

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

CPMA on the application of BFA (his maternal Grandmother) for a STATUTORY WILL

GAB No. 1058

REASONS FOR DECISION

Anita Smith (President)
Kim Barker (Board member)
Gerard Dibley (Board member)

Hearing: 12 May 2005

Statutory Will – represented person with severe brain injury occasioned in infancy by his mother – mother convicted of grievous bodily harm – estate derived from criminal injuries compensation – public policy issue of intestacy delivering a direct financial benefit from criminal activities – Board must assume that represented person would have been a normal decent person acting in accordance with contemporary standards of morality – recognition of foster carer

Wills Act 1992 ss 27A, 27D and 27E

Testator's Family Maintenance Act 1912 ss 3A, 8, 8A,

1. This is an application under section 27A of the *Wills Act 1992* (“the Act”) for a statutory Will for CPMA (“C”). The Board has produced this statement of reasons, if necessary, for the purposes of section 8A(1A) of the *Testator's Family Maintenance Act 1912*.
2. C is 21 years of age. A Health Care Professional Report prepared by Dr N on 7 February 2005 confirms that because of an acquired brain injury sustained when he was an infant, C is incapable of making a valid Will for himself.
3. C's grandmother, BFA (“Mrs A”) applied on 8 February 2005 for the Board to make a statutory Will for C in favour of his current carer, Ms RC and his mother, KD (“K”). Mrs A also suggested that if K predeceased C, her share should pass to K's nephew and nieces AA, SA and JA.

4. Pursuant to section 27E of the Act, the Board is bound to, as nearly as practicable, make the Will that would have been made by C as if he had capacity to make a Will. Section 27D specifies the matters to be considered by the Board.

C'S HISTORY

5. KD was 18 years of age when she conceived C as a result of a relationship with a married man, EF. C was born on 17 March 1984. There is no indication that at that stage C was not meeting normal developmental milestones. Before his first birthday, C's grandparents believed that K was not coping with C's care. They applied to the Magistrate's Court to have C fostered but the application was rejected.
6. The day after the application was rejected K severely assaulted C, throwing him against a wall and hitting him with a piece of wood. As a result, C suffered a severe comminuted fracture over the left parieto-occipital region of his skull extending forwards to the frontal region. By July 1985 he was experiencing frequent seizures, blindness in his left eye, uncertain damage to his right eye and left sided hemiplegia. It had, by then, been confirmed that he would have a severe disability for the rest of his life.
7. K was convicted of causing grievous bodily harm and sentenced to 18 months imprisonment, 9 months of which she served at Risdon Prison before being granted parole. C was made a ward of the State.
8. C's grandfather applied on his behalf for criminal injuries compensation, which was awarded to the then maximum of \$10,000.00 on 22 July 1985. The award was paid to the Public Trustee and included an order that K pay that sum back to the Crown. The Board heard that the debt has not been paid. The Board believes

such order would not be operative, in any event, for reasons expressed by His Honour Chief Justice Green in *The Queen v Richard Carter Southee Ex Parte Dalco* Judgment No. M2 of 1990 of the Supreme Court of Tasmania.

9. A family friend, LW cared for C until 1996 when she died. RC (“R”) was a friend of LW’s and took over the care of C. C has enjoyed a close relationship with both of his maternal grandparents. Unfortunately his grandfather died three years ago.
10. C is quadriplegic, has intellectual disability, cortical blindness and epilepsy. He is totally dependent upon others for his daily needs. His language is limited to two to three words, but he can express some preferences and needs.
11. C attends an educational facility 5 days per week from 8.30am to 4.00pm. R cares for him with some assistance from another person for bathing 5 days per week. Similarly to any person who cares for a family member with a disability, R receives a carer’s benefit. Her family treat C as part of their family and her adult children expect to take over C’s care if ever R is incapable of caring for him herself. R manages C’s Centrelink benefits on his behalf. She reports that C has an extremely healthy appetite and is likely to have an ordinary life expectancy.
12. Mrs A is in the process of considering the terms of her own Will. It is important to Mrs A that C’s affairs and the affairs of her family members are settled properly as part of that process. She declined to be considered as a beneficiary in any way.

SECTION 27D MATTERS TO BE CONSIDERED

13. *27D(a) – Evidence relating to C’s wishes:* C does not have verbal expressive skills nor the capacity to understand the issues related to creating a Will. It is not

possible for C to express any wishes regarding his estate for the purposes of section 27D(a) of the Act.

14. *27D(b) – The likelihood of C regaining capacity to make a will:* Given the extent of C’s disability it is inconceivable that he will ever regain capacity to make a Will at a future time.

15. *27D(c) – The interests of persons who would be entitled to receive any part of C’s estate if he died intestate:* If C were to die intestate, his mother and father would benefit equally from his deceased estate pursuant to the principles of intestacy set out in section 44(6) of the *Administration and Probate Act 1935*.

