

GUARDIANSHIP AND ADMINISTRATION BOARD
HOBART

Miss M.F. review of administration order of Board's own motion

GAB No. XXXX

REASONS FOR DECISION

Anita Smith (President)

Date of Hearing: 00/00/2008

Review of administration – effect of earlier order with directions – represented person's wishes – “best interests” includes issues of control, relationships, accountability, enjoyment – “least restrictive alternative” review of alternative arrangements - *Guardianship and Administration Act 1995* (Tas), ss 6, 54, 67

1. Miss M.F. is a 24 year old woman who lives in Hobart in supported group home accommodation supported by GHA a residential facility funded by Disability Services. Her mother, Mrs F.C., made an application for appointment as Miss M.F.'s administrator on 31 May 2006. An order was made on 2006 appointing Mrs F.C. as administrator. That order was reviewed in accordance with the terms of the order in 2007.
2. When reviewed the order was varied to include a direction to the administrator to direct Miss M.F.' income to an account in Miss M.F.'s name but controlled according to GHA's internal policies and procedures. There was also a direction to GHA that they develop a fortnightly budget to be approved by the administrator. That order included a provision to review operation after 6 months. Both orders were recorded in full statements of reasons. This statement of reasons presumes that the reader is aware of the contents of the two previous decisions.

3. The following people attended the hearing on 2008 to review the administration order:

Miss M.F.,	Proposed represented person
Mrs F.C.,	Applicant, Miss M.F.'s mother
Mr J.F.,	Miss M.F.'s father
Jane Blake,	Miss M.F.'s advocate, Advocacy Tasmania
Mrs E.X.,	Manager, GHA
Ms S,	Support staff member, GHA
Richard D'Eye,	Disability Services
Lee Perry,	Staff member GAB

Need for an Administrator – Section 51(1)(c):

4. The subject of the review was mainly the practical and operational aspects of the order and whether there is a need for an administrator. Parties did not seek to review whether Miss M.F. has a disability or whether she has the capacity to make reasonable financial judgments. Therefore the hearing concentrated on issues related to the need for an administrator and the particular directions applying to the administrator.
5. Miss M.F. has three sources of income, a Disability Support Pension, a Mobility Allowance and income from her employment. She also has a term deposit account. Currently all three sources of income are controlled on a day to day basis by GHA, with the administrator having only a supervisory role but not a decision making role over the income because of the operation of the terms of the direction in the order.

Miss M.F.'s wishes:

6. Miss M.F. stated at the hearing that she wants her mother to manage her money. The Board accepts this as a genuine expression of Miss M.F.'s wishes (and not merely the result of coaching) for the following reasons:

- (a) Miss M.F. has consistently expressed this wish over three hearings in two years.
 - (b) Miss M.F. not only stated this very clearly in the hearing but her advocate supplied a written record of an earlier conversation held away from the hearing environment which was consistent. That statement was recorded as follows: “I want Mum to help me – she’s the best – she helps me solve problems I don’t want it to change”
 - (c) Miss M.F. said in the hearing that her mother is her friend. This was not said lightly and demonstrated their mutual love, respect and affection.
7. It is unlikely that Miss M.F.’s wishes can be interpreted as any indication of whether she prefers her mother appointed under a full or limited administration order, retention of the current direction or some informal arrangement. The Board interprets that what is important to Miss M.F. is that her mother is the person who has control over her money, to what ever extent is required.
8. The principles in section 6 of the *Guardianship and Administration Act 1995* require the Board to perform its functions so that the wishes of a person with a disability may, if *possible*, be carried into effect. The means by which Miss M.F.’s wishes may be carried into effect will be the appointment of her mother as administrator or the potential endorsement of an informal arrangement with Mrs F.C. having control.
9. I cannot see any argument on the evidence that it is not *possible* to appoint Miss M.F.’s mother as her administrator. Mrs F.C. has been Miss M.F.’s administrator in a full or limited capacity for 2 years. Mrs F.C. submitted her accounts dutifully and attended a training session regarding her duties as administrator. Arguments from

GHA assert that appointment of Mrs F.C. as a full or limited capacity is not *convenient*, but that is different to what is *possible*.

