Guardianship and Administration Board
Hobart

Mrs M.K.C., on the application of THE PUBLIC GUARDIAN

GAB No.

REASONS FOR DECISION

Anita Smith (President)
Paul Mayne (Member)
Malcolm Schyvens (Member)

Hearing: 14 July 2006

Enduring guardianship – accommodation and medical treatment – stated wishes contrary to physical safety – one guardian not available, the other not acting in best interests – enduring guardianship revoked
Guardianship and Administration Act 1995 (Tas), s 6, 11, 27, 34 and 35

1. This is a review of an enduring guardianship pursuant to Part 5 of *Guardianship and Administration Act 1995* ('the Act') whereby Mrs M.K.C.(Mrs C.) appointed her two sons, Mr B.C. and Mr D.C., as enduring guardian and alternative enduring guardian according to particular conditions.

Emergency proceedings prior to hearing:

2. On XXX the Guardianship and Administration Board ('the Board') received an application for an emergency guardianship order for Mrs C. That application arose because during a period of respite care, staff at Aged Care Facility formed the belief that she was mentally and physically too unwell to return home, whereas her son was seeking to have her return home. Accordingly, the Aged Care Facility applied for an emergency guardianship order. That application indicated a need for urgent decisions regarding Mrs C.'s accommodation and medical treatment. An emergency guardianship order was made the following day pursuant to section 65(2) of the Act. According to the applicant, Mrs C.'s son, Mr B.C., was attempting to care for her but because of his own illnesses such care was putting her at risk.

3. On XXX the Registrar alerted the Board and the Public Guardian that Mrs C. had appointed an enduring guardian pursuant to Part 5 of the Act, executed approximately

two years earlier. That instrument appointed Mr B.C. as enduring guardian and his brother, Mr D.C., as alternative enduring guardian. On XXX, the Public Guardian applied for a review of the instrument appointing an enduring guardian. Such application was treated as both an emergency application for the purposes of Part 8 and an application pursuant to Part 5 of the Act.

4. Though attempts were made by telephone and mail, Mr D.C. was unable to be contacted for any of the relevant proceedings. Following discussions with staff from the Aged Care Facility, the Public Guardian and Mr B.C., the President made an emergency order vacating the initial emergency order and substituting an order pursuant to section 65(1) substituting the Public Guardian for the enduring guardian and the alternative guardian for a period of 28 days. The Board then gave notice to all interested parties of a hearing on 14 July 2006 where the application would be determined.

5. The notice of hearing dated XXX informed parties that the Board 'may make an order varying the enduring guardian, revoking the enduring guardian, appointing an alternative enduring guardian or an order dismissing the application.'

The terms of the Instrument:

6. The instrument contained the following conditions of appointment:

"I require my guardian to observe the following conditions in exercising, or, in relation to the exercise of, the powers conferred by this instrument:

To keep me out of hospitals or nursing homes
To ensure antibiotics are not used the exception is colloidal silver or minerals that are safe to take
My lungs and heart are both damaged
When the quality of life is no longer sufficient I wish for an immediate peaceful death.
If no longer illegal a voluntary euthanasia means to be used.
I do not wish for a funeral service.
I want cremation is plain receptical and my ashes destroyed (*sic*)
No advertisements
For my guardian to use my bank balance or sell any of my few possession to pay costs"

The inclusion of these conditions confuses the purpose of the instrument somewhat as it contains some testamentary provisions and the euthanasia provisions are inoperable. The Board assumed that only the first two conditions are relevant to the application.

The hearing:

7. The hearing on XXX was attended by Mr B.C., Ms F.C. from Aged Care Facility, Mary Rowe from the Office of the Public Guardian and Anne Perks and Anna Curtain, investigative staff with the Board. The Board had the following documents available for the hearing:

    - Initial Application for the Emergency Order
    - Anne Perks' file note of telephone conversation with Ms F.C.
    - Reasons for Decisions
    - Copy of both Emergency Orders
    - Instrument Appointing Enduring Guardian
    - Notes of President's telephone conversations
    - Registrar's email to the Public Guardian dated
    - Application to review dated
    - Health Care Professional Report by Dr Sue Fricker dated
    - Report of Anne Perks, Senior Investigation and Liaison Officer
    - Report by Public Guardian on visit to Mrs M K C.
    - Report by Public Guardian on visit to Mr B.C.s

8. The Board heard the application in an informal manner, commencing with discussions with Mr B.C. about his understanding of the conditions imposed by the instrument. The major interpretation that he gave was that she would not want to be in the nursing home and, having admitted her for respite care, he now wanted to take her home. The Board then heard evidence from Ms F.C. and Mary Rowe about Mrs C.'s current state of health, which is reportedly frail and at times very confused according to the progression of an aggressive urinary tract infection. Ms Rowe described her as 'emaciated' and 'rambling'. She also described her house as very cluttered and unsafe.

