

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

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

GAB No. xxxx of 2005

## **REASONS FOR DECISION**

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

Hearing: 26 May 2005  
30 May 2005

Guardianship – inappropriate exclusion of visitors to elderly person in nursing home – son had no authority to restrict visits to his father without his knowledge – role of nursing home to exclude visitors under duty of care – allowing access to visitors of choice constitutes a ‘need’ for a guardian – possible to carry represented person’s wishes into effect – best interests – proposed guardian having a conflict of interests

*Guardianship and Administration Act 1995* (Tas), ss 6, 10, 12, 19, 20, 21, 25, 27, 31 and 73

On 7 January 2005 Ms. C.C. made an application for the appointment of a guardian for Mr. H. pursuant to section 19 of the *Guardianship and Administration Act 1995* (“the Act”), (the “first application”). The application sought the appointment of a guardian to address circumstances where it was alleged that Ms C.C. had been denied access to Mr. H. and that visitors to Mr. H. were being restricted without his express permission.

### **A. The proposed represented person:**

Mr. H. will be 93 years of age in September 2005. History available to the Board indicated that he had an illustrious international career – not detailed in these reasons to protect his identity.

Mr. H. is currently a resident of a private nursing home in Hobart where he was admitted on 6 April 2004. His wife, D, died in 1993 and his first son, J, died in 1997. He has one surviving son, Mr. M.H. who resides overseas. He has grandchildren, great-grandchildren and a brother who all live overseas.

Until he was hospitalised in January 2004, Mr. H. lived in his own home in Hobart. A feature of the reports that the Board received was his active participation in a range of social activities, being a member of social and sporting clubs and hosting drinks parties for close friends and former colleagues at his home. Such activity continued until declining health and hearing began to diminish these experiences around 2003. However, he still enjoyed the company of numerous regular callers to his home. As a learned man and an extensive reader, he has had a wide range of interests including finance, world politics, sailing, mountaineering and public administration.

Mr. H. is in possession of a significant estate, currently managed under the terms of an enduring power of attorney by Mr. M.H., with Tasmanian Perpetual Trustees as alternate attorneys.

Ms C.C. states that she has been in a “close, personal and loving relationship” with Mr. H. for over 29 years. Mr. M.H., who opposed her application, denies that the relationship between Mr. H. and Ms C.C. has that level of significance.

## **B. The legislation:**

In making a decision, the Board is required to adhere to principles established in section 6 of the Act:

“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.”

Before making a limited guardianship order, the Board must be satisfied, pursuant to section 20(1) that Mr. H:

“(a) is a person with a disability; and

(b) is unable by reason of the disability to make reasonable judgments in respect of all or any matters relating to his ... person or circumstances; and

(c) is in need of a guardian.”

Subsections 20 (2),(3) and (5) repeat the principles in section 6(a) and (b) in relation to guardianship applications.

Section 21 states:

“(1) The Board may appoint as a full guardian or limited guardian any person who is of or over the age of 18 years and consents to act as guardian if the Board is satisfied that that person –

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

(b) is not in a position where the person's interests conflict or may conflict with the interests of the proposed represented person; and

(c) is a suitable person to act as guardian of the proposed represented person.

(2) In determining whether a person is suitable to act as a guardian of a 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 desirability of preserving existing family relationships; and
- (c) the compatibility of the person proposed as guardian with the proposed represented person and with the administrator (if any) of his or her estate; and
- (d) whether the person proposed as guardian will be available and accessible to the proposed represented person so as to fulfill the requirements of guardianship of that person.”

The powers of a guardian relevant to the contents of the application are set out in section 25(2):

“Without limiting subsection (1), an order appointing a full guardian confers on the person named as full guardian the power –

- (a) to decide where the represented person is to live, whether permanently or temporarily; and ...
- (d) to restrict visits to a represented person to such extent as may be necessary in his or her 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;”

Pursuant to section 27, once appointed:

“(1) A guardian must act at all times in the best interests of the person under guardianship.

(2) Without limiting subsection (1), a guardian acts in the best interests of a person under guardianship if the guardian acts as far as possible –

- (a) in consultation with that person, taking into account, as far as possible, his or her wishes; and
- (b) as an advocate for that person; and
- (c) in such a way as to encourage that person to participate as much as possible in the life of the community; and
- (d) in such a way as to encourage and assist that person to become capable of caring for himself or herself and of making reasonable judgments relating to his or her person; and
- (e) in such a way as to protect that person from neglect, abuse or exploitation.”

Pursuant to section 31(4):

“The Board of its own motion may direct, or offer advice to, a guardian in respect of any matter.”

**C. Process of the Application(s):**

The first application was not accompanied by a medical or psychological report; information prescribed by section 19(2)(b) of the Act and regulation 4 of the *Guardianship and Administration Regulations 1997*. By letter dated 12 January 2005, Ms C.C.’s solicitor indicated a refusal by Mr. H.’s general practitioner, Dr S, to supply such a report.

The Board received from Ms C.C.’s solicitors, copies of documents relating to an anti-discrimination claim by Ms C.C. and a statutory declaration from Mr. G.C. on 15 March 2005.

Staff of the Board undertook investigations with relevant parties and requested a general report from the Public Guardian.

On 22 March 2005 the Board received a further application, also for the appointment of a guardian for Mr. H. from his son, Mr. M.H. (the “second application”). This application nominated Mr. D. as guardian and attached, *inter alia*, a brief report from Dr S dated 10 February 2005 and a report of consultant psychologist, Mr. F., dated 20 February 2005.

Receipt of the second application satisfied the requirement for the prescribed information and accordingly time limits in respect of the application, for the purposes of section 72, ran from 22 March 2005. The hearing was commenced on 26 May 2005; 63 days had elapsed from the date of receipt of the application. The hearing was delayed to allow Mr. M.H. to attend from overseas. No party took issue with the delay.

At the commencement of the hearing, Mr. D. Zeeman, whose status in the hearing is discussed below, indicated that Mr. M.H. did not wish to pursue the second application for guardianship. However the Board indicated that, as the materials had been received by the Board and read by the members of the Board, the Board would continue to use information contained in the second application. Mr. Zeeman did not take issue with this and Mr. M.H. referred to his written materials in giving evidence. Further, Mr. D indicated that his consent to the appointment as guardian continued after the withdrawal of the second application.

**D. Section 73 - Representation:**

As applicant, Ms C.C. is entitled to legal representation pursuant to section 73(1)(b) of the Act. She was represented by Mr. T. Williams of Gunson Williams.

The proposed represented person, Mr. H, is also entitled to representation. Mr. Zeeman asserted that he was that representative, as well as representative for Mr. M.H., by reason of also being the representative of Mr. H’s appointed attorney,

next of kin and person responsible. Because of this assertion, Board member Schyvens convened a telephone conference on 20 May 2005 to determine questions relating to legal representation. The Board determined from that conference that it should seek the assistance of independent counsel at the hearing. As a result, Mr. M. Daly appeared as counsel assisting the Board.

The Board raised the issue of representation with Mr. Zeeman again at the commencement of the hearing on 26 May 2005. Mr. Zeeman reiterated that he represented Mr. H, although he admitted that he had not, and indeed could not, take instructions from Mr. H. He denied any conflict of interest in his position as counsel for the applicant (such application now being withdrawn) and subject person, donor and attorney, father and son. Counsel for Ms C.C. and counsel assisting the Board applied for a determination regarding Mr. Zeeman's appearance. The Board determined as follows:

1. "Mr. H has not instructed any solicitor.
2. The Division takes the view that there is no legal basis upon which Mr. Zeeman can assert that he acts for Mr. H in these proceedings.
3. If Mr. Zeeman continues to assert that he acts for Mr. H, the Division will attach no weight upon those assertions and such assertions will not affect the outcome of the hearing.
4. The Division will take on board all reports fairly and openly with no extra weight attached to Mr. Zeeman's representations as Mr. H's representative."

Whilst an applicant, Mr. M.H. was entitled to representation, once his application had been withdrawn that entitlement lapsed. However, given that both the applicant and the Board had counsel appearing, the Board granted leave to Mr. Zeeman to appear and Mr. J. Walker who attended with representatives of the nursing home was also granted leave to appear.