10. That potential appointment needs to be balanced against Miss M.F.'s best interests and what is the least restrictive of her freedom of decision and action.

Miss M.F.'s Best Interests:

11. On the evidence presented at the review hearing, Miss M.F.'s best interests may be categorised as follows:
 - (a) Accountability and transparency for money management
 - (b) Engagement in social activities and enjoyment of discretionary spending
 - (c) Issues of control
 - (d) Long term relationship issues

(a) Accountability and transparency for money management

12. GHA have a documented system for handling client's monies which involves the key worker and the resident developing a budget, then distributing funds towards the items in the budget. Expenses are then only authorised with three signatures, one is provided by the resident, the other two, staff members. No doubt this policy has been developed to provide a system of accountability and transparency. The system reportedly works very well for all other residents in the house where Miss M.F. lives and is, in the view of management, a less restrictive option than the appointment of an administrator. With the most recent administration order, the process for Miss M.F. is adapted to the extent that a budget is sent to Mrs F.C. for approval. However the control over financial decisions rests with the availability and acquiescence of the institutional signatories.

13. GHA staff apparently place greater emphasis on the opportunity for the resident to learn about financial management than upon the need for actual decision making authority. When asked at the hearing where authority came from to manage the financial affairs of people with disabilities, neither of the staff from GHA could answer the question. When asked where authority to manage clients accounts may be derived in the absence of family agreement, the staff members answered:

“It’s through the [*Disability Services*] Act and through our service agreement. Group homes are set up for that, for that process to happen, the learning and independence.”

14. Richard D’Eye from Disability Services pointed out that the learning comes from the interaction with the key worker in discussing the budget but the signatory to the account is largely irrelevant to the learning process. He also indicated that other opportunities for learning and independence exist. He said that there is nothing explicit in the service agreements to authorise non-government organisations to manage residents’ money.

15. The *Disability Services Act 1992* contains no reference whatever to management of client funds and is not a definitive statement of the laws relating to the management of funds of clients living in supported accommodation. That Act operates in conjunction with other legislation, such as privacy legislation, the myriad of laws relating to financial institutions and financial management and the common law regarding fiduciary duties. Even if the service agreement does refer to the management of client funds, it cannot supplant other obligations imposed by other laws and legislation.

16. It is of enormous concern to the Board that senior members of a supported accommodation facility are unable to recognise that there needs to be clear authority in order to operate and control a bank

account on behalf of a person who lacks the capacity to independently make reasonable financial judgments.

17. GHA staff members argued that the client is in control of their own funds and therefore has the requisite authority. This is, in Miss M.F.'s case (and maybe the case of other residents), a dangerous fiction because she lacks the capacity to make judgments such as establishing an account with three signatories. It is also dangerous that the organisation does not acknowledge the level of control that they have. It was clear from the evidence that staff of the centre will make decisions whether or not expenditure is warranted (as opposed to wanted) and can actively or passively refuse a client access to his or her money if they deem it appropriate. This active or passive resistance between an incapacitated resident and their funds operates completely without legislative authority.
18. The Board strongly recommends that GHA seek legal advice about the probity of having residents sign financial documentation (withdrawal slips etc) when the evidence has been that Miss M.F., who has the highest level of capacity for decision making in the house, lacks capacity to make reasonable financial judgments. If such a practice is adopted to ensure external accountability for the actions of staff, then it is a highly questionable practice. If it is done for training purposes, then it is questionable whether the educative value justifies the possible legal consequences such as invalidation of the transactions.
19. GHA staff seemed entirely confused about the difference between the need for accountable procedures and actual authority. Both are important. When asked about what happens if excess funds build up in residents' accounts, staff members stated that they would open an investment account and protect lump sums that way. It seems

highly unlikely that this is a strategy that the residents themselves would initiate, but is rather a decision imposed by the service with residents' acquiescence. Regardless of this, staff members persisted with the fiction that the residents are in control of their funds.