16. C’s father, EF, was married to a woman other than C’s mother at the time of his birth. Although he had visiting rights in C’s infancy, he has had no known contact with C for 15 years and has never paid any maintenance. The Senior Investigation and Liaison Officer of the Board (SILO) attempted to locate him for the purposes of the application, but received conflicting reports. One report said that he was dead; this was not confirmed by a search of death records. Another report quoted in the SILO’s report stated that he had lived at New Norfolk but moved and would be difficult to locate:

“... as he had no phone, was an ‘alchy’ and moved about a lot.”

Clearly, C has no personal relationship with his father such as would lead the Board to consider making him a beneficiary under a Will.

17. C’s mother, KD, lives in X, a supported accommodation facility. She has schizophrenia and was at the time of the application too unwell to be contacted about the terms of the Will. She clearly has an interest in C’s wellbeing and when

well enough visits C once or twice per year. C's grandmother and carer stated that he recognises his mother, and responds to her. The applicant suggested that the Board might make provision under the Will for RC and KD in equal shares. This suggestion has caused the Board concern for reasons detailed later in these reasons.

18. *27D(d) – The likelihood of an application being made under the Testator's Family Maintenance Act 1912:* By reason of section 3A(1)(c) of the *Testator's Family Maintenance Act 1912*, KD and EF, if they survive C, will be persons entitled to claim under that Act. The Board cannot predict what the outcome of any potential claim might be, but notes that both potential applicants may for different reasons be adversely considered within the provisions of section 8(1) of that Act.
19. *27D(e) – The circumstances of persons for whom C might reasonably be expected to make provision under his Will:* In considering the circumstances of the persons who might reasonably be expected to become beneficiaries under the Will, it is noted that RC expresses mild opposition to the prospect that she might inherit anything from C's estate. She has no identifiable needs and appears to be comfortably provided for. RC has modified her house and her life to take on the role as carer for C. She displayed affectionate humour towards him and impressed the Board as a selfless and devoted carer. Mrs A quite correctly ignores R's modesty in favour of making provision for her.
20. KD is in receipt of Centrelink benefits and resides in supported accommodation. According to Mrs A she has never acknowledged or displayed any understanding that she occasioned C's injuries. Mrs A believes that she may have had schizophrenia from an early age. Her mother has forgiven her for the injuries occasioned to C, and believes that C would have done the same. K is presently

- very unwell. The persons who provide her full time care requested that the Senior Investigation and Liaison Officer not discuss the application with her as she would experience extreme distress to the extent of threatening her well being.
21. C's cousins AA (aged 21), SA (aged 16) and JA (aged 11) have had limited if any contact with C as they live in Queensland. He is reported as having no contact with their father, K's brother.
 22. According to the evidence, there are no other persons in C's life for whom he might reasonably be expected to make provision in a Will.
 23. *27D(f) – Any gift or other purpose that C might reasonably be expected to give or make:* There are no clearly identifiable charities for which C might reasonably be expected to make provision in a Will, apart from X where his mother lives. He has not been the recipient of benefits from any particular charitable organisations in his life.
 24. *27D(g) – C's likely assets:* The compensation funds held by the Public Trustee have accumulated to approximately \$35,000.00. C makes very few demands upon those funds. He has a surviving great-grandmother, Mrs A's mother. She is known to be relatively wealthy and apparently changes her Will not infrequently. There is a possibility that C will inherit from her estate given that her solicitor telephoned Mrs A last year seeking specific details about C. Mrs A and the great-grandmother are estranged.
 25. *27D(h) – Any other matter the Board considers to be relevant:* C's mother is a potential beneficiary of half or all of his estate (if she survives his father as well) if there is no Will. Given that C's existing estate is derived from his payment of Criminal Injuries Compensation, the Board considers that it is relevant that if K

- inherits money from C's present estate, she will, in effect, receive a direct financial benefit as a result of her own criminal activities.
26. The Board notes that Mrs A now believes that K's actions were the product of undiagnosed schizophrenia and her responsibility for the crime may have been diminished accordingly. The Board is not able to "go behind" the conviction for grievous bodily harm and cannot come to a conclusion different to the Court.
27. In cases where a person, who is otherwise entitled under an intestacy, occasions the other person's death the law precludes that person from inheriting on public policy grounds. This principle of forfeiture does not extend to precluding persons from inheriting who cause grievous bodily harm to the testator. K is not disentitled to a share of C's intestacy by operation of law unless it is found at some later point in time that her actions have caused C's death, which is now a practically impossible finding. Her crime may be relevant if a person submits, pursuant to section 8(1) of the *Testator's Family Maintenance Act 1912*, that her actions have destroyed C's quality and enjoyment of life and therefore she is disentitled by reason of her character or conduct.
28. There is a public policy element to the proposed provision that has caused the Board deep consternation in that K should not profit by her criminal actions. The fact that K was not provided an opportunity to contribute to the discussion provides further concern to the Board. The Board must provide natural justice to K, but has no facility to do so while she is so unwell. There was no indication to the Board that K would recover to such an extent that she could participate in the hearing. The Board considered appointing a legal representative for her, but clearly a representative would also be unable to take instructions about this matter in the near future. Ms Gibbs from the Public Trustee attended the hearing and put arguments to the Board that urged the appropriate protection of K's interests.