**E. Documents available to the Board:**

In addition to the abovementioned medical and psychological reports, the following documents were attached to the second application:

- Consent of Mr. D. to be appointed guardian dated 1<sup>st</sup> March 2005
- A letter from Ms C.C. to Mr. H dated 1 April 2004
- A statement from Ms S. dated 10 May 2004
- Selected extracts from the Royal Hobart Hospital file between January 2004 and April 2004
- A letter dated 1 September 2004 from the Manager National Australia Bank (NAB), Hobart Office to Mr. M.H.
- NAB bank statement for account of Mr. H. dated 31 March 2004
- A copy of a power of attorney executed by Mr. H on 20 January 2004
- A financial report prepared by Tasmanian Perpetual Trustees on 10 March 2005
- Notes made by Ms. C.C. dated 15 January 2004
- Notes made by Ms S., countersigned by Mr. J dated 21 February 2005

Following receipt of the second application, the Board received from Mr. Zeeman's firm, Butler McIntyre and Butler:

- A copy of an Aged Care Assessment Team (ACAT) report dated 27 February 2004 (received 24 March 2005)
- A request for the hearing to be closed, including a copy of a letter to *The Mercury* (received 31 March 2005)
- Information relating to Ms C.C.'s appearance on ABC television program *Stateline* (received 21 April 2005)
- A copy of a report from Dr S. dated 19 May 2005 (received 23 May 2005)

Ms C.C. prepared for the Board a lengthy written response to the documents lodged by Mr. M.H.'s solicitor dated 12 May 2005.

Pursuant to the investigation activities of officers of the Guardianship and Administration Board, the Board also received the following documents:

- Report of the Public Guardian dated 10 May 2005
- Letter dated 19 May 2005 from Ms F., Director of Care Services at the nursing home.
- Letter dated 20 May 2005 from Ms Q, Chief Executive Officer of the nursing home, which attached a list of visitors approved by Mr. M.H., a letter from Butler McIntyre and Butler dated 19 November 2004, and an email from Daniel Zeeman dated 6 April 2005.
- Report by Senior Investigation and Liaison Officer, Anne Perks dated 20 May 2005

On 24 May 2005, two days before the hearing, the Board received from Butler McIntyre and Butler copies of the ACAT file for Mr. H. and the following written statements:

- Mr. M.H. dated 22 May 2005
- Mr. J. dated 22 May 2005
- Ms. S. and Mr. J. dated 22 May 2005 (updated version of previous statement)
- Ms. S. dated 22 May 2005
- Mr. D. dated 22 May 2005
- Mrs. D dated 12 May 2005
- Mr. E. dated 23 May 2005

The following day the Board received from Butler McIntyre and Butler further statements from Mr. D. (dated 23 May 2005) and Mrs. D (dated 24 May 2005) and a copy of an email from Mr. M.H. to Daniel Zeeman dated (24 May 2005).

In addition to the applications and the attached documents, the above documents were made available to each of the applicants, Mr. Daly (counsel assisting the Board) and the members of the Board prior to the hearing. Representatives of the nursing home were provided such documents as related to their interests as Aged Care providers.

On the morning that the hearing commenced the Board received from Butler McIntyre and Butler a copy of a certificate from Dr D. dated 20 January 2004, which was circulated to parties at that late stage.

During the hearing, Mr. Williams produced a series of 9 letters between Ms. C.C.'s solicitors and the nursing home's solicitors, and one letter from Butler McIntyre and Butler dated between 20 April 2004 and 1 December 2004.

**F. The hearing process:**

A hearing was convened on Thursday 26 May 2005. The Board determined pursuant to Schedule 2 Clause 2(3) of the Act that, in accordance with the usual procedure of the Board, proceedings would be inquisitorial and informal.

The Board granted Mr. Zeeman's application to close the hearing to the public pursuant to section 12(2) of the Act. However, the only person in attendance who was not directly interested in proceedings was Ms C.C.'s niece, Ms B.C. who attended as a support person for Ms C.C. Mr. Zeeman indicated that he did not require her exclusion from the hearing room.

Pursuant to a long standing policy of the Board attendance at the hearing by the proposed represented person is necessary in all hearings unless:

- The Health Care Professional Report or other information indicates that the proposed represented person may not/cannot attend the hearing, and
- An Investigation & Liaison Officer has (i) visited the person, and/or (ii) contacted the primary carer, and (iii) confirmed that the proposed represented person cannot attend the hearing, and (iv) ascertained the reasons why, and
- There is evidence given that attendance at the hearing is not in the best interests of the person, or evidence of some risk to the person if they do attend<sup>1</sup>.

The report by Dr S. dated 19 May 2005 indicated that Mr. H would experience significant distress and that his attendance would serve no useful purpose. Although this was contrary to the reports of the Public Guardian and the Senior Investigation and Liaison Officer, the Board accepted that medical advice and did not require his attendance.

In addition to submissions by counsel, the following persons (with their relevance to the proceedings noted) participated to varying degrees in the discussions conducted by the Board at the hearing:

Ms C.C. - applicant

Mr. M.H. - son

Mr. E. –neighbour and friend

Ms. Q. – CEO of the nursing home

Ms. F. – Director of Care Services of the nursing home

Mr. D. – Nominee for Guardian

Margaret Colville – Acting/Deputy Public Guardian

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<sup>1</sup> Manual for Members of the Guardianship and Administration Board , paragraph 4.3.2

Anne Perks – Senior Investigation and Liaison Officer GAB

Ms. S. – friend

Lisa Warner – Public Guardian (attended only on 30 May 2005)

The following people also attended but declined the opportunity to participate in discussions:

Mrs. D. - friend

Mr. G.C. – Ms C.C.’s nephew

Though Mr. D. stated a belief that evidence should be taken on oath, none of the members of counsel pursued that submission. To do so would have meant swearing in all witnesses at once including members of counsel, given that much of the evidence was being presented in writing and within submissions from counsel. Accordingly evidence was not taken on oath.

The Board discouraged counsel from questioning in a cross-examination style and encouraged witnesses not to repeat statements already canvassed in their written statements that had already been read by the Board. The taking of evidence was concluded on 26 May 2005 and the hearing resumed on Monday 30 May 2005 for submissions by counsel. Total hearing time was approximately 9 hours.

**G. Section 20 (1)(a) – Is Mr. H a person with a disability?**

Parties did not dispute that Mr. H is a person with a disability. According to the medical information available to the Board, Mr. H suffered a Cerebro Vascular Accident on 7<sup>th</sup> January 2004, has hearing and balance difficulties due to Meniere’s disease and experiences significant short-term memory loss. On 2 March 2004, Dr T. wrote in hospital notes: “Mr. H. has clearly moderate to severe Alzheimer’s Dementia.”

Each of these conditions causes or contributes to Mr. H experiencing a restriction or lack of ability to perform decision-making activities in a normal manner. The Board is satisfied that Mr. H has a disability for the purposes of section 3 and section 20(1)(a) of the Act.

**H. Section 20(1)(b) – Is Mr. H incapable by reason of his disability to make reasonable judgments in respect of all or any matters relating to his person or circumstances?**

On 19 January 2004 rehabilitation intern Dr D. states in a letter to Tasmanian Perpetual Trustees:

“It is my medical opinion that Mr. H is of sufficient mental capacity to be able to appoint an attorney.”

Thirty-one days later, in a report dated 20 February 2004, Consultant Psychiatrist Mr. F states:

“Although I consider that Mr. H. possesses sufficient intellectual and conceptual ability to understand propositions put to him at the time, his lack of insight, his poor orientation, and his memory impairment are unlikely to sustain safe independent living at this stage.”

An ACAT Assessment conducted by ACAT Case Coordinator Ms B. dated 27 February 2004 notes ‘cognitive impairment’ as the diagnosed disease or disorder having the greatest impact upon on Mr. H’s need for assistance with activities of daily living and social participation.

One year later, in his report dated 10 February 2005, Dr S. states that:

“[Mr. H.] is mentally and physically quite incapable of managing any independent existence outside the sheltered and supportive environment of the nursing home. I believe his mental capacity has deteriorated since he was last assessed in

September 2004 and he is not fit to make any significant decisions about his future.”

In the second application, Mr. M.H. stated:

“[Mr. H.] is a ‘high care’ dementia patient who is no more capable of understanding why he now needs guardianship than he was of deciding on his own admission to a nursing home.”