9. Ms F.C. indicated that in accordance with her wishes, Mrs C. was not being treated with antibiotics, despite the urinary tract infection. She has been at the Aged Care Facility in respite since May of this year and has had three falls. She requires an air mattress to prevent pressure sores. Ms F.C. also discussed the risks to Mrs C. presented by the physical environment of her home. Ms F.C. and Ms Rowe indicated that, despite the setbacks, Mrs C. appeared happy and content at the Aged Care Facility.

10. Mr B.C. indicated that Mrs C. is allergic to antibiotics and preferred the treatment with colloidal silver. He stated that silver kills 653 forms of virus and bacteria, whereas

antibiotics only kill bacteria. No scientific or medical evidence was put forward in support of either the allergy or the appropriateness of the silver as treatment for infection. The preference for treatment with silver is contrary to the medical advice supplied by Dr Fricker.

11. Ms F.C. confirmed that Mrs C. requires access to 24-hour care and monitoring. Ms F.C. impressed the Board as a person who was committed to providing an appropriate level of care to Mrs C. while respecting her choices regarding treatment as much as is safe in the circumstances.

12. On the other hand, Mr B.C. showed little insight into his mother's present mental and physical condition. He presented as vague and at times confused in response to questions at the hearing. His statements at the hearing concentrated upon the use of colloidal silver for treatment and his mother's desire to return home. The Board was concerned that with insufficient understanding of her present illnesses and her requirements for care, Mr B.C. is unable to care for his mother in a safe and appropriate manner.

13. Mr B.C. indicated that he had had a telephone conversation with his brother, Mr D.C., and that his brother was aware of the proceedings. However, the Senior Investigation and Liaison Officer indicated that she had been unable to contact Mr D.C. by telephone, despite sending written notice and making numerous attempts to call his mobile telephone.

Findings:

14. The Board was not satisfied that Mr B.C. was able to balance the responsibilities of a guardian as set out in sections 6 and 27 of the Act. He gave far greater weight to Mrs C.'s wishes than her best interests. The Board notes that the primary responsibility of a guardian under subsection 27(1) is to act in the represented person's best interests. Subsection 27(2)(a) promotes the duty of the guardian to act in accordance with the person's wishes, but interestingly qualifies this duty on two occasions as a duty to act "as far as possible":

> "(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;…" (emphasis added)

15. The Board considers that where acting upon the stated wishes of the person would be contrary to her physical safety, then such actions have reached the limits of being acted upon 'as far as possible'. Therefore an intention to return Mrs C. to a physical environment that is not adequately equipped for her safe care and treatment, even though it is consistent with the terms expressed in conditions in her enduring guardianship, is not in her best interests.

16. As noted above, the notice of hearing informed parties that the Board 'may make an order varying the enduring guardian, revoking the enduring guardian, appointing an alternative enduring guardian or an order dismissing the application.' However, upon a closer reading of sections 34 and 35 of the Act, the Board took the view that such a range of orders was not available. Because the application was not made by the guardian himself, the application could only be made upon the Board's own motion or pursuant to section 34.

17. For reasons expressed by the Full Court of the Supreme Court in *Attorney-General v Cartland* [2006] TASSC 14, the Board took the view that 'board' for the purposes of section 35(4) would mean the full Board. Therefore, there were no means by which it could be inferred that the present application was upon the Board's own motion.[1]

18. While an application pursuant to section 35 lends itself to a wide range of orders such as those described in the notice to parties, cognisant of the terms of subsection 11(2), the Board concluded that the only orders available to the Board were those under section 34, to revoke the guardianship or dismiss the application pursuant to an application under section 34(3)(a) by the Public Guardian. The fact that the terms of the notice went beyond the powers available to the Board did not, in the opinion of the Board, render the notices deficient.

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[1] Advice received from the Solicitor General's Office dated 26 June 2006 indicated that section 65 suffers from the same deficit regarding the characterisation of 'the board'. Accordingly, by the time of the hearing, on account of being in receipt of such advice, the Board lacked a practical facility to make a valid order under section 65.

19. With regard to Mr D.C., the Board concluded that by reason of his consistent lack of involvement and unavailability for these proceedings, he is not able to act in the capacity as alternative enduring guardian.

20. With regard to Mr B.C., the Board concluded that he has not acted in the best interests of Mrs C. in his attempts to return her to their home at Howrah when that environment is unsafe for her.

21. Accordingly, the Board revoked the instrument appointing an enduring guardian executed by Mrs C. on XXX.

THE BOARD ORDERS

That the appointment of Mr B.C. as the enduring guardian and Mr D.C. as alternative enduring guardian of Mrs M.K.C. be revoked.

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Anita Smith
CHAIRMAN

For and on behalf of the division.