

**GUARDIANSHIP AND ADMINISTRATION BOARD
LAUNCESTON**

Mr WKX on the applications of Mrs BX (his Mother) and Mr KMX (his Father)

GAB No. XXXX of 2004

REASONS FOR DECISION

[*P Whyte*] (Chair)
[*S Hill*] (Board member)
[*R Lester*] (Board member)

[*22 October 2004*]

Guardianship – disputes about proposed represented person’s care, education, development and relationships between family members and with support agencies – need for guardian to consult impartially with all parties

Guardianship and Administration Act 1995, ss 19, 21

1. Mr WKX was born on XX XXXX 19XX, he is the son of Mrs BX and Mr KMX. Following their separation in 1995 the Family Court of Australia made orders on 31 January 1996 that Mr KMX and Mrs BX have joint guardianship of WKX, that Mr KMX have sole custody and Mrs BX have unrestricted access.
2. On 1 March 2000 WKX was involved in a pushbike accident in which he sustained severe head injuries and as a result he now suffers from ongoing acquired brain injury. Following discharge from hospital after his accident WKX was accommodated in a Motor Accidents Insurance Board (MAIB) residential unit. He currently resides at an Accommodation Facility in Northern Tasmania where care is provided to him under the auspices of Anglicare. He attends College three days per week. WKX communicates by means of an alphabet board.

3. In September 2000, following allegations of sexual abuse by WKX's father, Child and Family Services (CFS) became involved and various applications were made under the *Children, Young Persons and Their Families Act, 1997*. It is to be noted that the allegations of sexual abuse were not substantiated but over the ensuing almost four years various care and protection orders were made in respect of WKX out of concern for medical/health and educational decisions being made by Mr KMX. These orders initially placed WKX under the sole guardianship of the Secretary until he attained the age of 18 years, subsequently they placed him under the joint guardianship of the Secretary and Mrs BX and in June 2004 the order was varied yet again placing WKX under the sole guardianship of his mother.
4. Mrs BX and Mr KMX have now both made separate applications pursuant to section 19(1) of the *Guardianship and Administration Act 1995* (the Act) for appointment as guardian of WKX. Mrs BX's application was received on 22 June 2004, at which time WKX had not attained 18 years of age.
5. On 20 July 2004, 3 days after his eighteenth birthday the Board made an emergency guardianship order on the application of Jan Wallace of Anglicare, pending hearing of Mrs BX's application. That order, appointing the Public Guardian, remained in force for a period of 28 days. On 26 July 2004 Mrs BX wrote to the Board withdrawing her guardianship application. On 3 September 2004 the Board received a further application for an emergency guardianship order from Jan Wallace of Anglicare. This application made allegations of possible sexual abuse of WKX by his father. An emergency order was made that day and was renewed for a further 28 days on 30 September 2004. Mr KMX lodged his application for Guardianship on 22 September 2004. Mrs BX's application was reinstated.

6. The applications were heard simultaneously in Launceston on Monday 22 October 2004. Notices of the hearing dated 5 October 2004 had been sent to the following interested parties:

- Mr WKX - Proposed Represented Person
- Mrs BX – Applicant Mother
- Mr KMX – Applicant Father
- The Public Guardian - Emergency Guardian
- Ms R Lewandowski - MAIB
- Mr Julian Eaves - Advocacy Tasmania
- Ms ND – Anglicare

7. The hearing was attended by the following :

- Mr WKX - Proposed Represented Person
- Mrs BX – Applicant Mother
- Mr KMX – Applicant Father
- Mr Kevin Preece – Public Guardian
- Ms Rachael Lewandowski - MAIB
- Mr Phillip Livinstone – MAIB
- Mr Chris Bartlett- solicitor for MAIB
- Ms EB – Manager of Accommodation Facility
- Ms Jan Wallace – Anglicare

Leave was granted to Mr Bartlett to appear on behalf of MAIB.

8. In support of Mrs BX’s application the Board received:

- a completed standard application form
- a health care professional report dated 16 June 2004 from Dr A J Hutchinson.
- Documents pertaining to the various care and protection orders made during the period September 2000 to June 2004.