Witnesses to Mr. H.’s recent behaviour all reported that he is disoriented in time and location, reflecting increasingly upon his earlier life overseas in preference to any discussions about recent events. They also report Mr. H. showing increasing reliance upon routine and experiencing increasing disturbance when incidents occur outside of his routine. According to these reports he displays a significant decrease in meaningful social interaction with visitors, fellow residents and staff of the nursing home.

For the purposes of section 20(1) (b), the Board is satisfied that Mr. H. is unable, by reason of his disability, to make reasonable judgments in respect of matters relating to his person or circumstances, particularly those matters relating to accommodation and restrictions upon visitors.

The Board notes a significant difference between the specialised assessments of Mr. H.’s level of capacity made in February and March 2004 and the one-sentence report of Dr D. in January 2004.

#### **I. Section 20(1) (c) – Is Mr. H. in need of a guardian?**

The first applicant asserted that Mr. H. needed a guardian because:

“He has been put in [the nursing home] and the home has been provided with, and accepted, a list of the names of people who can visit him, talk with him by telephone and write to him. Anyone not on that list cannot contact him. He did not draw up that list and I have evidence in his writing to this effect. ... None of my friends who are also his friends have been able to

see him or contact him by phone, we don't know if mail is received.”

Asked “What will a guardian do for the person?” the applicant wrote:

- “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.”

The applicant asserts that the actions of Mr. M.H. and the nursing home in creating and maintaining a list of selected visitors is a breach of Mr. H.'s fundamental human rights and a guardian is required to countermand Mr. M.H.'s instructions to the nursing home in creating the list and allow Mr. H. access to visitors.

Mr. M.H. asserts that the list is necessary for the protection of Mr. H. against Ms C.C.'s actions, which he asserts were a source of distress and anxiety for Mr. H.

The Public Guardian's report dated 10 May 2005 states that:

“... the appointment of a Guardian is necessary to make decisions around visitors. I also believe that in light of Mr. H.'s comments, an independent Guardian should work with Mr. H.'s power of attorney to review all the issues around Mr. H.'s current accommodation, including the issue of its appropriateness as well as other available alternatives.”

However, at the hearing, the parties agreed that the major issue for determination was the issue of restrictions upon visitors. The Acting Public Guardian, Margaret Colville, did not pursue the issue of accommodation at the hearing.

Clearly, the determination of the question of a need for a guardian requires the Board to undertake a thorough consideration of the practice of excluding visitors to Mr. H.

*The evidence of exclusion:*

According to Ms C.C.'s evidence, on 13<sup>th</sup> April 2004 Ms C.C. attended the Royal Hobart Hospital to visit Mr. H. Staff at the hospital informed her that Mr. H. had moved to the nursing home. She drove to the nursing home where staff initially would not confirm that Mr. H. was a resident. Ms C.C. telephoned Mr. D. who informed her that Mr. H. was resident at the nursing home. Because she had been refused access, she left a note written on an envelope for Mr. H., having been informed by staff of the nursing home that all communication must be directed through Mr. H.'s family. Ms C.C. then instructed solicitors, Gunson Williams to attempt to gain access to Mr. H. Ms C.C. has not seen Mr. H. since 31 March 2004.

On 20 April 2004 Ms C.C.'s solicitors wrote asking the nursing home what right it had to exclude Ms C.C. from seeing Mr. H. On 28 April 2004 the nursing home replied, through their solicitors, stating that:

“In the case of Mr. H. a request has been received that: 1. No information regarding his occupancy at [the nursing home] be given to other than immediate family and designated friends; and 2. That he does not wish to have contact with or visits from your client.” (Emphasis added)

Such letter also canvassed the possibility of a restraint order against Ms C.C.

On 9 May 2004 Mr. G.C., nephew of Ms C.C., attended the nursing home and spoke with Mr. H. He delivered a note from Ms C.C., to which Mr. H. added his

own note. Circumstances of the meeting will be the subject of later comment by the Board. Mr. H.'s note read:

“I have been expecting you (to) call here to see me and I have been worried because you have not come. I was not aware that you had been refused access to me. I shall be enquiring. This is the first information I have had. Yours H.”

At the time of Mr. H.'s admission, Ms. Q., the Chief Executive Officer of the nursing home, was on overseas leave and another person oversaw his admission. It is clear, however that at the point of admission, the nursing home had instruction from a person to exclude Ms. C.C. from seeing Mr. H.

Mr. M.H.'s application states:

“On securing my father's admission to [the nursing home] on 6 April 2004 I described the situation that had arisen with Ms. C.C. in the hospital and the real risk that she would continue her disruptive activity with disastrous consequences for my father. [the nursing home] instituted measures based on their right to control of their premises which have been successful in keeping Ms. C.C. off the premises for the 11 months that he has been there ...” (Emphasis added)

Ms. Q.'s evidence was that upon her return from leave, sometime before May 2004, she and Mr. M.H., in the absence of Mr. H., drew up a list of named individuals who could see Mr. H. The document recording those instructions (“the inclusive list”) reads:

“List of Visitors to Mr. H. as instructed by Mr. M.H.:

Mr. D and Mrs. D

Mr. and Mrs. E.

Mr. J and Ms. S.

Mrs. B.

Mr. O

Dr B.  
Mrs. M  
Mrs. W.”

On 25 May 2004 Ms C.C.’s solicitors wrote to the nursing home’s solicitors informing them of Mr. H.’s note to Ms C.C. and asking:

“If you claim to have directions from Mr. H. personally, please advise the date of the directions, the content of the directions and how they were communicated to your client. If the directions do not come from Mr. H. personally, then please advise the person who provided the directions, the legal basis for the provision of the directions and the manner and date they were communicated.”

The reply almost 3 months later, dated 18 August 2004, stated:

At the time Mr. H. entered [the nursing home] he had a list made of those individuals he wished to see him. Whilst I accept that this was a somewhat unusual arrangement, [the nursing home] is required under the Charter of Resident’s Rights and Responsibilities to comply with the reasonable requests of a resident.” (Emphasis added)

Stating that he acted for Mr. M.H., Mr. Zeeman on 20 August 2004 also wrote to Ms C.C.’s solicitors saying that it was the “family’s” wish that Ms C.C. not visit Mr. H. and supported the position of the nursing home.

Seeking further information about the authority to restrict visitors to Mr. H., Ms C.C.’s solicitors wrote again to the nursing home on 22 September 2004.

On 19 November 2004, Mr. Zeeman on behalf of the H “family” wrote to the nursing home noting a medical report relating to Mr. H.’s capacity stating:

“We have received very clear instructions to instruct you to ensure that Ms C.C. has no access to Mr. H. ... We trust that you are able to ensure that Ms C.C. does not gain access to Mr. H.”

The nursing home’s solicitors replied to Ms C.C.’s solicitors on 1 December 2004 stating that due to Mr. H.’s incapacity to make decisions on his own behalf:

“all instructions in relation to the list of individuals permitted to see Mr. H are now to be taken from his attorney, Mr. M.H..”  
(Emphasis added)

Neither Mr. M.H., nor his solicitors, asserts that Mr. H. had any knowledge of or input to the development of the list of visitors or the exclusion of Ms C.C. from Mr. H. It is of concern to the Board that letters from the nursing home’s representatives made it appear that Mr. H. was an active participant in the process of exclusion of Ms C.C. for a period of approximately seven months.

Though the measures to exclude Ms C.C. were successful, the operation of the list was imperfect. Mr. M.H. states in his application:

“but [measures employed by [the nursing home]] have not prevented her from slipping in the odd disturbing communication and procuring a representative to access the premises unlawfully and secure from him a supposed written confirmation of his desire to see her.”

Ms. Q. and Ms. F., Director of Care Services at the nursing home, gave evidence that the structure of the buildings in the nursing home meant that not all visitors were detected. Evidence was given that Mr. G.C. obtained access to Mr. H., as did Ms. V., a friend of the applicant’s and at least one other visitor.

Ms. F. said in evidence that staff had been aware of Ms V.’s first visit, which appeared to go well for Mr. H. and she indicated to staff an intention to return. Later, however, he became distressed and Ms F. sought guidance from Mr. Zeeman, who advised after seeking Mr. M.H.’s instructions that the return visit

should not proceed. When Ms V. returned staff asked her to desist from the visit and the visit did not, therefore, proceed.

