

Guardianship and Administration Board
Hobart

HF, on the application of CF and TF, his parents

GAB No. XXXX of 2006

REASONS FOR DECISION

Anita Smith (Chair - President)
Paul Mayne – Member
Kereth West - Member

30 May 2006

Administration – settlement of claim arising from motor vehicle accident – sanction by Master of Supreme Court or appointment of administrator - potential administrator must be satisfied that settlement was fair and reasonable and in the best interests of the person – need for review of legal and medical advice esp. after concerns raised by Master - relevance of litigation guardian
Guardianship and Administration Act 1995 (Tas), ss 6, 51, 54, 56 and 57

This is a part-heard application under part 7 of the *Guardianship and Administration Act 1995* for the appointment of an administrator for HF by his parents, CF and TF. The application relates to the need for a person with authority to settle, on behalf of the proposed represented person, an action for damages arising from a motor vehicle accident.

The Board has received the following documents:

- Application for Administration dated 15 March 2003
- Health Care Professional Report from Dr T dated 20 March 2006
- Report by ES, Occupational Therapist, to the MAIB dated 20 February 2004
- Letter from PWB Lawyers dated 7 April 2006 (enclosing an endorsement of claim, judgment by consent, instructions for settlement and an affidavit which attached reports by Mr L, plastic surgeon and Mr X, Orthopaedic surgeon)
- Commonwealth Bank Statement for HF dated 5 April 2006
- Report of the Senior Investigation and Liaison Officer dated 24 April 2006
- Letter from PWB Lawyers dated 28 April 2006

On 13 April 2006, notices of hearing were sent to the interested parties nominated by the applicant.

The hearing was convened on 5 May 2006 and both applicants, the proposed represented person, Mr E S from a Community Welfare Service and Mr Sam Peart from PWB Lawyers and Investigation and Liaison staff of the Board attended the hearing.

Disability and Incapacity:

On the basis of Dr T's report, the Board was satisfied pursuant to section 51(1)(a) and (b) of the *Guardianship and Administration Act 1995* that the proposed represented person is a person with a disability, namely an intellectual disability, which renders him incapable of making any reasonable judgments in relation to his estate.

Need for an administrator:

The application states:

“... HF has a current MAIB claim in the Tasmanian Supreme Court. The terms of settlement have been reached. However given HF's incapacity, the settlement either has to be approved by the Court or alternatively entered into by HF's administrator under the Guardianship and Administration Board.

At present, despite submission and medical evidence supplied to the Court, the Master of the Supreme Court is not prepared to sanction the settlement. The reason is concerned with uncertainty relating to particular medical evidence.

HF's solicitors PWB lawyers advise that the terms of the settlement adequately reflect HF's loss and expense.

Accordingly, it is in the best interests for HF that an administrator be appointed so settlement can occur.”

PWB Lawyers and solicitors acting for MAIB have agreed to settle the damages claim for \$25,000.00 plus an allowance for legal costs. Those legal costs exclude the costs of current proceedings, which are funded separately.

The Board was not yet satisfied pursuant to section 51(1)(c) that the proposed represented person is in need of an administrator because there still remains the possibility of a sanction of the proposed settlement by the Master of the Supreme Court of Tasmania.

Mr Peart explained to the Board that the Master was reluctant to sanction the settlement until further medical evidence could be presented. According to Mr Peart that further medical evidence related to the likelihood of any future degeneration of a fracture injury. He stated that the Master had suggested the appointment of an administrator instead. The resultant application nominated TF as the administrator.

At the hearing the Board discussed the issue that an administrator appointed by the Board takes on duties similar if not identical to a trustee. A trustee exercising his or her duties appropriately would have to be satisfied that the proposed settlement was a fair and reasonable settlement and in the best interests of the proposed represented person. The Board proposed to Mr Peart that the test applied by a competent trustee or administrator to that question would not be terribly different to the test that the Master imposed. Mr Peart responded that TF would have similar concerns and that she would review the medical and legal advice before accepting the settlement.

Persons eligible as administrators:

Although the application proposed that TF be appointed as administrator, the Board notes that CF has been the litigation guardian throughout the period of instruction to PWB Lawyers.

TF heard the Board's discussion described above about the duty of an administrator to ensure that the settlement was in the best interests of the proposed represented person. The Board then asked her some questions to assess the criteria set out in section 54 of the Act.

TF stated that she had accepted a referral from a social worker to PWB Lawyers a day or so after the accident. She and her daughter have already accepted settlements from the injuries they sustained in the incident, presumably also on the advice of PWB Lawyers.

