

Guardianship and Administration Board

Mrs T, on the application of Ms A, Solicitor

GAB No. xxxx/2002

REASONS FOR DECISION

Anita Smith (Chair - President)
Sue Hill (Board member)
Marguerite Lester (Board member)

February 2003

Administration – next friend for Family Law proceedings – capacity, depression – Public Trustee declining appointment as next friend – role of a guardian in litigation

Guardianship and Administration Act 1995 (Tas), s 3, 20, 27, 51, 54, 56 and 57

This is an application under part 7 of the *Guardianship and Administration Act 1995* for an administrator to be appointed for Mrs T made by her solicitor, Ms A.

The proposed represented person, Mrs T, is a 49 year old woman. The Board received evidence that Mrs T was employed as a teacher prior to her marriage when she was 26 years of age and that she has competently run the family household since that time. She has 3 children. She separated from her husband 3 years ago. The two younger children reside with their mother for two weeks out of three. The oldest child is presently living overseas.

The applicant commenced taking instructions from Mrs T in March 2000 and as a result she filed an application with the Family Court of Australia for Property Settlement and Parenting Orders in 2001.

This application under Part 7 was made on the basis that, by reason of her disability, Mrs T's ability to understand the proceedings has diminished and her capacity to provide competent, consistent and logical instructions has diminished to such an extent that the

applicant does not believe her to be capable of making reasonable judgments in her own best interests.

A corresponding application under Order 15, Rule 14(1) of the *Family Law Rules* for appointment of a next friend was filed with the Family Court on 21 October 2002.

Apart from the issue of who would act as administrator and/or litigation guardian, the application was not opposed. None of the evidence was challenged.

The Disability

It is the practice of the Board to receive medical evidence in a form known as the “Health Care Professional Report” (HCPR) as well as oral testimony in hearings.

The Board received affidavit evidence as well as a completed HCPR from Dr J a General Medical Practitioner. According to the HCPR, Dr J has treated Mrs T for 10 years and described her present condition as Depression/Anxiety.

In response to the questions prescribed by the Board in the HCPR, Dr J described Mrs T’s disability as fluctuating, with intellect fully intact but poor concentration and inability to make decisions. While Dr J anticipated an eventual recovery, she stated that Mrs T was incapable of making reasonable plans and understanding cause and effect relationships.

In answer to the HCPR standard question: “Is the person susceptible to undue influence by others (real and unreal others)? Yes/No. If Yes, please specify:” Dr J answered “Yes, Husband”

Dr J’s affidavit evidence was that:

“I have noticed that recently and more particularly in the last six months Mrs T’s mental condition has deteriorated to the point where I believe she is not capable of adequately conducting or giving adequate instructions for the conduct of Court proceedings.”

In accordance with Board procedures, an investigation officer of the Board attended Mrs T’s home to interview her and provide a written report prior to the hearing. The investigation officer’s report states:

“I visited Mrs T at her home in XXXX. She cried copiously throughout the interview for which she apologised. She stated that she was unable to discuss this matter without crying, that it dominated her life and that she often awoke through the night with panic attacks. Mrs T realises that she is unable to give informed instructions to her lawyer. She stated that she is unable to think or concentrate, has trouble with her memory and does require a litigation guardian. The children report that their father has told them that their mother is going mad.”

Mrs T repeated these statements and these behaviours consistently in the hearing. She also described adjustments she has made to her lifestyle to cope with her indecision, such as limiting difficult matters (such as appointments, reading letters or responding to telephone calls) to one per day. She gave evidence that after any conversation about any part of the litigation she would generally be incapacitated for the remainder of the day. She reported that when more than one such event occurs in one day, she simply cannot cope.

Dr R, Psychiatrist, attended the hearing and gave oral testimony. Dr R indicated that she had seen Mrs T on two occasions. She confirmed Dr J’s statement that Mrs T has a mixed anxiety and depression disorder and that the two conditions are compounded by the litigation and possible settlement of Family Law proceedings. She stated that medication had been unsuccessful and counselling had not had a positive effect to date but may be a longer term option.

Dr R stated that one of the common symptoms of depression is indecisiveness. In Mrs T's case, she described an extremely high level of indecisiveness, lack of concentration and difficulty understanding the proceedings.