20. What GHA staff members fundamentally failed to grasp was that, in the event that a family member questions their management of a resident's moneys, they have absolutely no authority whatever over client funds. Therefore, once conflict arises in the informal arrangements, all parties are in a vacuum of authority because the central party lacks capacity to make reasonable financial judgments. This vacuum, of itself, creates a need for an administrator.
21. I do not believe that the policy and procedure operated by GHA are in Miss M.F.'s best interests unless they are underpinned by clear authority to manage funds. Such clear authority can in this situation of conflict only be resolved by appointment of an administrator.

(b) Engagement in social activities and enjoyment of discretionary spending

22. Miss M.F. participates in a range of social activities with staff and other residents. There was evidence of a positive shopping expedition shared by Miss M.F. and a staff member from GHA. Miss M.F. also spends significant amounts of time with her parents, siblings and extended family usually spending every second weekend with her mother. It is clear that spending time particularly with her mother is very important to Miss M.F.
23. Mrs F.C. raised concerns that the present budgetary arrangements allow Miss M.F. only \$40 when she stays with her mother. This presents obstacles because Mrs F.C., being on a pension herself,

cannot afford to subsidise Miss M.F.'s entertainment costs and often the activities they would like to enjoy together exceed a cost of \$40. There was also evidence that a transaction to buy a pair of shoes took 3 days to complete because the staff member required to sign the withdrawal slip was not available earlier.

24. GHA staff members stated that if more than \$40 was required, then Mrs F.C. need only make a request and more would be provided. Mrs F.C. argued that this eliminated the possibility for spontaneity. It appeared from the evidence (though was not clearly spelt out) that there is some room for spontaneity in Miss M.F.'s spending and that her discretionary spending is not limited to \$40 per fortnight. It was also clear though that accessing any savings that she has depends upon the presence and willingness of the two other bank signatories to authorise a withdrawal.
25. The question arises whether the educative outcome of the budgeting process is to make Miss M.F.'s life as close to possible of the lives of other people in the community or whether it is to achieve financial perfection. Many people in the community might draw up a budget. Few people actually stick to such a budget. However there is power in the GHA process to ensure that a budget is adhered to the letter, potentially resulting in an experience for Miss M.F. that is very different to the rest of the community.
26. GHA have previously argued that Miss M.F. wants to spend money on things such as colours in her hair or clothes and such expenses have been discouraged by Mrs F.C. and then did not occur. This will be considered further under "Issues of control".
27. The Board was satisfied that the friendship between mother and daughter is enhanced by the experience of shopping and spending

money together. It also appeared that this is one of the most enjoyable aspects of Miss M.F.'s life. However it is currently limited by the process for management of Miss M.F.'s funds by GHA.

(c) Issues of control:

28. The standards published under the *Disability Services Act 1992* state:

“8. Programs and services are to be designed and administered so as to ensure that no single organization providing services exercises control over all or most aspects of the life of a person with disabilities.”

29. Interestingly, both Miss M.F.'s parents express a firm view that Miss M.F. is unable to learn financial management and never will be able. This statement sits uncomfortably for GHA staff members whose ideology is different. Although not expressly stated, it appears that GHA staff members believe that Miss M.F.'s capacity for financial decisions is presently hampered by a 'learned helplessness' that is reinforced by the attitudes of her family.

30. Mr J.F. and Mrs F.C. referred to a long history of attempts to educate Miss M.F. towards financial competence. Mrs F.C., however, expressed her concern that there may be too much pressure on Miss M.F. to make decisions and there is a risk that she will feel a failure, a feeling Mrs F.C. was keen for her to avoid. However this did not mean that she will withdraw Miss M.F. from the educative budgeting process if she was appointed administrator.

