

Guardianship and Administration Board
Level One, 54 Victoria Street, Hobart

H.D.H., on the application of C.C.

GAB No. xxxx of 2005

REASONS FOR DECISION ON COSTS APPLICATION

Anita Smith (President)
Malcolm Schyvens (Board member)
Catherine Wilding (Board member)

Costs – costs follow the event, compensatory not punitive – role of inquisitorial proceedings – who is a ‘party’ - proceedings do not remedy wrongful conduct – objects of the Act - no party wholly ‘won’ or ‘lost’ the proceedings – represented person absent and incapacitated, benefit to him is irrelevant to costs – costs not justified

Guardianship and Administration Act 1995 (Tas), ss 6, 69, 73, 80

1. C.C., the applicant in the previous proceedings, and X Nursing Home. have made applications for costs. The applications arose from the hearing and decision as recorded in the statement of reasons: *H.D.H., on the Application of C.C. 9 June 2005*.

2. Section 80 of the *Guardianship and Administration Act 1995* provides:

“Where the Board is of opinion in a particular case that there are circumstances which justify it in doing so, the Board may make such orders as to costs and expenses as the Board thinks just.”

3. The Board is grateful for the thoughtful and detailed written submissions by counsel in relation to costs. The Board accepts that the starting position for

interpretation of section 80 is that ‘costs follow the event’¹ and that costs should be compensatory not punitive. We also note that, given the language of the statute, there are no absolute rules that govern how the Board exercises this discretion². Having considered all of the submissions, the Board has come to the conclusion that the circumstances of this case do not justify the Board making an order as to costs and expenses.

4. At the commencement of the hearing on 26 May 2005, the Board indicated that the process of a hearing is determined by the Division³, and in accordance with the usual procedure of the Board, the Division had determined that proceedings would be inquisitorial and informal. By that determination, the Board altered the usual expectations from other forums of there being a ‘winner’ and a ‘loser’ in the proceedings.
5. The behaviour of individual parties prior to and during the hearing does not alter the fundamental nature of the proceedings which were prepared and directed by the Board itself and therefore inquisitorial.
6. The Act does not define who is a party to an application. However, some guidance is provided in sections 69(1) and 73 about the status of certain parties. The relevant parts of section 69(1) provide that notice must be given to the applicant, the person in respect of whom the hearing is to be held, the Public Guardian and “any other person who the Board is satisfied has a proper interest in the matter.”
7. Section 73(1) specifies that the applicant, the person in respect of whom the hearing is to be held and the Public Guardian are entitled to representation at the hearing. All other persons must seek the leave of the Board to be represented. The Board is of the view that it is appropriate to extrapolate

¹ *Latoudis v Casey* (1990) 170 CLR 534 and *Hardman v Ward* [2004] TASSC 74

² *Oshlack v Richmond River Council* (1998) 193 CLR 72

³ Schedule 2 Clause 2(3) – Section 11(3) *Guardianship and Administration Act 1995*

from these legislative provisions that the legislature intended that the “parties” for the purposes of this kind of application are the applicant, the person in respect of whom the hearing is to be held and the Public Guardian. With one other potential exception discussed below, all other persons in attendance at the hearing were, in effect, witnesses assisting the Board. (For convenience, the application form refers to the latter category of persons as “interested parties” but this does not infer their actual status as a “party” to the proceedings as their interest in the outcome of the application may be quite limited.)

8. This status as a witness arises because of the level of control that the Board assumes in the conduct of the hearing and the inquisitorial nature of proceedings. It is a consequence of these kinds of proceedings that, unlike adversarial proceedings, witnesses have the opportunity to discuss other witnesses’ evidence and to mix evidence with submissions in an effort to expose the best interests of the person who is the subject of the application.
9. Mr Williams’ submission characterises the proceedings as proceedings to remedy wrongful conduct. The Board has no such jurisdiction, it only has jurisdiction to promote the best interests of the person into the future. Therefore his submissions that ‘those who caused the situation should pay the costs’ presume a capacity to determine causation that the Board does not possess.
10. Although it was asserted by Mr Williams that M.H. was a hostile and contending party, once his application for guardianship was withdrawn, his status in the proceedings reverted to a witness only.
11. It was also asserted that X Nursing Home was not a neutral party in proceedings and should bear responsibility for the factual scenario that

brought about the proceedings. Again, the Board concludes that X Nursing Home was a witness to the proceedings, not a party.

12. Both X Nursing Home and M.H. were represented. However, both witnesses were the subject of adverse allegations in the proceedings and were entitled to procedural fairness, an element of affording them that fairness was granting leave to be represented by counsel. The Board concludes that the presence of counsel or the requirement to afford procedural fairness does not change the character of these persons from witnesses to parties.
13. The evidence of X Nursing Home and M.H. was extremely important in the development of the case. By operation of Regulation 4(e) of the *Guardianship and Administration Regulations 1997* and section 19(2)(b) of the Act, the Board could not have entertained the application by C.C. had M.H. not supplied the Health Care Professional Report with his (later withdrawn) application. X Nursing Home gave important evidence about H.D.H.'s wellbeing and about how the operation of the 'list of approved persons' had come into being.
14. To the Board's knowledge, this is the first application of its kind. The Board has no existing policy regarding section 80 applications. Therefore the Board has given careful consideration to the impact that this decision may have and the effect it could produce upon future applications for costs and even future applications for guardianship and administration.
15. Many persons submit evidence and information to the Board. If expressing a view about whether there ought or ought not to be an order made for a person, a witness was exposed to a potential costs order, the Board's functions would be impaired. The submissions urged the Board to consider the objects of the Act in section 5. Clearly to expose witnesses to a potential

award of costs in proceedings is contrary to those objects. The Board notes the decision in *Duke Eastern Gas Pipeline Pty Ltd* (2001) ATPR 41-827 and the importance of not discouraging participation in the legal process and the assumption that the rule that ‘costs follow the event’ is most relevant to *inter partes* litigation.

