount. Such wishes included the desire to see matters handled within the family. The Board rejects that view. In the absence of clear advice about Mrs P's wishes, the late Mr P's wishes are relevant, even as hearsay, but are not paramount.
18. The Board presumed that any member of the family would be compatible with the represented person. However, members of the family are clearly incompatible with each other. In terms of discerning the financial needs and interests of Mrs P, any member of the family appointed as administrator would be compromised by that

divide in the same manner that the existing administrator has been. For that reason the appointment of any member of the family is, in the Board's opinion, unsuitable.

*Section 54(1)(d)(iv) – Expertise of the Proposed Administrator*

19. AM indicated that RP is a businessman and has been for many years. She stated on numerous occasions that he would, in carrying out duties as administrator, consult with all members of the family and consider the best interests of the family. She stated that her father had been clear to nominate RP as his successor in matters of caring for their mother after his death.
20. These statements by AM were disputed by the other members of the family present at the hearing. They were concerned that RP had certain duties as the executor of his father's will which had remained unattended for too long. They were further concerned that RP had an overly relaxed attitude towards the finances of the estate and towards consultation with family members.
21. Given the differences of opinion between available witnesses and the absence of RP, the Board was not in a position to make any proper assessment of RP's expertise as an administrator. However, for the reasons given above, the Board was not prepared to appoint another family member in any event.

*Previous Considerations of the Board Regarding the Public Trustee*

22. At the original hearing of this matter, the Board avoided appointment of the Public Trustee as administrator because it believed that it was most likely that a commercial assessment of the estate would require immediate sale of the property in the coastal town and Mrs P was still deriving some enjoyment from

the property. Evidence at this hearing was that it was now impossible to ascertain whether Mrs P was deriving any special pleasure from the property.

23. The Board was grateful for the contributions of Dianne Joyce of the Public Trustee in this hearing. Ms Joyce explained in detail the style of decision-making that the Public Trustee employs and how it undertakes its duties. She was clear when questioned by family members that, while the trustees would consult the whole family on major decisions in the estate, it is not bound by a majority decision, and could defy the wishes of all members of the family if it had reason to believe such an action was in the best interests of their mother.

### ***Conclusion***

24. Given all of the above, the Board considered it in Mrs P's best interests that a person independent from either faction of the family be appointed as administrator. Such an appointment is the only measure that will guarantee that financial decisions are made that reflect the interests of Mrs P's estate rather than appeasement of a faction within the family. In this situation the Board had attempted the less restrictive alternative of appointing a family member who did not require remuneration, but this has failed because of the conflict within the family.
25. The evidence received indicated to the Board that appointment of another family member would exacerbate existing conflicts. While appointment of the Public Trustee cannot solve those conflicts, it can ensure that decisions made about Mrs P's estate are made independently from that conflict and for a single purpose of ensuring her best interests.

## **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 20 May 2007.

Anita Smith  
CHAIR

Rod Lester  
BOARD MEMBER

Philippa Whyte  
BOARD MEMBER