GUARDIANSHIP AND ADMINISTRATION BOARD
HOBART

MR K.S.L.Q., on the application of MR S.K.T.

GAB NO. XXXX of 2007

REASONS FOR DECISION ON COSTS APPLICATION

Malcolm Schyvens (Chair)
Lindi Wall (Board Member)
Elizabeth Love (Board Member)

20 December 2007

Application for costs following review of enduring power of attorney and enduring guardianships – effect of inquisitorial process on normal rules of 'winners and losers'
Guardianship and Administration Act 1995 (Tas), s 80
Latoudis v *Casey* (1990) 170 CLR 534, *Hardman* v *Ward* [2004] TASSC 74, *Oshlack* v *Richmond River Council* (1998) 193 CLR 72

Background

1. Mr S.K.T., "the Applicant", lodged a request for an emergency order pursuant to section 65 of the *Guardianship and Administration Act 1995* ("the Act") dated 23 May 2007 and as a result of such application the President of the Board on 25 May 2007 issued an order that registered Power of Attorney no. PAXXXXX given by Mr K.S.L.Q. to Ms S.C. be suspended for a period of 28 days.

2. Mr S.K.T. made application to the Board by application dated 24 May 2007 for the Board to determine the need for ongoing guardianship and administration arrangements for Mr K.S.L.Q. to determine

whether to revoke or otherwise declare invalid any and all powers of attorney and appointments of enduring guardianship in respect of Mr K.S.L.Q..

3. A division of the Board conducted a hearing into the matter on 19 July 2007. The participants in that hearing were as follows:

Mr K.S.L.Q. – proposed Represented Person
Mr S.K.T. – Applicant
Ms S.C. – partner of proposed Represented Person
Mrs T.Q. – relative
Mr Q.Q. – relative
Ms H.Q. – friend
Mr H.B. (by phone) – Donee of Power of Attorney
Max McMullen (previous) – Solicitor for proposed Represented Person
Mr B.K. – relative of proposed Represented Person
Dr Paul Sheehan – Psychiatrist
Kevin Clarke – Public Trustee
Lisa Warner – Office of the Public Guardian
Brendan McManus – Solicitor Public Trustee
Beth Sharman – Solicitor for proposed Represented Person
Dr Trevor Hatten - Psychologist

4. At the commencement of the hearing on 19 July 2007, the Board indicated that the process of an application is determined by a hearing before the Division[1], and in accordance with the usual

[1] Schedule 2 Clause 2(3) – Section 11(3) *Guardianship and Administration Act 1995*

procedure of the Board, the Division had determined that proceedings would be inquisitorial and informal. By that determination, the Board altered the usual expectations from other forums of there being a 'winner' and a 'loser' in the proceedings as to the matter of costs.

5. Upon conclusion of the hearing, the Board made the following declarations and orders:

   (a) that the Enduring Power of Attorney registered no. PAXXXX dated 30 May 2005 made by Mr K.S.L.Q. appointing Mr H.B. as his attorney be revoked in all the circumstances in that it was determined not in Mr K.S.L.Q.'s bests interests for such Power of Attorney to be continued;

   (b) that the Enduring Power of Attorney registered no. PAXXXX dated 19 July 2006 made by Mr K.S.L.Q. appointing Ms S.C. as his attorney be declared invalid pursuant to section 33(2)(e)(ii) in that it did not comply with section 30(2)(b) of the Powers of Attorney Act 2000 in that the instrument was not witnessed by at least two attesting witnesses;

   (c) that the Public Trustee be appointed as Administrator of the Estate of Mr K.S.L.Q. and that such order remains in effect until 18 July 2010;

   (d) that an enduring guardian made by Mr K.S.L.Q. by an Instrument of Appointment dated 25 March 2004 appointing Ms E.Q. as his enduring guardian be revoked pursuant to section 34(1)(b)(i) of the Act;

   (e) that an enduring guardian made by Mr K.S.L.Q. by an Instrument of Appointment dated 19 September 2006

appointing Ms S.C. as his enduring guardian be revoked pursuant to section 34(1)(b)(ii) of the Act; and

(f) that the Public Guardian be appointed as a Represented Person's guardian until 18 July 2010.