31. The staff members of GHA are concerned that Mrs F.C. exercises too much control over Miss M.F.'s decisions, such as hair colour and clothing styles. Mrs F.C. expressed concern about GHA wanting control over Miss M.F.'s funds and wanting to attend medical

appointments. This application has been dogged by competition for control over Miss M.F.'s life since it first came to the Board.

32. When this matter first came to the Board, it arose because although Mrs F.C. had assigned two out of three sources of income to GHA's control, they wanted the third source assigned as well. Such a demand for control appears to be contrary to the Disability Service Standards as well as Miss M.F.'s best interests. In light of the Disability Service Standards and the positive relationship Miss M.F. has with her parents, the balance of control in this situation lies in her parent's favour. This does not mean that the residential facility cannot encourage Miss M.F. to think independently from her parents and to consider alternative points of view if such encouragement still recognises that Miss M.F.'s family are the primary determinant of her cultural and family values and have actual authority given their status as actual or potential persons responsible.

(d) Long term relationship issues

33. Richard D'Eye and Mr J.F. stressed the importance of Miss M.F.'s family as the enduring relationships in her life. While every effort has been made to ensure that Miss M.F.'s residence is long term and secure, the staff there are employed and may move on at any time. Family relationships cannot be replaced with paid relationships. Miss M.F. has the benefit of a supportive and loving family and this was not disputed at the hearing.
34. The role of family members in administration was discussed in *Holt v Protective Commissioner* (1993) 31 NSWLR 227 Kirby P noted the following advantages in appointment of a family member (as opposed to a professional trustee):
- 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."

35. The advantages that Kirby P. mentions are all applicable to the appointment of Mrs F.C. as administrator in this case and to some extent also apply to the comparison between management under GHA's informal procedures versus Mrs F.C. also.

Least restrictive alternative

36. GHA have argued that the appointment of an administrator is the most restrictive alternative compared to compliance with GHA's informal financial controls.
37. Taking into account the fact that a financial decision by a resident can be actively or passively vetoed by GHA staff members, that a transaction to buy a pair of shoes can take 3 days waiting for the right staff member to be available, that Miss M.F. ought to be able to adhere or not adhere to a budget to the same extent as the rest of the community, I do not accept that the GHA processes are less restrictive than the appointment of an administrator. They may be equally restrictive, but I prefer the appointment of Mrs F.C. to the continued arrangement with GHA for the probity reasons expressed under the 'best interests' heading above.
38. With advances in financial services, including internet banking, it seems odd that Miss M.F.'s finances are so heavily cash and paper based. The use of debit cards with limited available funds (controlled at a distance by the internet if needed) might provide necessary access to funds with a requisite degree of accountability under the supervision of the administrator. However, I leave this to the administrator's discretion.

Review of the Directions in the Previous Order

39. I have concerns that the directions in the previous order, although given for sound reasons, had the effect in practice of resting all financial responsibility with the administrator but taking away any realistic capacity for control. The direction to GHA was probably not binding as a direction can only bind the administrator not an

external organisation. Mrs F.C. has described the experience as being “like having one arm tied behind my back”.

40. Mrs F.C. has proven herself to be a competent administrator and I see no reason to limit the order within the terms of this simple estate.
41. A long period of encouraging Mrs F.C. and GHA to cooperate over the management of Miss M.F.’s funds has had some success with parties expressing a better working relationship. Mrs F.C. has also said that she will leave in place the educative aspects of the budgeting process. This bodes well for the future of their cooperation but is not binding upon Mrs F.C. if for some reason she believes it does not continue to work.
42. The appointment of Mrs F.C. is the outcome most consistent with the principles in section 6 of the Act. I appoint Mrs F.C. accordingly.