Though not always strictly adhered to, the Senior Investigation and Liaison Officer, Anne Perks reported on 6 April 2005 the following evidence about the day-to-day operation of the list:

“I spoke to Ms. J. a retired respected solicitor, who was visiting another friend at the home many months ago. She noticed Mr. H.’s presence and went to speak to him but was asked by a ‘nurse’ if she was ‘on the list.’ When it was established that she was not on the list she withdrew but gave Mr. H. a wave. She said she did not wish to insist and is hesitant to become involved because she is friends with all parties.”

Ms Perks gave evidence that Ms. J. was aware of this information being presented to the Board. Ms J. was not a witness to the proceedings. Such uncontested evidence of an third party suggests that nursing home staff routinely screened detected visitors to Mr. H. It also suggests that the limited extent of the list has operated to exclude casual contact to Mr. H. from well-meaning acquaintances.

The Board heard evidence that only 9 of the 11 visitors approved by Mr. M.H. had visited between 6 April 2004 and the hearing date. The first 3 couples attended very regularly, and the Board heard various references to visits by Mr. O. It is not suggested that Mr. H. is lonely, only that he has no choice about who visits.

At the hearing, witnesses were unable to clearly explain why – given that Mr. M.H.’s motivation for the list was clearly to eliminate contact between Mr. H and Ms C.C. - an inclusive list of approved visitors was drawn up, instead of recording an instruction to refuse visits by Ms C.C.

It is helpful for the Board to consider the evidence of exclusion in two parts. The first part is: was the implementation of an inclusive list appropriate? The second is: was the exclusion of Ms C.C. appropriate?

*Was the implementation of an inclusive list appropriate?*

There is no doubt that had Mr. H. had decision-making capacity and provided to the Home a limited list of visitors, directing exclusion of all other visitors, a nursing home could lawfully follow that direction. The evidence clearly shows that Mr. H. did not give this instruction or have knowledge of it.

The nursing home is an ‘approved provider’ within the meaning of the *Aged Care Act 1997 (Cth)*. The Charter of Resident’s Rights and Responsibilities (which relates to Mr. H.’s residence at the nursing home pursuant to section 56.1 of the *Aged Care Act*, and s 23.14 and Schedule 1 of the User Rights Principles) provides:

“Each resident of a residential care service has the right:

- To live in a safe, secure and homelike environment, and to move freely both within and outside the residential care service without undue restriction
- To be treated and accepted as an individual, and to have his or her preferences taken into account and treated with respect
- To select and maintain social and personal relationships with anyone else without fear, criticism or restriction”

While this Charter was relied upon by the nursing home in correspondence to Ms C.C.’s solicitor as justification for the exclusion, such reliance appears misguided in light of the evidence that Mr. H. was not consulted about the development of the list or the exclusion of Ms C.C.

Mr. Zeeman asserted that Mr. M.H.'s right to draw up the list stemmed from his status as 'next-of-kin'. His written submissions state:

“[The ACAT files] make it clear that the body established under the relevant Commonwealth legislation were satisfied that Mr. M.H., as next of kin, and the person in charge of Mr. H., was able to make all of the necessary decisions in relation to his care and accommodation needs.”

In verbal submissions, Mr. Zeeman warned the Board against making a finding contrary to the ACAT team's decision. The Board finds that the ACAT team's decision is only relevant to the extent that Mr. M.H. made an application for his father for Aged Care Services. The ACAT decision does not provide him with any authority for drawing up an inclusive list of visitors for his father.

The Board also finds that Mr. M.H.'s status as 'next-of-kin,' of itself, provides no legal authority for the implementation of such a list.

The enduring power of attorney executed by Mr. H. in favour of Mr. M.H. and the Tasmanian Perpetual Trustees is limited to executing assurances or instruments<sup>2</sup> and making decisions relating to Mr. H.'s property and affairs<sup>3</sup>. The Board considers that Mr. H.'s 'property and affairs' are limited to affairs of his estate or finances. This is apparent from the legislation in that sections 32 and 33 of the *Powers of Attorney Act 2000* describe the duties and potential substitution of an attorney and make references to the roles of 'trustees' and 'administrators' but not guardians.

The Board finds that the role of an attorney is concomitant with the role of a trustee or an administrator under Part 7 of the *Guardianship and Administration Act 1995* in the same way that the role of an enduring guardian is concomitant

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<sup>2</sup> Section 23 *Powers of Attorney Act 2000*

<sup>3</sup> Section 31 *Powers of Attorney Act 2000*

with the role of a guardian appointed under Part 4 of the Act. Accordingly, the Board finds that no authority to exclude visitors (a function of a guardian pursuant to section 25(2)d) of the Act) extends to an attorney operating in an enduring phase of the power of attorney.

The Board has given consideration to circumstances when it might be possible for a person other than a guardian to draw up an inclusive list of visitors for another without that person's knowledge or consent. It appears that such circumstances would require a significant risk of harm to the person or others and the activation of restriction on the basis of a duty of care to the resident.

There is no evidence that on 6 April 2004 Mr. H. was at a significant risk of harm from members of the public generally. Up until that point in time he had been in an open ward in a public hospital visited daily by numerous health and allied health professionals with no documented reports of stranger anxiety or harm arising from visits by members of the public. When first admitted to the nursing home he was subject to what Ms. Q. described as a 'preliminary list' which was to the effect of exclusion of Ms. C.C.

Ms. Q. gave evidence that the later drawing up of an inclusive list:

“was drawn up subsequent to Mr. H.'s visit (*sic*) when there were instances, as has been described, about his distress about visits”

However, Mr. M.H. corrected this evidence and stated that the list was only to prevent access by Ms. C.C. Mr. M.H.'s allegations of harm or potential harm to Mr. H relate only to interactions with Ms. C.C. or her close associates.

There is evidence that, with the advancement of his dementia, Mr. H. now experiences a level of stranger anxiety. However, the Board finds that the creation and maintenance of the inclusive list was not done in accordance with a general duty of care.

Providers of aged care facilities have a duty to monitor the number and frequency of visitors to a particular resident and take steps to dissuade visitors or the resident him or herself should a resident become unduly fatigued or distressed at a particular time. The use of an inclusive list is an extreme measure, indeed staff of the nursing home gave evidence that of 272 residents in their facilities, Mr. H. is the only resident for whom such a list exists.

Ms F. stated that when the home has been asked previously to exclude persons from visiting other residents, usually one family member seeking to exclude another family member, they advise the parties to seek guardianship.

The Board finds that actions of the nursing home in maintaining an inclusive list of 11 approved visitors over 12 months without the resident's knowledge or consent is an unduly restrictive practice and does not represent the means which is least restrictive of Mr. H.'s freedom of decision and action. It was also contrary to, or done without regard to, his wishes.

The Board concludes that the implementation of the inclusive list was inappropriate.

*Was the exclusion of Ms C.C. appropriate?*

For the same reasons as given in the paragraphs above, the Board finds that Mr. M.H. had no lawful authority to instruct the nursing home to exclude Ms C.C. from seeing Mr. H. without his knowledge or consent by reason of being:

- Recognized by ACAT in the ACAT files,
- Next of kin, or
- Appointed under an enduring power of attorney.

Reasons to exclude Ms C.C. from seeing Mr. H. without his knowledge or consent would have to be established under a general duty of care owed by the nursing home to its residents.

The Act refers to a guardian having the power to restrict visits if the guardian reasonably believes that they would have an adverse effect on the represented person. The Board acknowledges that whereas a guardian might be appointed for a single individual, the proprietors of a nursing home have a wider duty, and might not be in the same position to give individualised attention.

The Board would consider that it is reasonable for the staff or management of a nursing home, pursuant to such a duty of care, to prohibit a person wishing to visit a resident from entering or remaining in the nursing home if they suspect on reasonable grounds that the person's entry into the nursing home or visit to the resident might endanger the good order or security of the home or the safety of the residents. Such language is borrowed from section 15 of the *Corrections Act 1997*.

Would a visit or visits by Ms C.C. endanger the good order or security of the home or the safety of the residents?

Mr. M.H. alleges that Ms. C.C. behaved inappropriately towards Mr. H. while he was in the Royal Hobart Hospital (RHH), “causing him emotional and psychological stress and interfering with his medical treatment and assessment.” Ms. C.C. denies the allegation that she presents or has ever presented any risk to Mr. H.’s safety or well being.