Application for Costs

6. The Applicant indicated at the commencement of the hearing that he would be seeking a costs determination.

7. Upon the conclusion of the hearing the Board stated that any party wishing to make an application as to costs should do so within 14 days, being 2 August 2007.

8. Mr S.K.T. wrote to the Board by letter dated 10 August 2007 formally seeking order as to payment of costs.

9. Mr K.S.L.Q. submitted that the Board should decline to deal with the request for costs given the request was outside the 14 day period of the hearing.

10. The Board decided to entertain the application nonetheless given that the Applicant had clearly indicated at the hearing that he wished to apply for costs which was known to all participants to the hearing, and further, the 14 day time line for submissions requested by the Board was intended by the Board to produce finality to the matter in a timely manner not bar an application "out of time".

11. The relevant parties were advised by an officer of the Board that the division of the Board had decided to determine the matter as to costs by way of written submissions.

12. The Applicant and Mr K.S.L.Q. and parties associated with each then supplied written submissions as to the application and the Board is grateful for such submissions.

13. Upon consideration of the submissions the division has come to the conclusion that the circumstances of this matter do not justify the Board making order as to costs.

Reasoning

14. Section 80 of the Act provides:

> "where the Board is of the opinion that it is the case that there are circumstances which justify it in doing so, the Board may make such orders as to costs and expenses as the Board thinks fit".

15. Prior to the matter of *HDH (Costs) 24.10.05* (HDH), the Board had not been required to determine an application pursuant to section 80. Accordingly, such case is most useful in illustrating the appropriate exercise of the Board's discretion when faced with an application for costs and relevant paragraphs of such decision are reproduced below:

> "3. The Board accepts that the starting position for interpretation of section 80 is that 'costs follow the

event[2]' and that costs should be compensatory not punitive. We also note that, given the language of the statute, there are no absolute rules that govern how the Board exercises this discretion[3]."

"5. The behaviour of individual parties prior to and during the hearing does not alter the fundamental nature of the proceedings which were prepared and directed by the Board itself and therefore inquisitorial."

"9 The Board has no such jurisdiction, it only has jurisdiction (to remedy wrongful conduct) to promote the best interests of the person into the future. Therefore submissions that 'those who caused the situation should pay the costs' presume a capacity to determine causation that the Board does not possess."

"15 Many persons submit evidence and information to the Board. If expressing a view about whether there ought or ought not to be an order made for a person, a witness was exposed to a potential costs order, the Board's functions would be impaired. The submissions urged the Board to consider the objects of the Act in section 5. Clearly to expose witnesses to a potential award of costs in proceedings is contrary to those objects. The Board notes the decision in *Duke Eastern Gas Pipeline Pty Ltd* (2001) ATPR 41-827 and

[2] *Latoudis* v *Casey* (1990) 170 CLR 534 and *Hardman* v *Ward* [2004] TASSC 74
[3] *Oshlack* v *Richmond River Council* (1998) 193 CLR 72

the importance of not discouraging participation in the legal process and the assumption that the rule that 'costs follow the event' is most relevant to inter partes litigation."

"21 The suggestion that HDH should pay costs to parties for proceedings that were for his benefit alone, is abhorrent. HDH has been confirmed in the proceedings as being a person without decision-making capacity. He did not attend the proceedings and had limited, if any, understanding of them."

"22 Awarding costs against HDH is contrary to the Board's duty to protect the represented person's best interests and the principles in section 6. If the Board always decides in the best interests of a person, how then could the Board determine that that person is the 'loser' for the purposes of a costs application and the principle that costs follow the event? This is compounded by the reliance placed upon HDH wishes and the extent to which the Board attempted to carry them into effect."