9. In support of Mr KMX's application the Board received :
- a completed standard application form
 - hand-written submissions from Mr KMX enclosing newspaper cuttings, a report from Dr Andrew Jackson dated 30 October 2000, and various emails sent between a Ms DH and a Ms NC.
10. In addition to the documents referred to above the Board also received the following documents:
- a Neuropsychology report dated 11 October 2004 by Mr James Drury
 - a copy of the Request for Emergency Order dated 3 September 2004
 - Copy correspondence from Anglicare to the Public Guardian dated 10 September and 15 September 2004 respectively
 - Report to the Board dated 19 October 2004 from the Public Guardian
 - Written submissions dated 20 October 2004 from Acquired Injury Support Services (Anglicare)
11. Section 20(1) of the *Guardianship and Administration Act 1995* (the Act) provides for the appointment of a guardian for a person where the Board is satisfied that the person in respect of whom the application is being made is:
- a person with a disability
 - unable by reason of that disability to make reasonable judgements in respect of all or any matters relating to his or her person or circumstances ; and
 - is in need of a guardian
12. Dr Hutchinson's report dated 16 June 2004 stated that he was WKX's regular medical attendant, that WKX suffered from Acquired Brain Injury as a result of an accident. That the disability had been evident for 7 years and the prognosis was "Permanent Brain Injury."

13. Dr Hutchinson expressed the view that although orientated to person, place, and time; able to understand and follow simple instructions; and to communicate through sign language; WKX was not capable of making reasonable plans and following them through; could not reliably determine cause and effect relationships; was prone to impulsive acts without consideration of the consequences; and susceptible to undue influence of others. Dr Hutchinson concluded that WKX had no understanding or ability to manage financial matters and no capacity to make reasonable decisions in relation to lifestyle matters.

14. Mr Drury's report dated 11 October 2004 provided an overview of WKX's daily activities. In relation to his cognitive functioning he observed that there had been no significant change since February 2003, that he continued to demonstrate limited abstract reasoning but did have basic verbal new learning skills with repetition. He stated that although WKX is generally orientated in person and place he is unable to correctly indicate his age. Mr Drury expressed the view that WKX did not have adequate mental competence to make rational and responsible decisions sufficient to recognise the implications of his decisions.

15. The Board was satisfied on the basis of the reports from Mr Hutchinson and Mr Drury that WKX suffers from a disability, namely acquired brain injury, as a consequence of which he is unable to make reasonable decisions about lifestyle issues. Further there was no dispute as to these matters by the parties present at the hearing and indeed both Mr KMX and Mrs BX in their respective applications state that WKX suffers from brain damage and requires the assistance of a guardian, the issue for each of them was who was the appropriate person to be appointed guardian.

16. The Board cannot appoint a guardian in respect of a person however unless it is satisfied that that person, in addition to having a disability by reason of which

they are unable to make reasonable decisions about lifestyle issues, is in need of a guardian. Both Mr KMX and Mrs BX in their respective applications stated that WKX required the assistance of a guardian in relation to a full range of lifestyle matters including accommodation, education, training, employment, recreation, medical, and dental treatment.

17. It was clear to the Board from Mr KMX's application and written submissions that he has a number of concerns about the care being provided to his son by Anglicare. His concerns ranged across a broad range of issues including: the transport of WKX in a vehicle not fitted with seat belts; the poor quality of food; failure to restrict visitors who WKX does not want to see; allowing his mother to take him home when he says he does not want to go; being taken to school when he repeatedly says he does not wish to attend; and harassment by an Anglicare carer. Mr KMX reiterated these concerns at the hearing. In particular he was concerned that WKX's wishes were not being taken into account by his carers when decisions were being made. Mr KMX expressed the view that WKX should be able to make choices and that his wishes should be adhered to for example in relation to matters such as whether he attended school, was visited by his mother or undertook the rehabilitation programs recommended by his carers.

18. Ms Jan Wallace from Anglicare submitted to the Board that WKX's carers were experiencing difficulty in maximising WKX's care and rehabilitation in the face of interference and disruption in his daily routine caused by Mr KMX. She explained that Mr KMX was frequently heard to undermine and contradict proposals and arrangements put in place for WKX's benefit by Anglicare – whether in relation to attending school, seeing his mother, going on outings with his mother or providing him with inappropriate food. She explained that it had become necessary to write to Mr KMX and subsequently draw up “visitation agreements” limiting the time Mr KMX spent with WKX and specifying codes of

behaviour; and restricting him from giving WKX unsuitable food or removing him from the premises.