Between 9 January 2004 and 6 April 2004 Mr. H. was in the care of the RHH. The Board was supplied incomplete copies of the hospital records; those records indicate the following interactions relating to Ms. C.C. and Mr. H:

- a. On 28 January 2004 Ms. C.C. expressed concern to a RHH social worker, Ms. M., that she was precluded from taking Mr. H. to her home in North West Tasmania for a few days. She also expressed concern that admission to a nursing home would “kill him”. The file note does not suggest that Mr. H. was present at that discussion.
- b. The following day RHH Occupational Therapy staff note a concern by Mr. M.H. “about the influence Mr. H.’s friend C has over his making decisions about his ongoing care.”
- c. On 10 February 2004 the staff of the RHH Rehabilitation staff state:

“Discussed with Mr. H. that we do not want him to have lunch with Ms. C.C. today. Discussed that Mr. H. needs more ‘convalescence’ > [the nursing home] – Mr. M.H. is making enquiries Mr. H. could fall if he went home Mr. H not to go on W/E leave with Ms. C.C. ... Mr. H. is happy to go to [the nursing home]”
- d. Ms M. noted on 12 February 2004 a “complex situation” between Mr. H, Mr. M.H. and Ms C.C. She states:

“Whilst Dwyer team and son agree Mr. H. cannot go home, Ms. C.C. is reported as encouraging Mr. H. to go home and resume his life independently but with home supports. ... Ms. C.C. advises today that she hopes to be able to be in touch with Mr. H. but feels she is being excluded”
- e. On 14 February 2004 nursing staff note that Mr. M.H. telephoned the ward to inform them that he was “not happy” with Ms C.C.’s plans to take Mr. H out that day. However it also states: “Staff have not observed any visitors this shift.”
- f. On 16 February 2004 nursing staff noted Mr. H. experiencing breathlessness. He reported to them that: “he had some bad news over the phone from his friend Ms. C.C. He said he was feeling somewhat anxious.” Measures were put in place to monitor his blood pressure and pulse, however he refused a check at 2230 hours and was reportedly ‘agitated.’ Over the following 24

hours he was noted as having 146/70 BP, but later “obs stable, high BP noted.”

- g. On 19 February 2004 Ms. O, RHH social worker, documented discussions with Mr. M.H. about his father’s objection to nursing home accommodation and Ms C.C.’s influence. They discussed applying for guardianship.
- h. On 19 February 2004, at the request of Ms C.C., a solicitor attended Mr. H. but once informed by RHH staff of Mr. H.’s reduced capacity to give instructions, the solicitor withdrew and did not proceed with the interview. Mr. M.H. discussed this incident with RHH social workers on 23 February 2004 and reiterated his concerns about Ms C.C.
- i. On 24 February 2004 hospital notes report that Ms C.C. demanded to know of ward staff why she was unable to take Mr. H. out for a haircut. The note states: “She then went on to say that we were keeping him a prisoner. She was very forceful and aggressive to myself”
- j. However notes for 25 February 2004 state: “Visited by Ms. C.C. this pm. No problems noted. ...”
- k. Notes indicate that Mr. H. maintained, during February, that he wanted to go home and did not want to go to a nursing home. He also often ignored instructions to ambulate with a walker and safety instructions generally.
- l. On 16 March 2004 notes state:

“Mr. H. found leaving the Ward with Ms. C.C. Ms. C.C. approached and questioned as to what she was doing became angry and replied “for Christ sake just going to lift” denied taking Mr. H. anywhere. Mr. H. returned to room.”

An analysis of the hospital records then reveals that Ms C.C.'s alleged inappropriate behaviour amounted to:

- Expression of concern to a social worker about admitting Mr. H. to a nursing home (items (a) and (d))
- Expression of those same concerns to Mr. H. and Mr. M.H. (item (g))
- A phone call to Mr. H. that caused him anxiety (item (f))
- Sending a solicitor to visit Mr. H. (item (h))
- Challenging, somewhat forcefully, staff when she was forbidden to take Mr. H. off premises for a haircut (item (i))
- One incident in taking Mr. H. as far as the lift (item (l))

Evidence was also given that on or 31 March 2004 Ms C.C. attended the NAB branch office in Hobart and obtained a transactional statement of Mr. H.'s account. It is not suggested that she had any intention to steal from Mr. H. Ms. C.C.'s explanation for all of the above activities is that she was acting in Mr. H.'s best interests and, at times, on his instructions.

Ms. C.C.'s statement that she visited Mr. H. on 80 occasions between the 10<sup>th</sup> January and 31<sup>st</sup> March 2004 was not contested. From 80 visits, the notes reveal four actual incidents where Mr. H. was present and only one incident that resulted in reported anxiety, agitation and an attributable increase in blood pressure.

Mr. M.H. is recorded as expressing concern about Ms. C.C. on at least 4 occasions, but RHH staff did not take any steps to restrict her ability to visit Mr. H. on the ward. Evidence would suggest that Ms. C.C. caused Mr. M.H. anxiety to a greater degree than she caused anxiety to Mr. H. in that Mr. M.H. did not believe that her actions were in Mr. H.'s best interests.

Mr. M.H. states that on Tuesday the 27 January 2004 Ms C.C. was denied access to Mr. H.'s hospital records and "vented her rage upon my father telling him that she was going back to her home in the NW and would never see him again." Mr.

M.H. reports that his father “made a pathetic appeal” to him to intercede so that he would not lose her friendship. Hospital records for 27 and 28 January 2004 do not provide any independent verification of Mr. H.’s reported distress. One would expect an entry in hospital records similar to that for item (f) on the 16 February 2004 if such distress had been observed.

It is clear that Ms C.C. supported Mr. H. in his resistance to move to a nursing home and that this support or advocacy was unhelpful and maybe even rash at that transitional time. It is common for persons close to an elderly person to have markedly different views about the timing and necessity to move to a nursing home and for the period of transition to a nursing home to be marked by conflict. It is also common for a hitherto independent person to fervently resist leaving their homes. However, the advocacy did not change the course of events or the decision to admit Mr. H. to the nursing home.

Ms. C.C. submitted to Mr. M.H.’s authority to make the final decision about nursing home care as he evidenced in the second application which states:

“... she provided me with some helpful notes (copy attached) of all she had done pending my arrival which made it abundantly clear that she expected me to be the responsible person.”

The risk, if any, that Ms C.C. presented to Mr. H.’s well being is limited by the fact that on each occasion that she was refused permission to undertake a venture with Mr. H., after voicing dissatisfaction, she complied with directions given. One potential aberration from this compliance was the incident on 16 March 2004 taking him to the lift but she denied an intention to remove Mr. H from the hospital.

Further, when told that she could not see Mr. H. in the nursing home she took the step of instructing solicitors, which would appear to be an appropriate response. There is no evidence that she has ever attempted to evade detection to secretly

visit Mr. H., though Ms F. and Ms Q.'s evidence suggests that a covert visit is possible.

The Board notes that Mr. M.H. viewed Ms. C.C.'s behaviour and attitudes as presenting a risk and undoubtedly conveyed that to the nursing home. It was incumbent upon the nursing home, because of the Charter of Rights, to make further enquiries of Mr. H. If Mr. H's instructions had conflicted with Mr. MH's, the nursing home might have made further inquiries of Ms. C.C. and RHH staff to make an assessment of the potential risk.

If the nursing home determined that, given her past behaviour and attitudes, Ms. C.C. presented a risk of assisting Mr. H.'s flight from the nursing home, it might have been appropriate, to supervise her early visits and to counsel her against taking any such action, in a similar manner to that successfully employed by RHH staff, before taking the drastic measure of restricting a visitor to a resident.

Because the nursing home relied solely upon the report of Mr. M.H., the Board is not satisfied that the nursing home had reasonable grounds to believe that Ms C.C.'s entry into the nursing home or visit to Mr. H. might endanger the good order or security of the home or the safety of the residents.

If the nursing home independently assessed that Ms C.C. presented a risk of flight for Mr. H., there may be circumstances where it is appropriate to restrict her access to Mr. H. or institute low level supervision for certain periods. Such restriction may therefore be appropriate under a duty of care to Mr. H., however the Board believes that the nursing home's process in deciding to exercise that duty was irregular.

Therefore it was not appropriate, in the view of the Board, to take as a first step the refusal of access by Ms. C.C. to Mr. H. under any circumstances and to

maintain that refusal in the absence of knowledge or consent by Mr. H. over an extended period of time.