"25 References in the submissions to estate litigation ignored that, in estate litigation, the deceased can have no future financial interest in the estate. There is clearly an incentive in the costs arrangements for estate litigation because the potential beneficiaries have an interest in keeping litigation costs at a

> minimum, such a incentive does not operate in this jurisdiction. "

16. The Board notes that the Applicant provided prior to hearing a voluminous amount of information and documentation in the main prepared by engaged solicitors. Whilst the level of preparation was commendable, it is a simple fact that it was unusually detailed given the nature of the application in comparison to like matters dealt with by the Board.

17. Interestingly, despite the level of cost of legal engagement incurred by the Applicant prior to the hearing, the Applicant was not legally represented at the actual hearing. Mr K.S.L.Q. was legally represented at the hearing and he advised both prior to the hearing and on the day to the Board's investigation officers that he felt the need to obtain such legal representation given the level of legal representation evident on the part of the Applicant prior to the hearing.

18. It should be stated at the outset that all participants to the hearing clearly annunciated a view that their involvement was purely seeking what was best for Mr K.S.L.Q. and there was no evidence before the Board to suggest otherwise.

19. Having said this, it could at first glance seem a simple step to avoid costs in favour of an Applicant who prima facie achieved at hearing the outcome sought of the Board. Such a conclusion would however be overlooking the very nature of the Board and its form of operation.

20. The Board does not form a decision based upon the merits of the case as presented by a traditional plaintiff bearing the responsibility of proving a claim and as then defended by the opposing party. The Board in its inquisitorial nature informs itself at a hearing as it sees fit, not bound by the rules of evidence, yet conforming with the principles of natural justice. Given this level of control being removed from parties, despite how similar such parties may resemble parties in an adversarial model, it would seem unjust in most circumstances to make one party responsible for another party's costs when such party had little control over the proceedings per se. Further, this inquisitorial role of the Board may be interpreted as a "reason connected with the case"[4] which operates to deny an order for costs favouring what might otherwise be seen as the successful party in respect to an application for costs.

21. There is no doubt that the Board conducted the hearing, despite the level of legal representation (both prior to and at the hearing) with the same level of informality and inquisitorial nature as the Board is chartered to conduct all hearings.

22. It seems wholly inconsistent to diminish the estate of Mr K.S.L.Q. by granting an application for costs by application of the "loser" v. "winner" analysis often associated with principles relating to costs when the overall consideration for the Board is to act in the best interest for Mr K.S.L.Q.. This inconsistency is magnified when one considers that by the very orders given by the Board in this matter illustrate that the Board concluded that Mr K.S.L.Q. was lacking

[4] McHugh J in Latoudis v. Casey at page 751

decision making capacity. It would be quite unpalatable to now effectively penalise Mr K.S.L.Q. for participating in a hearing with the outcomes that ensued given such a finding at the time of the hearing.

23. Of particular interest, the Board notes that whilst information was supplied from many parties during the course of what was an extended hearing for the Board, the most useful information deemed by the Board to assist in reaching a conclusion in Mr K.S.L.Q.'s best interests came from Dr Trevor Hatten.

24. Dr Hatten is a clinical psychologist who had treated Mr K.S.L.Q. over many years (on and off) and it was Mr K.S.L.Q. himself who introduced this witness and insisted that the Board speak to him, which the Board did by means of phone during the course of the hearing. To highlight this point is in no way intended to undermine or degrade the value of the information supplied to the Board prior to hearing by the Applicant to which this costs application has primarily been sought. Rather, it is to illustrate the inquisitorial nature of the Board and the fact that a witness introduced by a party which could traditionally to be interpreted as having assisted that party to become the "loser", in the circumstances, in fact assisted that very party in the overall scheme because the test of best interest is at play in the form of the Board and that not of competing interest.

Conclusion:

20. Accordingly the Board is not satisfied that the circumstances justify an award of costs in favour of any party or witness or against any

party or witness. Accordingly the witnesses and the parties who were represented should bear their own costs.

21. The Board does not believe that publication of this or any report of these proceedings is in the best interests of Mr K.S.L.Q.. However the statement of reasons canvasses many issues that may be of use for educational purposes and the Board will produce a de-identified version of the statement following its delivery.

Signed:

(on behalf of)
Malcolm Schyvens, Elizabeth Love and Lindi Wall