

GUARDIANSHIP AND ADMINISTRATION BOARD  
HOBART

MR I.V. on the application of MS L.R. of Aged Care Facility

REASONS FOR DECISION

Anita Smith (President)  
19 December 2007

Guardianship – emergency guardianship in possible life saving treatment – applicant with a ‘proper interest in the matter’ – ‘need’ for a guardian versus role of person responsible – roles of a medical practitioner, guardian and person responsible – meaning of ‘close relative’ – role of remunerated carers in residential facility regarding consent to medical treatment – status of previous agreement to withdraw application for guardianship

*Guardianship and Administration Act 1995* – ss 4, 43, 65

1. On 14 December 2007, Ms L.R. (“the applicant”) made an application for the urgent appointment of the Public Guardian as guardian for Mr I.V. (“the proposed represented person”) under Part 8 of the *Guardianship and Administration Act 1995* (“the Act”). I have considered her application and decided not to make such an appointment. These are the reasons for my decision.

2. Relevant parts of section 65 state:

“65(2) Where the Board considers it proper to do so, by reason of urgency, the Board may, in respect of a person who is not a represented person but in respect of whom the Board considers that there may be grounds for making a guardianship order or an administration order make an order appointing –

(a) the Public Guardian as his or her guardian; or

(b) ... –

and in either case the Board may make any order or give any direction considered appropriate in the circumstances.

(3) The Board may make an order under this section of its own motion or on request by any person whom the Board considers to have a proper interest in the matter.

(4) In the exercise of its powers under this section –

(a) the Board is not required to give notice to any person or to hold a hearing before making an order but the

Board must make such inquiries or investigations as the Board may think appropriate; and

- (b) the Board may act on a request made, or information received, by telephone or any other means that the Board considers appropriate in the circumstances; and
- (c) ...”

**The applicant (section 65(3):**

- 3. The applicant is the Executive Director of an incorporation who run a supported accommodation facility where the proposed represented person lives. As such I determined that the applicant is a person whom the Board considers to have a proper interest in the matter for the purposes of section 65(3).

**The application:**

- 4. The proposed represented person is 35 years of age and has had an acquired brain injury since 1991. The applicant completed a pro forma written application for emergency order. In answer to a request in the pro forma application to “*outline the reasons for requesting an emergency order*”, the applicant states:

“To enable to have medication (Antibiotics) to counteract pneumonia. Parent/Guardian has demanded medication be stopped. As a result the GP, Frank Reynolds, has stopped treatment with Antibiotic on parents demand. This goes against Order by the Guardianship and Admin. Board dated 8<sup>th</sup> April 2005. The stopping of Antibiotics will slow his recovery and with each day his illness persists it weakens his capacity to fight off illness. We had been giving him Antibiotics from the time it was prescribed by Dr Reynolds on Wednesday 12 Dec. On Thurs 13<sup>th</sup> Mr I.V.stopped swallowing and we could not get medication or fluids into him. He was sent to Hospital where he was re hydrated and sent back to Supported Accommodation Facility. No medication was given at the hospital in accordance with the Orders.

Mr I.V. showed good signs of recovery, he has been taking fluids and passing fluids and will eventually recover. Antibiotics would make that a stronger recovery.”

**Method of exercise of the Board’s powers:**

5. After reading the application, I considered that a hearing was not required but that the following inquiries and investigations were required before determining the emergency application:
  - A consideration of the circumstances of the previous “orders” of the Board and the historical materials held in the Board’s file.
  - A telephone call to the proposed represented person’s mother.
  - A telephone call to Dr Reynolds to enquire whether he concurred with or had any concerns about the directions given to him by the ‘person responsible.’