*Do the inclusive list and the exclusion of Ms. C.C. impact upon the need for a guardian?*

The Board notes the judgment of His Honour, Justice Underwood (as he then was) in *Public Trustee v Blackwood, King and Baxter* No. 130/1998 where he approved the reasoning in the decision of the Administrative Appeals Tribunal (Vic) in *Re M & R & The Guardianship and Administration Board* (1987) 2 VAR 213 and particularly the statement of the President, his Honour Judge Jones, at 219:

"In my view, it is the evident intent of the legislature that guardianship (particularly in its plenary form) should be the last resort to be utilised where no other viable, and less restrictive, protective means is available to meet the needs of the person. This involves considering whether the person to be represented is likely to benefit from guardianship as distinct from the person seeking to be appointed. Even where guardianship is considered necessary in the best interests of the person, it is the intention of the legislature that the least restrictive form available be applied."

At page 265 His Honour Justice Underwood's judgment, he also concludes that the expression, 'needs of the proposed represented person' is of wide import and includes 'wants and necessities.' Accordingly the Board is satisfied that access to visitors of his choice would fall within in Mr. H.'s 'need' for a guardian. The question for the Board, regarding the need for a guardian is whether the 'last resort' has been reached.

The ability to restrict a visitor is the domain of a guardian pursuant to section 25(2)(d) of the Act. Without formal appointment as a guardian, Mr. H.'s son has given instructions to limit Mr. H.'s access to visitors in breach of his rights. The nursing home has accepted that instruction because they accepted on legal advice that Mr. M.H. had that authority.

The instruction to adhere to the inclusive list of visitors must be countermanded. It is possible that the nursing home would accept the decision of the Board and ignore the instruction in the future, which would be less restrictive than the appointment of a guardian. In that case the appointment of a guardian might not be required to countermand that instruction, as the 'last resort' may not have been reached.

However the second limb of the restriction, that of the exclusion of Ms C.C., requires more careful consideration and the evaluation of whether visits by Ms C.C. present a risk to Mr. H.

The nursing home ability to now make an independent assessment of the risk that Ms C.C. presents is compromised by the fact that she has commenced litigation against them under the *Anti-Discrimination Act 1998*. It is further compromised, in the view of the Board, because of its apparent collusion with Mr. M.H. in allowing Ms C.C. to believe that Mr. H had instructed her exclusion in the course of correspondence between solicitors between 20 April 2004 and 1 December 2004.

There is no other option presented to the Board as to how an independent assessment might be made that could bind the actions of the nursing home regarding visitors to Mr. H. and accordingly the 'last resort' has been reached regarding this requirement for an assessment.

The Board finds that there is a need to appoint a guardian for the purposes of the determination of whether the restriction upon visits by Ms C.C. to Mr. H. should remain or be countermanded.

*Section 6(c) - What are Mr. H.'s wishes?*

In determining that there is a need for a guardian, the Board is mindful of its duty to carry into effect, if possible, Mr. H.'s wishes.

Mr. Zeeman submitted that the Board should take into account Mr. H's wishes from the context that Mr. H. is reportedly happy in his environment, in preference to the statements attributed to him regarding his specific wishes relating to Ms. C.C. Mr. H.'s level of comfort in the nursing home is relevant, but it will also be considered in the context of his best interests. The following exploration is of the evidence of Mr. H.'s wishes specific to visits by Ms C.C.

It appears to be common ground that Mr. H. gave no instruction to restrict visits by Ms. C.C. and has never agreed to that instruction.

Ms. C.C. states that she has been in a relationship with Mr. H. for over 29 years and that such relationship was close, personal and loving. Mr. D, Mrs. D and Ms. S. actively deny that such a relationship existed. The Board indicated that its purpose was not to make a finding of fact as to the extent of a 'marriage-like' relationship between Mr. H. and Ms. C.C. but to focus upon the best interests of Mr. H. Accordingly, the Board notes the following:

Mr. M.H. in the second application admits:

“... there had been a relationship of sorts between my father and Ms. C.C. prior to my father's stroke in January 2004.”

Mr. M.H. acknowledged such a relationship to the extent that he thought it possible that his father and Ms. C.C. might cohabit after his hospitalisation until corrected by Ms. C.C.

Ms. C.C. was acknowledged as sufficiently relevant to Mr. H.'s life by Mr. J., Ms. S., Mr. D. and Mrs. D, Mr. and Mrs. E to be included in a gathering of those

friends of Mr. H's the day after his admission to hospital to decide what could be done to assist Mr. H. in the absence of Mr. M.H..

The Board can conclude that, to the extent that Ms. C.C. asserts that she was a significant person to Mr. H. and a member of his immediate social circle prior to his admission to the nursing home, she is supported by the evidence of Mr. J, Ms. S, Mr. D. and Mrs. D, Mr. E. and Mr. M.H..

There is no evidence that Mr. H. has ever expressed a wish to any of the witnesses that he does not want Ms. C.C. to continue to be a significant person in his immediate social circle.

Ms. C.C. in her application relies upon Mr. H.'s note, which read:

“I have been expecting you (to) call here to see me and I have been worried because you have not come. I was not aware that you had been refused access to me. I shall be enquiring. This is the first information I have had. Yours H.”

[Mr. G.C. who procured the note did so by evading the operation of the inclusive list at the nursing home. In a statutory declaration, which includes a photograph of Mr. H writing the note, he states that he videotaped the interaction. The Board did not view the video. No party has submitted that that evidence was unlawfully obtained, however the Board believes that the manner in which it was taken was extreme and undermines Mr. H.'s dignity.]

In his application Mr. M.H. observes the following indication of Mr. H.'s wishes regarding Ms C.C.:

“He was quite unable to see through her manipulative behaviour [telling him that she would return to her home and never see him again] and made a pathetic appeal to me to intercede with her so that he would not lose her friendship as he put it. Reluctantly I agreed and called her ...”

This incident allegedly occurred on 27 January 2004. The Board notes that Mr. F.'s assessment 19 days later leads him to conclude that Mr. H.:

“... did display the ability to recognize his errors and he did not impress as particularly impulsive during testing. Mr. H.'s capacity for abstract reasoning continues to rate in the high average to superior range and he should therefore be able to grasp concepts put to him”

Later in Mr. M.H.'s application, he states:

“[Ms. C.C.] so identified herself in my father's mind with the idea of escape from the hospital and freedom that it is now impossible to distinguish in his mind between his desire to see her and his desire to return to his own home and to his old life of which she was an occasional part. In short he sees her as his ticket out of [the nursing home]. What my father thinks he wants is not the issue in this case, rather it is what is in his best interests.”

The Public Guardian, Lisa Warner, reported as follows:

[In a visit on 29 April 2005] “We asked Mr. H. about his contact with Ms. C.C. He stated that she was a friend of his, and was a “highly intelligent” woman, and that he would be “very pleased” to see her again. He said that it had been some time “perhaps six months” since he had last seen her, and stated that she lived near him in Hobart and also had a house on the North West coast that he had regularly visited. He stated that he hoped to go to the North West Coast to see her again and stated “We have seen a lot of each other over the years, and understand each other.”

Mr. H. described their relationship as a “very friendly” one, and that he “would be delighted” to see her again, as he had “known her for a long time”

We asked Mr. H. if he knew that his son Mr. M.H. had restricted Ms. C.C. from visiting him. Mr. H. stated, “I have known Ms. C.C. for a long time, and we understand each other. I don't think that Mr. M.H. approves of her, if you know what I mean.” After

repeated questions, Mr. H. continued to state that he would be “very pleased” to see her again.

Senior Investigation and Liaison Officer, Anne Perks, reported:

“I visited with the Public Guardian in an effort to minimize any intrusions into Mr. H.’s life. I concur with her report in all respects.”

No other witnesses provided direct evidence regarding Mr. H.’s wishes specific to having contact with Ms C.C.

Mr. Zeeman submitted that the Board should disregard this aspect of Ms Warner’s report on the following grounds:

“I should also point out that the Public Guardian refers to Mr. H expressing certain wishes. That must be considered only in light of the other evidence before the Board and it needs to be said that an expression of wishes does not lead to the conclusion that the carrying out of those wishes is in the best interests of the person, the subject of the application for the purposes of subs. (3) of s, 20 of the Act.”

