

**GUARDIANSHIP AND ADMINISTRATION BOARD
HOBART**

F H T on the application of M J T

GAB No. XXXX of 2007

REASONS FOR DECISION

Anita Smith (President)

Decision: 31 July 2007

Administration – role of family members as administrators – proposed administrator a discharged bankrupt - significant disparity in the relative wealth between the applicant and the proposed represented person – best interests
Guardianship and Administration Act 1995 (Tas), ss 6, 50, 51, 54

1. This is an application under section 50 of the *Guardianship and Administration Act 1995* ('the Act') for the appointment of an administrator.
2. The proposed represented person is a 49-year-old wife, mother and grandmother who has recently suffered a right intracranial haemorrhage and right middle cerebral artery aneurysm. Immediately prior to the haemorrhage, she was living with her husband, the applicant, near Hobart. She is presently resident at the Dwyer Ward of the Royal Hobart Hospital awaiting a more permanent placement in suitable residential care.
2. The Board was amply satisfied that the conditions of subsection 51(1) were met on the evidence, in particular the report of Dr Janine Martin, a psychologist with the Dwyer Ward, confirmed that she is a person with a disability who is unable by reason of that disability to make reasonable financial judgments.

3. The proposed represented person needs an administrator to accept receipt of an entitlement of approximately \$7500 from her mother's estate and to make:
 - (a) Arrangements for the ongoing assessment for and payment of Centrelink benefits,
 - (b) Payment of outstanding rental and existing debts to a furniture store and Telstra, and
 - (c) Decisions regarding the proposed represented person's superannuation and other entitlements arising from her former employment as a cleaner, which may be as much as \$27,000.00.

4. Though it is not a complex estate, the Board was also satisfied pursuant to subsections 51(2) and (3) that the proposed represented person's needs could not be met by any less restrictive means than the appointment of an administrator and that appointment of an administrator was in her best interests.

5. The difficulty presented by the application was in considering the eligibility of the applicant as an administrator for the purposes of subsection 54(1)(d) of the Act. The applicant has consented to appointment and there was no other nomination for appointment as an administrator. However the Board is still entitled to consider the appointment of the Public Trustee, the Public Guardian or Tasmanian Perpetual Trustees pursuant to section 54. In ordinary circumstances, the Board will generally appoint either a person nominated under subsection 54(1)(d) or the Public Trustee for the management of relatively small estates.

6. The Senior Investigation and Liaison Officer's report (SILO report) indicated that the applicant has already undertaken significant

steps in organising the proposed represented person's estate. He was able to give a good description at the hearing of the expectations of an administrator and showed in all practical respects that he was capable of undertaking the task. However, the SILO report also noted that the applicant and the proposed represented person were bankrupted as a result of financial difficulties arising from the failure of a business operated by the applicant. The bankruptcy was discharged by effluxion of time in 2004.

7. The applicant explained at the hearing that after many years employed in construction, he created his own construction business. The proposed represented person had little involvement in the business other than to take telephone calls from time to time. The business failed because (i) the nature of the business requires that he had to employ other people, (ii) there were long delays between outlay for materials and labour and receipt of payment for work done, (iii) he commenced the business with only \$10,000 start-up capital which was insufficient to cover wages of employees and the costs of materials without prompt payment of accounts. The applicant made it clear that his bankruptcy was for the assistance of his creditors and that he since has worked hard to restore financial credibility.
8. One result of the failure of the business was that the couple's house was sold to meet their debts and they have since rented accommodation. Since his wife's hospitalisation, the applicant has been in arrears in rent but he gave evidence at the hearing that he has almost caught up. This is relevant to the extent that the Board had the distinct impression that the applicant is still in strict financial circumstances and relies to some extent upon his wife's estate for day-to-day management.