Dr R indicated that she has many years experience as a psychiatrist and in that time has treated many patients who experience mental health problems, in particular depression, as a result of marriage breakdown and the resultant participation in Family Law litigation. She stated, in that time, she had never seen a referral such as Mrs T's with such complications.

Dr R reported that Mrs T's disability is actually quite minor. She agreed with the capacity for recovery expressed by Dr J. However, Dr R also stated that the effect that the disability is having is that Mrs T is completely unable to operate in the litigation environment in any normal manner. Dr R also stated that the effect of granting an order, which would relieve Mrs T of decision making responsibility, may have a positive impact upon her recovery.

The applicant Ms A also gave evidence of the behaviours she has observed in Mrs T. Ms A stated that she had many years of experience in litigation and has specialised exclusively in Family Law matters since 1994. She said she had never had a worse situation. She reported that despite Mrs T making copious notes during all meetings she still had no capacity to retain information from one day to the next. She did not have the capacity to make decisions and adhere to them. On numerous occasions she had provided the applicant with instructions that were not coherent in the factual or the legal circumstances in which they were given. She did not appear to have the capacity to understand correspondence and at times refused to open or respond to mail from her solicitor.

In evidence Ms A also described a very complex property arrangement between Mr T, Mrs T and Mr T's mother. These involve complicated areas of company and trust laws as well as a high level of responsibility considering Mrs T's financial responsibility for her children, and the relative wealth of her husband. Additionally many of the transactions that have occurred during the period of the retainer have been very complex business transactions and Mrs T has no ability to comprehend what those transactions mean, how they impact for her and how to respond in her own best interests. Proceedings are about to become more complex because Mr T's mother has applied to join the proceedings as a party to recover an alleged loan from Mrs T.

A reported that Mrs T's capacity to provide instructions has been particularly complicated during the period of the retainer because of the impact that Mrs T's contact with her husband has upon her. She stated that Mrs T is extremely easily influenced by her husband's statements and finds it very difficult to evaluate competing assertions between parties.

Both Mrs T and Dr R were present and interacted during the applicant's evidence in this regard. Both readily concurred with the statements of the applicant. When asked whether Mrs T had the capacity to deal with the complex legal and financial decisions she was required to make, Dr R stated "She hasn't a hope."

During the hearing the Board observed that Mrs T had difficulty concentrating on the discussion and would ask for issues to be repeated before being able to respond to questions.

The definition of "disability" in section 3 of the *Guardianship and Administration Act 1995* imposes a two-fold test. Firstly a person must have "any restriction or lack of ability." This is not a high threshold and Mrs T meets that description even though the disability is relatively minor. Secondly, a person must experience that restriction of lack

as an inability “to perform an activity in a normal manner.” It was this test that caused the Board most concern.

The Board was informed by Dr R and the applicant that it is quite normal for Family Law proceedings to cause litigants great anxiety, periods of depression and indecision. That, of itself, would not satisfy the Board of a “disability” for the purposes of the Act. However, the applicant’s and Dr R’s evidence of the extremity of the condition and the highly unusual level of restriction that it presents for Mrs T’s ability to perform the activities required of her, and Mrs T’s agreement with all of these statements were highly persuasive.

This is an unusual application to proceed before the Board, and not one that is readily, or easily, granted. The Board recognises its particular responsibilities under section 51(2) and the fact that “A guardianship order and an administration order affect the status and legal capacity of a person in a fundamental way”¹. It was particularly important to the Board’s decision that both of the professional people giving this oral evidence have significant and specialised experience in their respective fields and both described Mrs T’s reaction to her present circumstances as a worst case.

Considering all of the above, the Board was satisfied that Mrs T has a “disability” for the purposes of section 3, subsection 51(1)(a) and subsection 20(1)(a) of the Act.

Subsections 51(1)(b)&(c) and subsections 20(1)(b)&(c) of the Act

Mrs T is presently required to attend settlement conferences, provide instructions as and when further evidence is obtained by her solicitor and provide directions for the future management of the litigation. She is required to read and understand complex correspondence, financial information and legal advice.

Evidence was given that during the marriage she had little or no knowledge or involvement in the financial affairs of her husband. She is now required to make decisions weighing up conflicting information provided to her by her solicitor on one hand and her husband (or his solicitor) on the other. By reason of her disability as described above, she is incapable of doing that independently.