16. It is the natural position of the Board to assume that the appointment of a guardian is unnecessary unless evidence is put to contrary effect. Indeed the observation of section 6 principles and the decision of Underwood J. in *Public Trustee v Blackwood, King and Baxter* No. 130/1998 that appointment of a substitute decision maker is a last resort would require that the Board avoids appointment wherever possible. M.H.’s position did no more than reflect the natural position of the Board and highlight alternative points of view.
17. It might be argued that the exception in the Board’s finding that all persons other than the applicant and the represented person were witnesses may be Mr. D. who presented himself as a potential guardian but was rejected for reasons discussed in the original statement. He is the only other person who might be described as a party and who might have ‘lost’ in these inquisitorial proceedings. None of the submissions have argued that he is responsible for costs and his nomination was more in the nature of a kindly gesture than an opposing or competing submission.
18. If the Board is incorrect in respect of its characterisation of the roles of persons attending the hearing and the consequent impact upon the costs applications, then in any event, the Board is of the view that no party has wholly won and no party wholly lost⁴ and that the circumstances therefore

⁴ *Bremer Landesbank Kreditanstalt Oldenburg v The Ship Rangiatata* (1999) 161 ALR 587

do not justify a costs award. C.C.'s application was for the appointment of the Public Guardian whom she stated would be able to:

- “1. Free up access to him in the Home. He had a large number of friends and acquaintances and should be allowed to see them.
 2. Allow him to see me. We have had a close personal relationship for over 29 years. For his sake it should continue in his declining years.
 3. Allow him to continue our relationship and activities such as picnics. I took him out of hospital on 25 January 2004 and had a picnic at Gordon. I am the only person who took him out of hosp. for his enjoyment.
 4. Allow him to come home with me – where he has spent many many happy times over the 25 years I have had my property here.”
19. The Board did not grant automatic access for C.C. in the terms she sought. Instead it delegated the authority to the Public Guardian to make determinations about H.D.H.'s fitness for such access. It was a limited order:
2. “That the powers and duties of the guardian are limited to decisions about restricting visits to the represented person as may be necessary in his best interests and to prohibit visits by any person if the guardian reasonably believes that they would have an adverse effect on the represented person.
 3. The powers of the guardian include but are not limited to:
 - a. countermanding any previous instructions provided to X Nursing Home. regarding visitors to the represented person,
 - b. access to medical, psychological, psychiatric, personal or other information relating to the represented person as required to perform the functions described in paragraph 2 hereof, and
 - c. access to hospital and nursing home records as required to perform the functions described in paragraph 2 hereof.”
20. Such an order did not guarantee that C.C. would have the access that she desired and the Public Guardian might have exercised her powers to exclude her visits if she had believed it would have an adverse effect upon H.D.H.,

particularly for reasons of psychological or physical health. Indeed the Board's decision included guidance for a staggered and monitored re-introduction between the two parties. In preserving that ability to exclude visitors, it can neither be said that C.C. wholly won the proceedings nor that M.H. and X Nursing Home. wholly lost them.

21. The suggestion that H.D.H. should pay costs to parties for proceedings that were for his benefit alone, is abhorrent. H.D.H. has been confirmed in the proceedings as being a person without decision-making capacity. He did not attend the proceedings and had limited, if any, understanding of them.
22. Awarding costs against H.D.H. is contrary to the Board's duty to protect the represented person's best interests and the principles in section 6. If the Board always decides in the best interests of a person, how then could the Board determine that that person is the 'loser' for the purposes of a costs application and the principle that costs follow the event? This is compounded by the reliance placed upon H.D.H.'s wishes and the extent to which the Board attempted to carry them into effect.
23. These proceedings do not take on the character of 'public interest' or 'private (competing) interest' proceedings, but they primarily involve the interests of an absent and incapacitated party, not the particular interests of any person who attended the hearing.
24. The Board rejects Mr Williams' submission that H.D.H. has derived benefit from the operation of the orders. This submission presumed that the Board has independent evidence of a benefit, when such evidence has not had an opportunity to be tested. In any event it is irrelevant to the present decision of the Board.

25. References in the submissions to estate litigation ignored that, in estate litigation, the deceased can have no future financial interest in the estate. There is clearly an incentive in the costs arrangements for estate litigation because the potential beneficiaries have an interest in keeping litigation costs at a minimum, such a incentive does not operate in this jurisdiction.
26. The Board received evidence that H.D.H.'s estate had already paid significant sums in legal costs associated with these proceedings. While this causes the Board deep concern about the potential misuse of his funds, it is not actually relevant to the present decision of the Board.
27. In essence, each person who provided information to or attended the hearing did so from the stated position of wishing to serve H.D.H.'s best interests. Each person had demonstrated a sufficient connection with H.D.H. and interest in the proceedings as to make that participation relevant to the proceedings. Accordingly the Board is not satisfied that the circumstances justify an award of costs in favour of any party or witness or against any party or witness. Accordingly the witnesses and the parties who were represented should bear their own costs.
28. For reasons expressed in the earlier statement of reasons, the Board does not believe that publication of this or any report of these proceedings is in the best interests of H.D.H. However the statement of reasons canvasses many issues that will be of use for educational purposes and the Board will produce a de-identified version of the statement following its delivery.
29. The applications for costs made by C.C. and by X Nursing Home. are dismissed.

Anita Smith
PRESIDENT

For and on behalf of:

Malcolm Schyvens
BOARD MEMBER

Catherine Wilding
BOARD MEMBER