19. Ms Wallace explained that one of the biggest problems being encountered by Anglicare was in managing the respective parents' visiting rights. She expressed the view that no-one at the Accommodation Facility was trying to stop WKX from seeing either parent but that it was important that they be able to set up some regime whereby certain times were allocated to each parent to be with WKX. She was concerned that this would require an independent guardian to ensure that WKX had the opportunity to spend valuable time with each of his parents. Ms Wallace provided the Board with a copy of her written submissions to which are annexed copies of the correspondence and visitation agreements.
20. Mrs BX told the Board that she had been happy to have Mr KMX involved in WKX's care to the "greatest extent possible". She explained that she worked full time and had not been trying to stop him from having contact with WKX but was concerned with his interference in the rehabilitation and care plan set up for WKX by his carers and had become even more concerned when WKX had started saying that "things had been happening" with his father. Mrs BX did not expand on this but it was clear to the Board that she was referring to allegations of impropriety that were covered in the written materials provided to the Board and most particularly in Mr KMX's written submissions.
21. The Board also received a report from Mr Kevin Preece, from the Office of the Public Guardian, the contents of which he re-iterated at the hearing. Mr Preece stated that in the time since he had been acting as WKX's guardian he had primarily been involved in ensuring that the programmes arranged by Anglicare for WKX's care and development proceeded without interference from Mr KMX. Mr Preece expressed concern about the conflict between Mr KMX and Mrs BX

and the concerns Anglicare had in relation to Mr KMX's "unco-operative attitude to their programmes for WKX."

22. Mr Preece advised that he had also been involved in arranging a police investigation into allegations of impropriety on the part of Mr KMX contained in the request for Emergency Order dated 3 September 2004 – and to restrict his access to WKX. Mr Preece advised the Board that following the police investigation he had been advised that these allegations had not been substantiated and related to an earlier incident which had not been proved and that there was no new issue to be pursued. The Board did not consider it necessary to consider these issues further nor to make any findings of fact about those allegations.
23. The Board was satisfied that although WKX currently appears to be settled at the Accommodation Facility, there are many aspects of his day to day life that require co-ordination and co-operation of all parties involved. It was clear to the Board that there is considerable dispute as to what is best for WKX in relation to his care, education, development and relationships and in order to resolve these issues there was a need for a guardian to be appointed to consult with experts and interested parties in order to ascertain what is in WKX's best interests and make decisions accordingly.
24. In reaching this conclusion the Board considered whether there was a less restrictive way of meeting WKX's needs but was satisfied, given the divergence of opinions as to WKX's best interests and given the level of conflict and dispute between WKX's carers and family members, that a cohesive and collaborative approach was necessary which would only occur with the appointment of a guardian.

25. The next issue for the Board to determine was who would be suitable to act as a guardian for WKX. Section 21 of the Act provides that in considering this question the Board may appoint a person as a guardian if they are satisfied that the person:

- will act in the best interests of the person;
- is not in a position where the person's best interests conflict or may conflict with the interests of the proposed represented person; and
- is a suitable person to act as guardian.

the Board is also required to take into account the wishes of the person and the desirability of preserving existing family relationships.

26. Mr KMX submitted that although he respected Mr Preece, he did not believe he was suitable as WKX's guardian as he could not provide WKX with the personal love and attention of a father. Mr KMX expressed the view that if the Public Guardian was appointed there would be only confusion, he said it would be like appointing a committee and that committees never achieve anything. He was of the opinion that WKX needed one person to take care of him who knows all the things he needs – he said he believed he was that person. Mr KMX told the Board that he and WKX had a 4 year plan – a vision of WKX going to the Olympics.