Ms A reported that amongst the many difficulties that the lack of competent instruction has presented, the following consequences are immediately compromising the best interests of Mrs T's estate:

- Mr T is in arrears of Child Support payments by approximately \$30,000.00 and she has been unable to obtain instructions to pursue that debt.
- Orders have been made in the Family Court pre-trial proceedings and breached, but without instructions, Ms A cannot pursue compliance or remedies for the breaches.
- Mr T has sold business assets to a value of approximately \$1.2 million. The proceeds are potentially divisible in the Family Court settlement, but appear to be dissipating. This requires urgent instructions to instigate investigations and/or injunctive action which Ms A cannot obtain.

Mrs T is, for our present purposes, still capable of managing her own domestic affairs which include running her independent household and caring for herself and her children. However, she is not, by reason of her disability, capable of exercising reasonable judgments in respect of the part of her estate which relates to the Family Law litigation. Accordingly, sections 51(a) and (b) have been made out to that extent.

¹ *Public Trustee v John Blackwood, Heather King, Tom Baxter (in their capacity as members of the Guardianship and Administration Board) Tas Sup Crt 130/1998.*

Even where section 51(a) and (b) are made out the Board must consider whether there is a need for an administrator or whether less formal arrangements will suffice. The Board was consistently informed by Mrs T and the applicant that no person is available to help Mrs T. Evidence from Mrs T indicated that she has refrained from involving any other person in her Family Law matters for reasons of a high personal level of privacy and a desire to be particularly discreet in relation to her husband's affairs.

The evidence given was that when Mrs T approached members of her friends and family to act as next friend they stated that they "do not want to get involved". Accordingly no "person responsible" is available to assist Mrs T to manage her affairs. Additionally, the requirements of the Family Court application for next friend call for a high level of responsibility over and above that which friends and family will voluntarily commit. In the circumstances, the Board is satisfied there is no less restrictive option than a formal administration order.

For that reason, the administration order made by the Board is limited to an order for the purposes of section 56(2)(1) of the Act to "bring and defend actions and other legal proceedings in the name of the represented person." It is assumed that the administrator will subrogate the litigation rights of Mrs T as applicant in the Family Court of Australia for Property Settlement and Parenting Orders and any transactions, conferences or instructions related to that application in so far as it deals with her financial estate. In accordance with usual subrogation arrangements, Mrs T is not absolved from giving evidence where required.

When an application is brought under section 50, the Board is entitled to also consider an application under section 20.

Resulting from an order under section 54, an administrator has specific instructions for the performance of his or her duty in section 57(2). These instructions are aimed at encouraging self-reliance in the represented person and enabling consultation between

administrator and represented person in all decisions. Section 27(2) has complementary provisions. However, section 27(2) has an additional provision that the guardian must act as far as possible to ensure that the represented person is protected from abuse and exploitation. The Board believed that in order to be able to successfully act as an administrator in this particular Family Law application, it may be necessary to remove sources of intimidation and exploitation from Mrs T.

The applicant and Mrs T were asked to comment upon the appropriateness of making an order for a limited guardian under section 20 for the purposes of ensuring that Mrs T is free from abuse and exploitation during the Family Law proceedings. It was envisaged that this might take the form, for example, of removing Mrs T from situations before or during conferences and hearings where she is subject to intimidation or confusion from other parties who could reduce her ability to concentrate and cope with those proceedings. Both Mrs T and the applicant readily agreed.

Accordingly, taking into account all of the evidence and the wishes of Mrs T, the Board determined that it is in the best interests of Mrs T to make an order for an administrator for the purposes of Subsection 56(2)(1) and a limited guardianship order pursuant to section 20 to ensure that the objects of section 27 are made out during the course of the litigation.

The availability of an administrator or guardian

The Board's investigator's notes indicated that:

“Lisa Warner is reluctant to commit the Public Guardian where the matter concerns a purely financial settlement. It would be different if the welfare of the children were concerned. She feels that in this situation it is appropriate for the Public Trustee to be involved.”

Unfortunately, due to an oversight, the Public Guardian had no notice of the hearing and was unable to attend.

The Public Trustee received an invitation to attend and responded by letter dated 23 January 2003 from the corporate solicitor. The letter states in part:

“The Public Trustee is not willing to be a next friend in the Family Court. The Public Trustee’s view is that it should not be a litigation guardian or next friend in any Court or Tribunal as it is not one of its core functions. The board of the Public Trustee’s view is that it should not accept invitations and/or requests that it be appointed next friend or litigation guardian.