THE BOARD ORDERS

1. That Mrs F.C. 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 30 April 2011.

Anita Smith
PRESIDENT

Reasons delivered 7 May 2008

APPENDIX "A"

Documents received by the Board:

ORDERS dated 2006 and 2007

Notes for Board decision dated 00/00/2007

Statement of reasons for decision dated 00/00/2007

APPLICATION dated 2006 with attachments:

- Letter from Mrs F.C. to GHA Board of Management dated 2006
- Commonwealth Bank Account Statements for Miss M.F.

REPORTS:

Investigator's report dated 21.4.08

Administrator's Annual Report and Statement of Account dated 00/00/07

Administrator's Annual Report and Statement of Account dated 00/00/08
including account verification

CORRESPONDENCE:

Letter from GHA dated 22.10.07 including journal

Email from Jane Blake

Investigator's file dated 5.11.07

Emails between Jane Blake and Anita Smith

Request for statement of reasons (email + letter) dated 00/00/07

Investigator's file dated 10.12.07

Miss M.F.'s budget for period of a fortnight

Investigator's file dated 1.5.08

Letter dated 18.5.08 from administrator including 'record of events
26.10.07 to 18.4.08

Letter from GHA dated 24.4.08 including file note

Email from Jane Blake dated 28.4.08

APPENDIX “B”

Section 3. Interpretation

(1) In this Act, unless the contrary intention appears –

...

"disability" means any restriction or lack (resulting from any absence, loss or abnormality of mental, psychological, physiological or anatomical structure or function) of ability to perform an activity in a normal manner;

Section 6. Principles to be observed

A function or power conferred, or duty imposed, by this Act is to be performed so that –

(a) the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted; and

(b) the best interests of a person with a disability or in respect of whom an application is made under this Act are promoted; and

(c) the wishes of a person with a disability or in respect of whom an application is made under this Act are, if possible, carried into effect.

Section 51. Administration orders

(1) If, after a hearing, the Board is satisfied that the person in respect of whom an application for an order appointing an administrator or an order appointing a guardian is made–

(a) is a person with a disability; and

(b) is unable by reason of the disability to make reasonable judgements in respect of matters relating to all or any part of his or her estate; and

(c) is in need of an administrator of his or her estate–

the Board may make an order appointing an administrator of that person's estate.

(2) In determining whether or not a person is in need of an administrator of his or her estate, the Board must consider whether the needs of the proposed represented person could be met by other means less restrictive of the person's freedom of decision and action.

(3) 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.

(4) Where the Board makes an order appointing an administrator of a person's estate, the order is to be that which is the least restrictive of that person's freedom of decision and action as is possible in the circumstances.

(5) An order made under subsection (1)–

(a) may be made subject to such conditions and restrictions as the Board thinks fit; and

(b) may be expressed to take effect when the represented person is aged 18 years.

(6) The Board may exercise its powers under this section on an application under Part 4 of the *Powers of Attorney Act 2000*.

54. Persons eligible as administrators

(1) The Board may appoint as an administrator of the estate of a proposed represented person –

(a) ...

(d) any other person, including the guardian of the proposed represented person, who consents to act as administrator if the Board is satisfied that –

(i) the person will act in the best interests of the proposed represented person; and

(ii) the person is not in a position where his or her interests conflict or may conflict with the interests of the proposed represented person; and

(iii) the person is a suitable person to act as the administrator of the estate of the proposed represented person; and

(iv) the person has sufficient expertise to administer the estate.

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

(a) the wishes of the proposed represented person, so far as they can be ascertained; and

(b) the compatibility of the person proposed as administrator with the proposed represented person and with his or her guardian, if any.

57. Exercise of power by administrator

(1) An administrator must act at all times in the best interests of the represented person.

(2) Without limiting subsection (1), an administrator acts in the best interests of the represented person if the administrator acts as far as possible –

(a) in such a way as to encourage and assist the represented person to become capable of administering his or her estate; and

(b) in consultation with the represented person, taking into account as far as possible the wishes of the represented person.