The Board, as a specialised tribunal, is quite practiced at weighing up the expressed wishes of proposed represented persons as against the other requirements of the principles in section 6. This submission is not as helpful as a submission by Ms. S. criticising Ms Warner’s report in that Ms Warner has not outlined the methodology she employed in asking questions of Mr. H. For example, she has not specified whether Mr. H. volunteered Ms C.C.’s name and whether Ms Warner employed an ‘inverted triangle method’ in the interview.

Notwithstanding those criticisms, the Board believes that Ms Warner’s evidence is reliable evidence of an expression of Mr. H.’s wishes.

Ms F., Ms Q. and Mr. D gave evidence that they had never heard Mr. H. volunteer Ms C.C.'s name in conversation. They also gave evidence that his conversation now centres upon his earlier life overseas. Further, the Board heard evidence that although she is a very regular visitor and close friend, Mr. H has at times referred to Mrs. D. as "that girl." Accordingly the Board does not draw inferences regarding Mr. H.'s wishes from the fact that no reports exist of his volunteering information about her.

The Board acknowledges that Mr. H. has diminished decision-making capacity. It is a feature of this jurisdiction that the Board is required to consider the wishes of persons who have impaired capacity to understand the consequences of those wishes. For the purposes of section 6(c) of the Act, the Board concludes that Mr. H. wishes to see Ms. C.C. again and holds her in fond regard, even though he is clearly aware that his son does not approve of her. The Board finds that, subject to the operation of section 20(3) of the Act ('best interests'), it is *possible* to carry Mr. H.'s wishes into effect.

Without the appointment of a guardian, the Board cannot be satisfied that Mr. H.'s wishes regarding Ms. C.C. will be observed.

To the extent that the appointment of a guardian is required to countermand the instructions given by Mr. M.H. to the nursing home to prohibit visits by Ms. C.C. to Mr. H., the Board is satisfied that Mr. H is in need of a guardian for the purposes of section 20(1)(c) of the Act.

**J. Section 20(3) and 6(b) - Is the appointment of a guardian in the best interests of Mr. H?**

The Board was not presented with evidence or law that Mr. M.H.'s instruction at the time of Mr. H.'s admission to the nursing home had the weight of lawful authority. A finding that past behaviour has breached a resident's rights does not,

of itself, presume the requirement for an ongoing appointment of a guardian beyond remedying the breach.

The Board must be satisfied that a guardian will be required into the future. One function of a guardian would be to facilitate the appropriate re-introduction of Ms. C.C. to Mr. H. and, possibly, other friends. It is appropriate, in this context, to assess the best interests of Mr. H. in his current accommodation and state of health.

The Board heard important evidence that Mr. H.'s social demeanour and disposition have changed remarkably in the past year. According to witnesses, Mr. H dwells increasingly upon past events and experiences anxiety about visits from strangers and changes to his routine.

To refer to the terms of Ms. C.C.'s application, the Board does not consider that Ms. C.C.'s requests to take Mr. H. out of the nursing home for visits to her home in the North West and picnics are in Mr. H.'s best interests.

Evidence was given that the visit by Ms Warner and Ms Colville from the Office of the Public Guardian and Ms Perks caused Mr. H. distress for some days particularly because they left business cards and this prompted him to ask repeated anxious questions to staff. Evidence related this to Mr. H.'s social skills and his worry that he should respond in some way to the visits or was required to take some action.

Some witnesses were concerned that the mere interaction with Ms Warner who is a stranger would provoke anxiety for Mr. H. The Board assumes that a statutory officer appointed to protect the best interests of a vulnerable person will take whatever steps are necessary to prevent distress and act in a professional manner appropriate to the circumstances. That said, evidence would suggest that leaving

business cards in his room is a trigger for anxiety for Mr. H. and should be avoided in future.

The Board is satisfied that it would be inappropriate to lift all visiting restrictions to Mr. H. without careful management and observation of his ability to cope with visitors. Such management and observation might well be undertaken by a guardian using the expertise of staff of the nursing home who are known to him and adopting a hands-off approach so as not to cause further distress.

The Board heard evidence that the population inside a nursing home can change from day to day, with new staff, contractors and volunteers presenting from time to time. The nursing home has developed strategies to assist Mr. H. to cope with those changes, presumably the presence of a guardian could be accommodated within those strategies and the guardian could seek the nursing home staff member's advice as to how best to adopt his or her role.

Some witnesses displayed a concern that Ms. C.C. might present as a stranger to Mr. H and provoke stranger anxiety. However, according to her report, Mr. H. responded in a meaningful way to questions by Ms Warner regarding Ms. C.C.

Ms F. gave evidence that she witnessed Mr. H. receiving correspondence, photographs and a bottle of champagne from Ms. C.C. at Christmas 2004. She stated that he smiled and said "Thank you". When questioned she stated that following that event Mr. H showed no disturbance of mood, such as the reaction to the business cards left by representatives of the Board and the Office of the Public Guardian.

Even considering his significant loss of memory, the Board does not accept that Ms. C.C. will provoke stranger anxiety, but in any event would assume that an appointed guardian will undertake significant preparatory work before Ms. C.C. is allowed a visit.

Subject to the results of research and consultation with all parties that a guardian might undertake, such preparatory work might include:

- Seeking the professional advice of a psychologist or psychiatrist about the appropriate methods of re-introduction of Ms. C.C. to Mr. H.
- Quietly introducing photographs of Ms. C.C. along with other photographs on his wall and monitoring his response to these
- Offering counseling and guidance to other regular visitors as to how they might or might not approach discussions relating to Ms. C.C.
- Reintroducing telephone contact before face to face contact and monitoring his response

If the guardian determined that it was appropriate for visits to proceed, further preparatory work might include:

- Arranging counseling for Ms. C.C. to assist her in coping with and understanding the loss of skills between her last attendance with Mr. H and the present
- Placing limits around the subject matter that Ms. C.C. might discuss with Mr. H. to avoid distress, e.g. avoiding discussion of leaving [the nursing home] or returning home, her conflict with Mr. M.H., her period of restriction from visits and her legal action against [the nursing home]

The evidence of Mr. M.H., Mr. J, Ms. S., and Mr. D. was that Mr. H. is best left in his environment without any changes to the present regime. This is best summarised by Mr. M.H.'s statement dated 22 May 2005:

“Present arrangements are working well. Leave well alone.”

The Board believes that the present range of visitors provide important stimulation for Mr. H. which promotes his mental health. Indeed the present range of visitors state that they coordinate their visits with a view to maximising the number of visits he has.

The Board does not accept Mr. D.' statements that to allow Ms. C.C. to see Mr. H. may threaten his survival. The Board notes, with approval, Mr. Williams' submission that:

“One of the great mysteries is trying to ascertain what the disastrous consequences are for Mr. H. if contact with Ms. C.C. is resumed. ... Mr. M.H. was asked directly as to the behaviour that he alleged had caused his father's rapid and serious mental deterioration. At best it can be ascertained it would appear that the cause was Ms. C.C.'s threat to leave Mr. H. if he did not return to his home and opted for nursing home accommodation [such threat was denied by Ms. C.C.]”

Whilst the circumstances occupying the Board's attention concerned the exclusion of Ms. C.C., there may be other persons of significance to Mr. H. who might also be considered by the guardian in a like way to Ms. C.C. It is possible that extending the range and availability of known visitors to Mr. H. will have personal value for him if such visits are undertaken sensitively. Ms Perks reports:

“Ms. F. stated that Mr. H. is depressed which she said is common with dementia. He isolates himself and will not join in 'happy hour' or the breakfast club. He sits only with other men and his best relationship is with the male diversional therapist. Ms. F. advised that one cannot have a discussion with Mr. H. He might give half an answer and then digress to something more immediate which has his present attention.”

This and other reports of Mr. H.'s declining attention to the 'here and now' suggest that he continues to lose skills. Given his previously social nature, the Board believes that responsibly extending the range of old friends with whom he has meaningful and enjoyable social contact is in his best interests. Such extension is consistent with the duties of a guardian pursuant to section 27(2)(c) of the Act to encourage a person to participate as much as possible in the life of the community.