The Public Trustee accepts that it cannot oppose the appointment as administrator but notes that under the Family Law Act Order 15 Rule 16, that it cannot be appointed as a next friend unless it is willing to be appointed.”

He concludes by saying:

“*In any case*, The Public Trustee will attend the hearing but will be advising the GAB at that time that even if appointed administrator for the purpose of the continuation of the legal proceedings in the Family Court, it will not be signing consent to act as next friend in the Family Court.” (My emphasis.)

Clearly the corporate solicitor was demonstrating a considered policy position of the Public Trustee Board. Ms H and observer from the Public Trustee attended the commencement of the hearing on the Public Trustee’s behalf. The Board ascertained in a preliminary stage of the hearing that Ms H had no authority to agree to any position other than that stated in the corporate solicitor’s letter. She also agreed that it was the intention of the Public Trustee to frustrate the operation of any potential order made in this case by not signing consent to be next friend in the Family Court.

Ms H stated that the reservation of the Public Trustee was due to the possibility of adverse costs. Ms A pointed to a provision for indemnity for costs in the next friend application. Ms H was not authorised to alter the position of the Public Trustee's Board in light of that indemnity.

The Board indicated to persons present in the hearing that it was the Board's view that the Public Trustee's Board's position was inconsistent with an appointed administrator's legal duty to act in the best interests of the represented person. However the only practicable sanction available to the Board for an administrator not acting in the best interests of a represented person would be to review the order and appoint an alternative administrator. Such procedural circularity and uncertainty was not considered by the Board to be in Mrs T's best interest.

Ms H and the observer were invited to leave at that early point in the hearing and they chose to do so.

Interestingly, given the very considerable size of the joint estate of Mr and Mrs T and the likelihood that Mrs T will receive an equitable share of that estate, it is questionable whether the Public Trustee has acted in its own commercial best interests in this case. These are the dangers of the Public Trustee's Board action in exercising an inflexible and potentially irresponsible policy, rather than examining on a case by case basis. Alternatively, it is a consequence of sending representatives to hearings without vesting in them the authority to make decisions on its behalf.

The only practicable decision of the Board was to consider an alternative administrator. Mrs T indicated a strong desire to receive representation and support from a person with significant life experience. The reluctance of both of the statutory authorities to act was noted. In all of the circumstances, the Board believed that the appointment of the Public

Guardian was the most appropriate and compatible appointment. Of particular consideration in the Board's decision were the following issues:

- The Public Guardian, Lisa Warner, is an experienced legal practitioner and while not practising in Family Law she will be eminently capable of understanding legal issues arising for the purposes of forming instructions in the litigation.
- The Public Guardian is represented in the North of Tasmania by Kevin Preece who has had a long and distinguished career as a professional trustee and will be capable of making informed decisions on the complex financial matters involved in the litigation.
- Mr Preece and Ms Warner are both suitably mature persons and meet, as far as the Board is able to ascertain, Mrs T's request for a person with "life experience". Additionally they are informed by and act in accordance with their statutory responsibilities under the Act.
- Both Ms Warner and Mr Preece will be in a position to rely upon the legal and accounting advice already provided by Ms A and Mr R respectively and, if necessary, they can determine whether second opinions are required from alternative professional advisers.
- The additional role of limited guardian foreshadowed by the Board sits well within the role of the Public Guardian
- The indemnity for costs foreshadowed in the application for next friend in the Family Court.

Conclusion

Following the hearing, the Board is satisfied in all the circumstances that the conditions of section 20 and section 51 have been met.

THE BOARD ORDERS

1. That The Public Guardian be appointed as the represented person’s administrator.
2. That the powers and duties of the administrator are limited to the conduct of the represented person’s application for property settlement, parenting orders and child support filed with the Family Court of Australia in April 2001 (hereinafter ‘the litigation’).
3. That the Public Guardian be appointed as the represented person’s guardian.
4. That the powers and duties of the guardian be limited to decisions in relation to restricting contact with the represented person to such an extent as may be necessary in her best interests and prohibiting contact by any person if the guardian reasonably believes that they would have an adverse effect on the conduct of the litigation and the best interests of the represented person.
5. That in the event the litigation is concluded the administrator is directed to apply to the Board for a review or variation of this order.
6. That this order remains in effect until 6 February 2006.

PRESIDENT

BOARD MEMBER

BOARD MEMBER