9. The Board needs to decide in light of the above between appointment of the applicant and the appointment of the Public Trustee. The decision in *Holt v Protective Commissioner* (1993) 31 NSWLR 227 is relevant to the application of section 54(1)(d) as against section 54(1)(a). In that case, while he was careful not to be seen as setting down guidelines, Kirby P stated at page 242:

“When weighing up the competing advantages of appointing a family member or the Protective Commissioner to manage the estate of a protected person, the court may take into account as relevant:

- (a) to the appointment of the Protective Commissioner, the following advantages:
 - i. the manifest independence of his statutory office;
 - ii. the advantages of a dispassionate and neutral approach where there is a potential for family conflict and sharply divided views concerning the best interests of the protected person;
 - iii. the expertise of his staff, their experience in managing estates, the know how accumulated by them and their impeccable reputation; and
 - iv. the security provided to the estate against loss or damage; and
- (b) to the appointment of a family member, the following advantages:
 - i. the size and complexity of the estate: in a smaller estate it may often be appropriate to appoint a family member who will be entirely familiar with the assets and liabilities and readily able to manage them with greater economy and possibly free of cost to the protected person. The Protective Commissioner is entitled to and ordinarily does recover fees under the Act.
 - ii. The capacity of the protected person, if disabled, to interact with his or her manager so that, so far as possible, within the disability which has led to the appointment, such person may remain in charge of, or at least able to influence, the broad directions of the estate;
 - iii. The ingredient of love and affection and unquestioning devotion to the protected person which an appropriate family member can add to the task of management. Whilst the office of manager is, by definition, concerned with proprietary and financial matters and involves the prudent control of the property and like interests of the protected person, in the nature of

things the manager of the estate of a protected person is more likely than a general trustee or receiver to become involved in decisions which affect the protected person's quality of life. A lifetime of knowledge of the person and a devotion to his or her interests may contribute to that quality. It may more readily be secured by the appointment as manager of a family member with the requisite knowledge and motivation

iv. Any special feature of the case which may require particular attention. ...

v. Any special qualities of the applicants to act as managers will be relevant. Although professional training does not necessarily guarantee good management, that fact that one of the present appellants of a chartered accountant and the other a medical practitioner suggests, at least, the possibility that they would not be unfamiliar with the management of large sums of money.

... The Protective Division of the Court must respond, as statute envisages, with a proper mixture of compassion, vigilance and efficiency.”

10. Kirby P's description of the role of the Protective Commissioner is extremely similar to the role of the Public Trustee in this case and the manager of a protected person's estate is extremely similar to the role of an administrator under the Act. Therefore I take each of those matters into account. I note that it cannot be said that all members of the proposed represented person's family are content with the appointment of the applicant, however I do not place great importance on that issue.

11. There is no doubt that having proceeded through a bankruptcy, the applicant is entitled to assume responsibilities in business and finance the same as any other person. The following statements are relevant:

“The overriding intention of the legislation in all Bankruptcy Acts is that the debtor on giving up the whole of his property

shall be a free man again, able to earn his livelihood, and having the ordinary inducements to industry.”¹

And

“The law should enable the debtor to be freed from the burden of accumulated debts so that the debtor can make a fresh start.”²

12. However, the assumption of responsibilities as an administrator, a position of trust, is a particular responsibility over and above the management of one’s own business and finance. The responsibility of the Board in considering appointment as administrator is to give priority to the best interests of the proposed represented person over the rights of the applicant. In *Miller v Cameron* (1936) 54 CLR 572, Latham CJ said:

“It has long been settled law that, in determining whether or not it is proper to remove a trustee, the Court will regard the welfare of the beneficiary as the dominant consideration. (*Letterstedt v Broers*(1))”

13. It is relevant that:

“There is no legislation in Australia preventing a bankrupt from being a trustee, although at common law a bankrupt is unfit to act as a trustee and bankruptcy constitutes grounds for removal.”³

And

“A bankrupt is unfit to act as a trustee.”⁴

14. Two distinctions arise from these statements and the present application. One is that the applicant has been discharged from

¹ *Re Gaskell*[1904] 2KB 478 at 482.

