

**GUARDIANSHIP AND ADMINISTRATION BOARD
HOBART**

T. O. S.-N. on the application of U. S.-N.

GAB No. 2620 of 2008

REASONS FOR DECISION

Anita Smith (President)

Decision: 3 June 2008

Guardianship – capacity to make reasonable decisions – need for a guardian arose from detention in hospital without a mental health order – future accommodation options – eligibility of private guardian – conflict of interest because of joint ownership of property *Guardianship and Administration Act 1995*, ss 19, 20, 21

1. This is an application under section 19 of the *Guardianship and Administration Act 1995* (“the Act”) for appointment of a guardian.
2. The proposed represented person is known by her second name, O, and is 60 year of age. She is presently resident at the Royal Hobart Hospital (“RHH”) awaiting a more permanent placement in a suitable facility. Her daughter, U, was appointed as her administrator on 2 March 2007. She made a further application for appointment as a guardian on 10 April 2008.
3. The hearing was listed for 1 May 2008 but was adjourned on that occasion due to difficulties that staff at the RHH had in facilitating O’s attendance. It was reconvened on 13 May 2008 at the RHH. The following people attended (with reference to their role):

O S-N (Proposed represented person)

U S-N (Daughter, administrator and applicant)

Dr Warwick Ashley – (Consultant Psychiatrist)

Dr Robin Scheepers – (Medical Practitioner)

Liz Shepherd – (Nurse)

Michelle Denehey - (Community Options)

Margaret Colville – (Deputy Public Guardian)

Lee Perry – (Investigation and Liaison Officer GAB)

4. The Board had access to the GAB file for O which included materials for the administration application, but had particular reference to the documents listed in appendix “A”. The legislation relevant to the application is set out in appendix “B”.

Disability and Incapacity – Section 20(1)(a)&(b)

5. The application included a copy of a report completed by Dr Toby Croft, neuropsychologist, on 5 January 2007 which indicates that O experienced cerebrovascular episodes in late 2006 and states (in part):

“Recent neuropsychological testing, and the experience of allied health staff with RHH suggests that Mrs S-N is competent to handle her everyday finances but needs supervision and independent assistance for large decisions that have long-term implications given a current pattern of confabulation, poor verbal learning and unrealistic social and vocational judgment.”

And:

“I would expect Mrs S-N to struggle with: Social vocation and financial judgment of her own abilities appears poor, with consistent unrealistic (or confabulated) overestimation of skills and possibilities. Thus accurate estimations of herself suggest poor current insight and a high probability of making poor judgments to do with long term lifestyle decisions including financial and vocational initiatives. I think there is a high likelihood of failing socially, financially and occupationally without supervision and guidance.”

6. Dr Amy Rooke, psychiatry registrar, completed a pro forma Health Care Professional Report on 28 April 2008. She described O’s

disability as dementia and noted chronic alcohol abuse. Dr Rooke indicated that this disability resulted in O's recent memory, remote memory and capacity for new learning as "poor". She reported that O is unable to reliably make reasonable plans and follow them through, nor reliably determine cause and effect relationships. She is frequently prone to impulsive acts without reliable consideration of the consequences. Dr Rooke determined that O shows extremely poor judgment regarding accommodation and does not understand her current medical status.

7. Dr Scheepers and Dr Ashley attended the hearing. Dr Scheepers confirmed that it is O's inability to acknowledge the need for supported accommodation that renders her unable to make reasonable judgments about her future accommodation. Dr Ashley noted that O previously was a highly functioning woman but that she has lost those skills. This is also discussed further below with regard to a need for a guardian.
8. O's participation in the hearing confirmed all of the above in that on one hand she professed independence and proposed plans of living overseas but on the other was focussed on minor or irrelevant issues. The Board was satisfied that O has a disability and that disability renders her unable to make reasonable decisions about accommodation and the appropriate levels of support that she requires in such accommodation.

Need for a guardian – Section 20(1)(c)

9. When asked what her plan was for leaving hospital, O provided various responses. On one hand she wanted admission to Hobart Clinic for treatment for flatulence problems, on the other she wanted to return to her home in Southern Tasmania, without support, for a few days to sort some possessions, but she had been in hospital for 4

weeks even though there was no active treatment being given. It is clear that she is quite dependent upon others for a plan to leave but does not recognise that dependence or that such dependence would continue post-hospitalisation.