**Materials held in the Board’s file:**

6. Reports on file indicate that, as a young man, the proposed represented person was physically active and talented. He was diagnosed with bi polar affective disorder. He attempted suicide by hanging in late 1991 and as a result experienced severe brain damage. He remained in hospital and State funded services for 2-3 years following the injury and was eventually moved to Supported Accommodation Facility.
7. The proposed represented person was the subject of an emergency application (section 65) in 2004 which also related to a direction by his mother to Dr Reynolds that he not be given antibiotics for pneumonia. That application was refused. On 4 January 2005 the Board received an application for the appointment of a guardian (section 20) and a pro forma Health Care Professional Report completed by Dr Reynolds. That report states that the proposed represented person is not capable to any extent of making reasonable

decisions about health care and that this diagnosis is static with no prognosis for improvement.

8. Independent reports of the Board's investigators and the Office of the Public Guardian prepared for the 2005 application disclosed a tension between the proposed represented person's family members and the staff at Supported Accommodation Facility primarily about whether he experienced meaningful quality of life since his disablement. Because staff at Supported Accommodation Facility believed that he did, they supported active treatment of his pneumonia. His mother, however, was concerned that her son would not want to live this way and that he should be allowed to die naturally.
9. The application for guardianship was listed for hearing on 11 March 2005. The Board did not conduct a hearing but issued the following orders:
  - i. "That the application be adjourned sine die.
  - ii. That within the next 8 weeks the proposed represented person's mother, Mrs J.V. and the Executive Director of Supported Accommodation Facility, Ms L.R., attend a meeting facilitated by the Board and develop an updated and specific personal care plan for the proposed represented person.
  - iii. That if no agreed plan is completed, the Registrar is to re-list the application for further hearing.
  - iv. The Board understands that the applicant will withdraw the application if a plan is reached that is agreed between the parties."
10. This 'agreement' between Mrs J.V. and Ms L.R. is also on file. The purported agreement states: "This Agreement does not bind the Guardianship and Administration Board in future proceedings." It also clearly acknowledges that Mrs J.V. is the person responsible for the proposed represented person.

11. The application for guardianship was withdrawn on 11 April 2005 as a consequence of the purported agreement being signed.
12. Also on file is a new application for guardianship dated 14 December 2007. That application asserts that Mrs J.V. has, in giving instruction to Dr Reynolds to withdraw antibiotics, breached the terms of the order/agreement reached in 2005. Ms L.R.'s interpretation of the agreement is that the "*order ... was established to allow home to seek and follow doctor's order to treat illness in home. Order allowed parent to stop all treatment if Mr I.V. was sent to hospital only.*"

**Telephone enquiries of Mrs J.V.:**

13. Mrs J.V. told the Manager of Investigations and Liaison (MIL) that she believes that she is acting in her son's best interests. She believes that he is suffering from the side effects of lithium, which is prescribed for the effects of bi polar disorder. She consented to the insertion of a naso-gastric tube but not to antibiotics. Her belief is that dying from pneumonia is less awful than dying from the side effects of lithium. In making her decision she had consulted Dr Barrenger at the hospital and Dr Reynolds. Ultimately she was satisfied that her instruction to refuse antibiotics was in her son's best interests. She feels that the applicant's attachment for her son goes beyond a professional interest and that her intervention in this matter amounts to interference. The proposed represented person is showing signs of healing regardless of the instruction not to administer antibiotics.

**Telephone enquiries of GP:**

14. Dr Reynolds stated to the MIL that he believes that Mrs J.V. as the person responsible has made the morally and ethically correct

decision. He believes that the applicant's motivation for the application arises from concerns about legal liability. He confirmed that the proposed represented person is improving in health and that the naso-gastric tube has been removed. He believed that the insertion of the naso-gastric tube was probably inserted as an excess of caution.

**Are there grounds for making a guardianship order?**

15. There appears to be no dispute that the requirements of section 20(1)(a) and (b) would be easily made out. However, it is not clear why the proposed represented person is *in need of a guardian* for the purposes of section 20(1)(c) as the area of decision making stated in the application is covered by the role of a person responsible who can consent to or refuse medical treatment.