29. *Secretary of the Department of Human Services v Anette Nancarrow and Lee Nancarrow* [2004] VSC 450 had remarkably similar facts. In that case both of the testator's parents who had perpetrated severe injuries to their child, declined an interest in the estate.

30. Mrs A and Mrs C believed that C would have forgiven his mother. The Board was unable to share their belief. In *Nancarrow* (supra), Cummins J. cites with approval an English case, *Re C (a patient)* (1991) 3 All E.R. 866, in which Hoffman J. considered a case of a person who had lacked capacity since birth. Hoffman J. stated (at 870):

“In all relevant aspects, the record of her individual preferences and personality is a blank on which nothing has been written. Accordingly, there is no material on which to construct a subjective assessment of what the patient would have wanted to do.”

He concluded:

“The court must assume that she would have been a normal decent person, acting in accordance with contemporary standards of morality. In the absence of actual evidence to the contrary, no less should be assumed of any person...”

31. After considering the authorities, Cummins J. in *Nancarrow* (supra) stated:

“In my view in Victoria the proper test to apply is that of a normal decent person acting in accordance with contemporary standards of morality. The test is not reasonableness but decency and fairness”

32. The Board adopts that test for the purposes of section 27E of the *Wills Act 1992*. Therefore, reflecting upon contemporary standards of morality, the Board accepts the following principles:

- (i) A son of a woman with a severe mental illness, who is decent and fair, would not want to leave her unprovided for, and would make a testamentary gift for her maintenance.
 - (ii) A victim of a serious crime that has completely destroyed that victim's quality of life might, as a decent and fair person, forgive the perpetrator, but not to the extent of providing for the perpetrator in his or her Will.
 - (iii) It is decent and fair that a perpetrator of a crime should not benefit from compensation paid to the victim as a direct result of that crime.
1. The Board believes that if C had capacity to make a Will he would want an outcome that balances each of those three principles. Therefore, the Board has decided that any benefit to K from C's estate ought to be targeted towards supporting the people who support K. The provision proposed for K is therefore deliberately indirect.
 2. RC has had an overwhelming influence for good in C's life. To all intents and purposes she has provided a family life for him and carried on the important work of LW. She is thoroughly deserving of C's love and affection and therefore the majority of his estate.
 3. The Board is satisfied that C has not made a valid Will, is incapable of making a Will for himself and in all the circumstances a Will should be made for him, in particular, to recognise the important contribution of RC. Upon the Board having considered all matters relevant to ensuring the Will reflects, as nearly as practicable, the Will which would have been made by C if he had legal capacity to make a Will the Board makes the following orders to enable the execution of a Will for C:

ORDERS:

1. That The Public Trustee prepare and submit to the Board a will for CPMA which gives effect to the following dispositions and objectives:
 - (i) Payment of any funeral and testamentary expenses and any duties payable in respect of the estate;
 - (ii) If at the time of CPMA's death, his mother KD resides in supported accommodation managed by X, distribution of a 25% share of the residue of the estate to X;
 - (iii) If at the time of CPMA's death KD lives in an alternative supported accommodation facility managed by a similar organisation to X, distribution of a 25% share of the estate to such organisation as is providing that supported accommodation to KD;
 - (iv) If at the time of CPMA's death KD lives independently of any supported accommodation facility, but is in regular receipt of day support, respite, medical or psychiatric care from any charity organisation, distribution of a 25% share of the estate to that charity, or if more than one, to them equally;
 - (v) If KD predeceases CPMA or all of the gifts described in paragraphs (ii), (iii) or (iv) fail for any reason, distribution of a 25% share of the estate to AA, SA and JA with a remainder to their children according to standard terms of wills;
 - (vi) Distribution of the residue of the estate to RC, or if she does not survive C, to her children in equal shares with a remainder to their children according to standard terms of wills;
 - (vii) Inclusion of appropriate clauses (a) in relation to payment to the proper officer of the charitable organisation and (b) a saving clause in the event that the charitable organisation ceases to exist;
 - (viii) To appoint The Public Trustee as executor and trustee of the will of CPMA;
 - (ix) A clause to the effect that The Public Trustee may without obtaining a Court Order exercise all or any of the powers contained in Section 32 of the *Public Trustee Act 1930*.

2. That upon the Board being satisfied that the will has been prepared in accordance with the dispositions and objectives set out in Order 1 that the will be executed for CPMA in accordance with Section 27A(4) of the *Wills Act 1992*.

3. The Board determines that pursuant to section 13(2) of the *Guardianship and Administration Act 1995* it is in the public interest that a de-identified copy of this decision may be published.

Dated this 22nd day of June 2005.

Signed:

Anita Smith
PRESIDENT

For and on behalf of Board Members Kim Barker and Gerard Dibley