10. A range of accommodation options have been tried in recent months and failed. These included a trip to China, living with her elderly mother in Queensland, living in a Village Life community, admission to Hobart Clinic, hotels, a private rental unit but finally hospitalisation. Accommodation options have failed for various reasons, but some reasons include particular supported accommodation managers finding O's behaviour unacceptable when drinking.

11. There was a discussion at the hearing where all parties confirmed that the work involved in finding alternative accommodation is not the work of a guardian but a proper role for her family and social workers. A guardian may consent to alternative accommodation once found, but it is not the guardian whose task it is to generate options. However where O is considering at least two alternative temporary accommodation options (her house in Southern Tasmania and the Hobart Clinic) and neither are suitable, only a guardian might refuse such options and keep her in hospital unless powers can be exercised under the *Mental Health Act 1996*.

12. Presently, no *Mental Health Act* powers are being exercised with regard to O. She is currently considered by the RHH staff to be a 'voluntary patient'. However, RHH staff admitted that this is a misnomer for three reasons:

- (i) Based on all of the above reports, O lacks the capacity to make a reasonable decision about suitable temporary or

permanent accommodation (and therefore the requisite capacity for 'voluntariness'),

- (ii) Dr Ashley reported that if O did attempt to leave, the RHH would most likely respond by making her subject to a Continuing Care Order under the *Mental Health Act 1996*, and
- (iii) In any event O does not wish to remain in the RHH.

13. Dr Ashley also agreed that the prospects of the Mental Health Tribunal confirming a Continuing Care Order are very slim, as O's primary disability is a brain injury which is unlikely to meet the requisite definition of a 'mental illness'.

14. Therefore O is neither a 'voluntary patient' nor is she likely to be suitable as an 'involuntary patient' meaning that she is not afforded any of the checks and balances which might arise from either having capacity to advocate on her own behalf or the entitlements to review under the *Mental Health Act*. However it is clear that until another more suitable accommodation option is found, someone needs the authority to keep O in the hospital, to prevent her discharging to the range of unsuitable places that she mentioned in the hearing. Someone also needs authority to later to consent to suitable future accommodation options.

15. Such authority can only be provided by a person giving informed consent or a guardian on behalf of a person who cannot give informed consent. Therefore as a consequence of her incapacity and continued hospitalisation, the Board is satisfied that O needs a guardian.

16. In considering whether O's needs could be met by other means less restrictive of her freedom of decision and action, for the purposes of

section 20(2) of the Act, the Board takes into account the history of O's own decisions about accommodation, the fact that her daughter, mother and sister all live in Queensland so are not available to give immediate decision-making support and the need for monitoring of O's situation to ensure that she does not have a protracted stay at the RHH without authority. Such needs cannot be met other than through the appointment of a guardian.

17. In considering whether the appointment of a guardian is in O's best interests, for the purposes of section 20(3), the Board takes into account primarily the need for independent supervision of the decisions being made by the RHH care team which have had the effect so far of her being hospitalised for four weeks without her active or informed consent and would continue until other accommodation is found. I also take into account that when suitable accommodation is found it should involve a level of in-house support to monitor O's levels of alcohol consumption which can have a dangerous effect for her. It is in O's best interests that the next accommodation option is scrutinised by a guardian for the appropriate levels of support.

18. I am not satisfied that a full guardian is required for the purposes of section 20(4) and therefore the order will be limited in the terms set out below which is the least restrictive of O's freedom of decision and action in accordance with section 20(5). One aspect of this was to consider the term of the guardianship order. While it appears that finding a suitable accommodation option may take some time, the Board ordered a review the appointment at 18 months regarding the decisions made about accommodation and whether a need for continued decisions remained.

Section 21 – Persons eligible as guardians

19. The applicant, U, had nominated herself as guardian but also indicated that she would not object to the appointment of the Public Guardian.

20. The Board was satisfied that U could meet all of the requirements of section 21 of the Act except section 21(1)(b) which states:

“The Board may appoint as a full guardian or limited guardian any person who is of or over the age of 18 years and consents to act as guardian if the Board is satisfied that that person ... (b) is not in a position where the person's interests conflict or may conflict with the interests of the proposed represented person”

21. U recently purchased a half share in the house in Southern Tasmania from the estate of O's former partner C Q, meaning that O and U are co-owners. Because one of the accommodation options that O discusses is to return to the house in Southern Tasmania whether temporarily or permanently this creates a conflict in the following ways.

(i) U, as administrator, would have to determine any financial arrangements for O's residency such as payments of rates, taxes, insurance, electricity and telephone but as co-owner might be in a position of charging board for such residence.