16. Part 6 of the Act entitles a person responsible to consent to medical or dental treatment where a person with a disability is incapable of understanding the nature and effect of the proposed treatment. Section 4 of the Act defines a person responsible. Because the proposed represented person is over 18 years of age, his treating practitioner may obtain valid consent (which assumes also refusal) for medical treatment from the person responsible who is:

“one of the following persons, in order of priority: (i) his or her guardian; (ii) his or her spouse; (iii) the person having the care of the other person; (iv) a close friend or relative of the other person.” (emphasis added)

17. Dr Reynolds, one assumes, has taken instructions for medical treatment on the assumption that Mrs J.V. is the person responsible by reason of being a close relative.

18. It is important to note that section 4(4) states:

“A person who resides in a hospital, nursing home, group home, boarding-house or hostel or any other similar facility at which he or she is cared for by some other person is not, by reason only of

that fact, taken to be in the care of that other person and is taken to remain in the care of the person in whose care he or she was immediately before residing in the facility.”

19. For further clarification, section 4(5) states:

“(5) For the purposes of this section –

(a) ...

(b) a person is taken to be a close friend or relative of another person if the person maintains both a close personal relationship with the other person through frequent personal contact and a personal interest in the other person's welfare; and

(c) a person is taken not to be a close friend or relative if the person is receiving remuneration (whether from the person or some other source) for any services that he or she performs for the other person in relation to the person's care; and

(d) ...

(e) ...”

20. The clear intention of the legislators is that in a situation such as this, the remunerated carers of a residential facility do not assume the role of person responsible for a person with a disability, but that those who cared for the person prior to admission to a residential facility retain that decision making function. One assumes this is to prevent a conflict of interests for paid service providers.

21. What is also clear is that the appointment of a guardian will supersede Mrs J.V.'s authority as person responsible. *Prima facie* it appears from the MIL's report of her discussion with Mrs J.V. that Mrs J.V. has undertaken her task as person responsible in a diligent and conscientious manner and addressed all of the issues in section 43 of the Act. She has also made her own assessment of the principles in section 6, that is what is least restrictive for him, what is in his best interests and what his wishes might be if he could communicate them. Dr Reynolds is firmly of the belief that she has

made the correct decision. If a guardian were appointed and consented to the treatment with antibiotics but Dr Reynolds refused to prescribe or administer such medication, would the guardian then be impelled to search for a medical practitioner who would?

22. It appears that the persons who have authority in this situation are content that the correct decision was made. Such a scenario does not present any urgent need for the appointment of a guardian without a hearing.

**The status of the purported 2005 agreement and the order:**

23. The applicant believes that Mrs J.V. has breached an order of the Board and perhaps asserts this as a ground by which she has invalidated her role as person responsible. There is no breach of any order of the Board. The Board's "order" on 11 March 2005 was simply to allow for an adjournment in proceedings to facilitate negotiations. Those negotiations succeeded to the extent that the application was withdrawn.
24. The applicant also believes that the purported agreement has been breached. The purported agreement is extremely vague and, I believe, of little practical effect. At its highest, it records some conditions in which the staff members of Supported Accommodation Facility have been given general consent to treat the proposed represented person without direct consultation with the person responsible.
25. However, my *prima facie* view is that it cannot amount to a permanent assignment of rights to consent to or refuse treatment on behalf of the proposed represented person. Interpretation of agreements, and determination of whether they have been breached, is a matter for the courts but this agreement is not particularly relevant to the application at hand. Neither of the persons who

entered the agreement has any role in determining who is a person responsible. That is the role of the treating practitioner or, perhaps, the Board. Therefore, I am not certain that such an assignment (even if effective) would bind a medical practitioner in the exercise of his or her professional duty to seek appropriate consent.

**Are there grounds for urgency?**

26. Now that the proposed represented person's condition has subsided and he is recovering there are no grounds upon which it can be argued that the matter is urgent. In any event grounds for urgency were not properly established in the application.

**Conclusion:**

The application for the appointment of a guardian pursuant to section 65(2) is dismissed.

Anita Smith

PRESIDENT