² *Lewis’ Australian Bankruptcy Law 11th Ed.* D. Rose QC, LBC Information Services 1996

³ *Jacobs’ Law of Trusts in Australia 7th Ed.* JD Heydon and MJ Leeming, Lexis Nexis Butterworths Australia 2006 at [1413].

⁴ *Ibid* at [1517].

bankruptcy, and therefore is no longer a bankrupt, and the other is that it is a case of appointment rather than removal as a trustee or administrator. It is relevant, however, to consider potential grounds for removal of an administrator in weighing up whether to make an appointment.

15. In *Miller v Cameron* (above) a case which proceeded 7 years after the bankrupt had assigned his estate, the Chief Justice also stated:

“Perhaps the principal element in the welfare of the beneficiaries is to be found in the safety of the trust estate. Accordingly, even though he has been guilty of no misconduct, if a trustee is in a position so impecunious that he would be subject to a particularly strong temptation to misapply the trust funds, the Court may properly remove him from his offices as trustee. ... A trustee who becomes bankrupt is removed almost as of course. (*Bainrigge v Blair*(2)). There may be exceptions under special circumstances to this rule, but the rule is generally applied. (*In re Baker’s Trust* (3)). If bankruptcy is explained by financial misfortune without moral fault and the trustee has recovered from pecuniary distress he may be allowed to retain his office (*In re Adam’s Trust* (4)).

16. Further in *Chambers v Jones* (1902) 19 WN (NSW) 248 the court found that:

“With reference to the main question, bankruptcy was *prima facie* evidence of the unfitness of a trustee, and the Court of Equity would always at the instance of the beneficiary remove or require a trustee to retire who had been recently bankrupt, unless the trustee proved (1) that his bankruptcy was due to misfortune and not imprudence, and (2) that he was at the time of the hearing of the suit possessed of sufficient capital, not income, as would afford sufficient security to the estate against possible breaches of trust into the future.”

17. Some facts about this application appear to be relevant in light of the above considerations. One is that the failure of the applicant’s business resulted in the proposed represented person’s own bankruptcy and the loss of her home. The second is that the proposed represented person may be, if she is entitled by the onset of

disability to make an early claim for her superannuation, entitled to a significantly greater estate than the applicant. Thirdly, even without the payment of superannuation funds, the funds from the proposed represented person's mother's estate will occasion a significant disparity in the relative wealth between the applicant and the proposed represented person.

18. I cannot escape the conclusion that the applicant's previous financial behaviour resulted in significant losses for the proposed represented person. The estate that she is now entitled to is particularly personal and the Board must take every step to ensure that it is secure and available for her future needs. I have considered whether the appointment of the applicant could deliver the same level of security if certain reporting conditions and directions were embodied in the order. This would require a higher than usual level of scrutiny by the Board of this account. However, the main consideration is that if the Board subsequently discovered a disallowable expense during such scrutiny pursuant to section 63(6) of the Act then the applicant has little or no personal estate from which to reimburse such an expense.

19. Therefore, even though there is no evidence of misconduct or intended misconduct by the applicant, in considering the best interests of the proposed represented person, on balance, I am satisfied that the compassionate, vigilant and efficient course is to appoint the Public Trustee as administrator.

20. I am not satisfied that the applicant has sufficient expertise to administer the estate for the purposes of section 54(1)(d) and prefer in all the circumstances to accommodate the proposed represented person's best interests by appointment of the Public Trustee.

After hearing an application by M J T in respect of F H T (hereinafter called the 'represented person')

The Board was satisfied that the represented person

- is a person with a disability, and
- is unable by reason of the disability to make reasonable judgements in respect of her estate, and
- is in need of an administrator;

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*.

That the order remains in effect until 1 August 2010.

Anita Smith
PRESIDENT