The following discussion took place:

“MS SMITH: Right. So he suffered more injuries than anybody else out of the accident, okay. So if we accepted your application, TF, and appointed you as administrator today what would your immediate actions be, what would you do straight off?

TF: Well we was going to put it on a term deposit probably for a while and just leave it there for -

MS SMITH: So you’d simply instruct Piggott Wood & Baker to settle the action and finalise it?

TF: Yes, yeah, and put it on some sort of an account.

MS SMITH: Would you consider getting advice from any other lawyers about the amount of the -

TF: Probably not, no.”

Despite the fact that she had heard the discussion between the Chairman and Mr Peart, TF’s answer indicated that she does not intend to undertake any review of the legal and medical information at all. The Board was satisfied that if TF is appointed the only likely outcome is that she would accept that \$25,000.00 settlement and invest the proceeds. TF has no professional qualifications and clearly relies entirely upon the advice of PWB Lawyers for her legal judgments. The Board was unable to conclude that TF would meet the test required by section 54(1)(d)(iv) of the Act, to have sufficient expertise to administer the estate, without further independent advice.

An administrator adhering to the duties imposed by sections 6, 56 and 57 of the Act would have to be satisfied that the settlement was in the best interests of the proposed represented person. It is unclear how an unqualified person can satisfy herself that the acceptance of a sum of damages is appropriate where the Master of the Supreme Court has previously expressed concerns about the sufficiency of the sum proposed. The Board

understands that Supreme Court practice is that the Master, who has considerable experience and responsibility, will determine most applications for such sanction. The Board presumes that if it appointed a professional administrator, that administrator would meet their fiduciary duty to the proposed represented person by commissioning an independent legal opinion to verify the appropriateness of the proposed award.

Certain statements in the documents also caused the Board concerns that the issue of Post Traumatic Stress Disorder had not been thoroughly considered. Questions raised and answers to those questions in the hearing did not allay that concern.

The Board also has a duty pursuant to section 6 and 51(3) to ensure that an order is in the best interests of the proposed represented person. At the hearing the Board discussed two methods of proceeding in the best interests of the proposed represented person.

The first method would be to appoint a professional administrator. The second method would be for the Board to appoint TF but (accepting that her only intention is to accept \$25,000.00 as damages for the injury) satisfy itself that the proposed settlement was in the best interests of the proposed represented person before doing so.

The documents provided to the Board do not provide the Board with any guidance about how the figure of \$25,000.00 was arrived at. The affidavit simply states:

“The litigation guardian has instructed me to settle the claim on behalf of the plaintiff on the basis that the Defendant pays to the Plaintiff the sum of \$25,000.00 plus agreed costs.”

The Board, like the Master, was troubled about future implications from the injury and the apparently modest size of the agreed payment. It determined that it would require an independent assessment to be able to satisfy itself that the advice to the family is correct. Accordingly the Board did not proceed to a decision, but adjourned the application on the

understanding that certain information would be obtained prior to re-listing the matter. That adjournment was framed as follows:

“The Board requires:

A multidisciplinary assessment of the consequences of the motor vehicle accident with respect to CF's comfort in cars. Such an assessment should include:

1. A psychological assessment of CF's avoidance behaviour to the left side of cars with a determination of the extent to which this behaviour is generalised. For instance: Is the behaviour specific to small cars or sedans or does it include wagons? Does the colour of the car have an impact on the behaviour and is the behaviour still present, but less significant, in larger cars?
2. Is the apparent physical discomfort in small cars psychological or physiological in origin? That is, is CF uncomfortable because of lack of room, or is it a trauma reaction resulting in him acquiring a protective body position?
3. If CF is more comfortable either physically or psychologically in larger vehicles what impact will this have on future vehicles required by the family to maintain CF's freedom of movement?

When such a report is received, the Board will require that information, together with the information gathered to date to be submitted for an independent legal opinion regarding the sufficiency of the damages award.

When the independent legal opinion has been obtained, the applicants are at liberty to re-list the hearing of this matter before the Board as originally constituted. Both written responses should be submitted to the Board.

The application remains adjourned until notification of the completion of these tasks by the applicants or their solicitors.”

The applicants have three possibilities for the future of this action: (i) Nominate a professional administrator and proceed with the application for appointment of an administrator, (ii) Complete the tasks set by the Board as set out above and continue with the nomination of TF, or (iii) Re-list proceedings before the Master and abandon the application for appointment of an administrator.

THE BOARD ORDERS

That the application be adjourned.

Anita Smith

PRESIDENT

On Behalf of the Division