The Board's finding that Mr. H. is in need of a guardian relates not to the quality of his care, only to the fact that his rights have been breached. The finding that

his best interests are promoted by enhancing the range of visitors is not a finding that he is materially lacking in care at present. This is consistent with authority provided by Mr. Daly: *Re R* (2000) NSWSC 886 a decision of His Honour Justice Young in particular a statement at [35]:

“I would agree, however, with the Victorian AAT that the “best interests” must include the welfare, health and well-being of the person in a wider sense than is suggested by protection from neglect, abuse or exploitation. ... [At 37] What is in the best interests of the incapable person under the general cases has been taken to mean what is for the benefit of the lunatic personally and not for his family or his friends or his estate.”

The Board finds that the management of visitors to Mr. H. by an appointed guardian is in the best interests of Mr. H.

**K. Section 21 – Persons eligible as guardians:**

Mr. D. consented to appointment as a guardian as did the Public Guardian.

The Board is satisfied that Mr. D. is a dedicated friend and acts from the very best motivations regarding Mr. H. However, he clearly stated in his evidence that his consent to act as a guardian was conditional to the extent that should the Board provide directions that he must facilitate visits by Ms. C.C., he would not consent.

Given that the Board is now considering the appointment of a guardian, in part, for the purpose of independently assessing the feasibility of Ms. C.C.’s visits, the Board is not in a position to consider Mr. D.’s nomination.

Further, or in the alternative, given the Board’s findings that Mr. H wishes to have contact with Ms C.C., Mr. D.’s clear indication that he supports Mr. M.H.’s action and that he will not allow Ms. C.C. to have access to Mr. H puts him in a position

where his interests conflict with the interests of Mr. H such as would make him ineligible for the purposes of section 21(1)(b) of the Act.

The Board notes allegations by Ms. S. that Ms Warner is biased and by Mr. Zeeman that Ms. Warner has accepted Ms. C.C.'s statements in preference to statements of other persons. The Board, having determined that Mr. H. needs a guardian and that Mr. D.'s nomination is conditional and, in the circumstances, inoperative has no other option.

Mr. Zeeman's submissions point to 'incompatibility' between Ms Warner and Mr. H. The factual bases upon which he makes that assertion are of Mr. H.'s reactions after her visit, not during. Again, the Board assumes that a statutory officer appointed to protect the best interests of a vulnerable person will act in a professional manner appropriate to the circumstances.

It was also submitted that appointment of the Public Guardian would be contrary to the Board's duty to take into account the desirability of preserving existing family relationships pursuant to section 21(2)(b) of the Act. The Board has taken that into account and believes that such preservation can be achieved by limiting any order made to the issue of access to visitors. Mr. M.H. has assumed the important role as 'person responsible' for Mr. H. pursuant to Part 6 and section 4 of the Act. The Board's appointment of a guardian will not impact upon that assumption. It is most often a matter for the practitioner treating Mr. H. to determine who is the appropriate 'person responsible' for the purposes of obtaining valid consent to treat.

The Board is satisfied that the Public Guardian will act in Mr. H.'s best interests, that she is not in a position where her interests conflict with Mr. H.'s interests and that she is in all respects a suitable person to act as his guardian for the purposes of subsections 21(1) and (2) of the Act.

**L. Section 13 – Publication:**

On 20 March 2005 a letter was published in *The Mercury* penned by Ms. C.C. making reference to her relationship with “a Hobart man” and her exclusion from seeing him. The Board also received information relating to a program apparently aired on ABC television program *Stateline*. Neither articles identified Mr. H. by name. By her own solicitor’s admission, Ms. C.C. was “desperate” to see Mr. H. again, however such actions in potentially exposing a hitherto private relationship and undermining the reputation of a high profile man cannot be viewed as in the best interests of Mr. H.

Accordingly, subject to any later applications, the Board does not believe that publication of this or any report of these proceedings is in the best interests of Mr. H. However the statement of reasons canvasses many issues that will be of use for educational purposes and the Board will produce, in consultation with Ms. C.C. and Mr. M.H. a de-identified version of the statement following its delivery.

The Board is, of course, content for counsel to supply any persons named in the decision with a copy of the statement of reasons. For reasons given below the Board will supply a copy of this statement and relevant parts of the transcript to Tasmanian Perpetual Trustees.

**M. The Enduring Power of Attorney:**

As referred to above, the Board has concerns about the paucity of Dr D.’s report as to Mr. H’s capacity to execute an enduring power of attorney. The Board has no means by which it can ascertain whether, in making that statement, Dr D. had any knowledge of or reference to section 30 of the *Powers of Attorney Act 2000* in particular subsections (2)(a) and (3) of that section.

The Board notes that a senior member of Dr D.'s rehabilitation team, Dr T. notes approximately six weeks later, on 2 March 2004, that:

“Mr. H. has clearly moderate to severe Alzheimer’s dementia”

Witnesses provide various dates between 2001 and 2003 from which they had noticed Mr. H.'s decline and began to suspect that he had dementia. The Board cannot therefore assume that he experienced ‘sudden onset’ dementia between execution of the instrument on the 20<sup>th</sup> January 2004 and March 2004.

The Board’s concerns were exacerbated by the evidence of Mr. M.H. which inferred that the opinion was given because of Mr. H.’s categorisation as “under assessment” as opposed to having been confirmed as having dementia. This would appear to mean that the opinion was given according to Mr. H.’s administrative status and not the substance of his condition at that time.

The Board notes these concerns and will extend a copy of this statement of reasons to Tasmanian Perpetual Trustees to enable them to consider whether, in light of the new evidence and their duties arising under a fiduciary duty and the *Trustee Act 1898*, an application pursuant to section 33(1)(b) of the *Powers of Attorney Act 2000* is necessary.

**N. A late application to reopen:**

After the conclusion of the hearing, on 3 June 2005, the Board received by ordinary mail a letter from Mr. Zeeman foreshadowing an application to reopen the evidence to receive a report from Dr S. regarding the submission of counsel assisting the Board for the appointment of the Public Guardian as a limited guardian for Mr. H.

After seeking the advice of counsel assisting, the Board responded by fax on 6 June 2005 :

“The Board is not in a position to treat your letter as an application to reopen the matter without better particulars as to:

- What new information does Dr S.’s new report reveal over and above submissions already put by other witnesses?
- When will Dr S.’s report be ready?
- Why was Dr S. not in a position to report upon these issues in his earlier reports dated 10 February 2005 and 19 May 2005 when you and your client have known of the possibility of the appointment of the Public Guardian since you were first notified of Ms C.C.’s application dated 7 January 2005?
- Does the recommendation made by counsel assisting the Board represent any material change in circumstances?
- Why it is in the interests of justice to delay the decision of the Board members in releasing their reasons?

The President has had regard to the law as stated in *R v Resource Planning and Development Commission; Ex parte Dorney* [2003] TASSC 7. She has indicated that should such report merely repeat the assertion that Mr. H. will experience stranger anxiety from the interactions with Ms Warner, the Board has already heard such evidence and will require very convincing reasons to agree to delay an outcome and reopen the evidence on the basis of receiving repeat material.

The President has asked me to make you aware that the members of the Division will meet on Wednesday afternoon [8 June 2005] to discuss the first draft of the written statement of reasons. If they have not received a proper application to reopen the evidence (preferably accompanied by the report itself) they will proceed to

finalise their reasons as they believe that there are reasons for urgency given Mr. H.'s age and state of health.”

The Board had not received any application or response from Mr. Zeeman by 1.00pm on 8 June 2005 and therefore proceeded to finalise its reasons.

## **Conclusion:**

After hearing an application by Ms. C.C. in respect of Mr. H. (hereinafter called ‘the represented person’) the Board was satisfied that the represented person is a person with a disability, being dementia.

The Board is also satisfied that by reason of his dementia, the represented person is unable to make reasonable judgments in respect of his person and circumstances, particularly with respect to restriction of visitors. Accordingly he is in need of a limited guardian.

## **THE BOARD ORDERS:**

- 1) That the Public Guardian be appointed as the represented person’s guardian.
- 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:
  - (i) countermanding any previous instructions provided to [the nursing home] regarding visitors to the represented person,
  - (ii) 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
  - (iii) access to hospital and nursing home records as required to perform the functions described in paragraph 2 hereof.
- 4) That the order remains in place until 8 June 2008.

Dated: 9 June 2005

Anita Smith  
PRESIDENT

Malcolm Schyvens  
BOARD MEMBER

Catherine Wilding  
BOARD MEMBER