(ii) U objects to that option on the basis that it is too remote and is completely unsupported, but an independent observer may be concerned that her objection was based upon personal financial considerations rather than O's best interests.

22. Therefore the Board considered it appropriate to appoint the Public Guardian instead. The Deputy Public Guardian attended the hearing and said:

“... but I mean from what I can understand I’m obviously, although O wants to go to Southern Tasmania, Southern Tasmania is probably not a good option for you to stay for any time. That’s not to say that you couldn’t go down there but maybe if – if a guardian was put in place to say ‘Well look I’m sorry but at the moment you need to stay here while people look to see what is an appropriate option for you’. I know that you’re not going to like that sort of – that sort of option, but we need to protect you.”

23. The Board inferred from this that the Public Guardian accepted appointment for the purposes of securing supported accommodation. The Board was satisfied that the Public Guardian meets the criteria in section 21 for appointment as a limited guardian.

THE BOARD ORDERS

1. That Public Guardian be appointed as the represented person’s guardian.
2. That the powers and duties of the guardian are limited to decisions concerning both temporary and permanent accommodation for the represented person and decisions regarding the level of support required by the represented person in such accommodation.
3. That a review of the order be held at the expiration of 18 months.
4. That this order remains in effect until the 12 May 2011.

DATED this 13th day of May 2008.

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Anita Smith
PRESIDENT

Reasons delivered 3 June 2008

APPENDIX "A"

Application:

Application for guardianship by U S-N dated 10 April 2008

Pro forma Health Care Professional Report completed by Dr Amy Rooke dated 28 April 2008

Evidence from previous proceedings:

Administration order dated 2 March 2007

Decision sheets from a review by the Board of the administration order on 14 March 2008

Other reports and correspondence:

Report by Dr Vuocolo dated 25 March 2008 (obtained by the proposed represented person)

Email from applicant dated 18 April 2008

Internal GAB memo seeking early hearing date

Email from Michelle Denehey, Community Options South

APPENDIX “B”

Legislation:

The requirements for appointment of a guardian are contained within section 20 and 21 of the Act:

20. Guardianship order

- (1) If the Board, after a hearing, is satisfied that the person in respect of whom an application for an order appointing a guardian or an order appointing an administrator is made—
 - (a) is a person with a disability; and
 - (b) is unable by reason of the disability to make reasonable judgements in respect of all or any matters relating to his or her person or circumstances; and
 - (c) is in need of a guardian—the Board may make an order appointing a full or limited guardian in respect of that person and any such order may be subject to such conditions or restrictions as the Board considers necessary.
- (2) In determining whether or not a person is in need of a guardian, the Board must consider whether the needs of the proposed represented person could be met by other means less restrictive of that person's freedom of decision and action.
- (3) The Board must not make an order under subsection (1) unless it is satisfied that the order would be in the best interests of the proposed represented person.
- (4) The Board must not make an order appointing a full guardian unless it is satisfied that an order for limited guardianship would be insufficient to meet the needs of the proposed represented person.
- (5) Where the Board makes an order appointing a limited guardian in respect of a person the order to be made is that which is least restrictive of that person's freedom of decision and action as is possible in the circumstances.
- (6) Two or more guardians of a person, each with different functions, may be appointed under one or more limited guardianship orders.

21. Persons eligible as guardians

- (1) The Board may appoint as a full guardian or limited guardian any person who is of or over the age of 18 years and consents to act as guardian if the Board is satisfied that that person –
 - (a) will act in the best interests of the proposed represented person; and
 - (b) is not in a position where the person's interests conflict or may conflict with the interests of the proposed represented person; and
 - (c) is a suitable person to act as guardian of the proposed represented person.
- (2) In determining whether a person is suitable to act as a guardian of a represented person, the Board must take into account –

- (a) the wishes of the proposed represented person so far as they can be ascertained; and ...
- (d) whether the person proposed as guardian will be available and accessible to the proposed represented person so as to fulfil the requirements of guardianship of that person.

Once appointed the following provision regulates the exercise of the guardian's authority:

27. Exercise of authority by guardian

- (1) A guardian must act at all times in the best interests of the person under guardianship.
- (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; and
 - (b) as an advocate for that person; and
 - (c) in such a way as to encourage that person to participate as much as possible in the life of the community; and
 - (d) in such a way as to encourage and assist that person to become capable of caring for himself or herself and of making reasonable judgments relating to his or her person; and
 - (e) in such a way as to protect that person from neglect, abuse or exploitation.