27. When asked how he would conduct WKX's guardianship if he were to be appointed and in particular as to the extent that he would involve Mrs BX and Mr KMX indicated that he favoured an inclusive form of approach. In his written application he states that even as a sole parent he encouraged his children to maintain a relationship with their mother and that it would be his desire for WKX to maintain relationships he wishes to. The Board notes however that much of Mr KMX's criticism of the current care regime relates to the failure by Anglicare to prevent certain visitors from seeing WKX and in particular to prevent his mother from taking him on outings contrary to his expressed wishes.

28. Mr KMX stated that WKX was well able to express his likes and dislikes and that as such every detail of his care should be discussed with him and as far as possible his wishes should be adhered to. He indicated that if he were appointed guardian he would be doing this. That if WKX did not wish to go to school, he should not have to go to school; if he did not wish to see his mother, he should not have to see her; if he did not wish to participate in a particular aspect of his rehabilitation program, he should not have to participate.
29. Mrs BX stated that she would like to be appointed as WKX's guardian, she said she had been appointed his sole guardian until he attained the age of eighteen and that she wished to continue in that role. In her application she expressed concerns about the difficulty of maintaining the current rehabilitation and care plan that had been put in place at the Accommodation Facility in the absence of being appointed guardian and at the hearing she re-iterated that this needed to continue. She explained that if she was appointed guardian she would not try to stop Mr KMX from having contact with WKX. She said however that she worked full-time and had other children and did not have a problem with the Public Guardian being appointed.
30. Mr Kevin Preece told the Board that if the Public Guardian was to be appointed as WKX's guardian he would approach the role from the point of view of what could be done to assist WKX in the future to maximise his rehabilitation, socialisation and to address his emotional needs rather than looking back into anything that might have occurred in the past. He advised that decisions would be made in consultation and conjunction with WKX, his carers and both his parents. He said there were so many people involved in WKX's life he saw his role almost as mediator between all interested parties.

31. Ms Wallace of Anglicare stated that her experience was that a lot of WKX's discussion occurred "in the moment" that he would make comments about what he wanted to do and who he wanted to see depending upon who he was with and how he was feeling at that particular moment. She said that they were looking to establish some guidelines and structure in WKX's life at the Accommodation Facility as opposed to an ad hoc arrangement determined by WKX's whims. She said that things had improved in that regard since the appointment of the Public Guardian and stated that if either parent were guardian she believed it would be very difficult to maintain that structure.
32. Mr Bartlett on behalf of MAIB submitted that his client's concern was in relation to the conflict between WKX's parents, he commented that whilst he did not doubt that each of Mr KMX and Mrs BX had WKX's best interests at heart his client was concerned that the conflict between the parent's was impacting adversely upon what was being undertaken at the Accommodation Facility. Mr Bartlett submitted that the Board should consider the recommendations made by Mr Drury in his report that an independent administrator be appointed on behalf of WKX. Mr Bartlett also submitted that the Board may wish to consider whether there was a need to appoint an administrator for WKX.
33. Mr KMX expressed concern that he had not been provided with a copy of Mr Drury's report prior to the hearing. He was offered a copy of the report at the hearing but declined on the basis that he did not have the time to read it. Mr KMX was assured that the question of who was appointed as administrator and whether it was a private individual or the Public Guardian was a decision for the Board and that the Board would not be attaching any weight to Mr Drury's recommendation in relation to that question.
34. The Board attempted to ascertain from WKX what his wishes were in relation to the application. It is clear he had difficulty in communicating in the hearing room

environment however there was no doubt that he is fond of both parents. He indicated with the assistance of his alphabet board that he liked his mother. He indicated that he enjoys time with his father. He also indicated that he enjoyed school and particularly liked art and music. He indicated with a “thumbs up” sign that that he liked Kevin Preece. WKX also indicated that he was keen to leave the hearing.

35. From the evidence before it the Board formed the view that it was in WKX’s best interests that decisions about his future care and ongoing rehabilitation and relationships should be made through a process of consultation with all parties currently involved in his care and rehabilitation, including his carers, health care professionals, both his parents and in particular WKX. The Board was also of the view that it was in WKX’s best interests that as far as possible WKX’s relationship with both his parents should be encouraged and nurtured.
36. Whilst the Board accepted that each of the applicant’s believed that they would act in WKX’s best interests the Board was not satisfied that this would in fact be the case. In particular the Board was concerned that in the past neither parent has been inclusive of the other in making decisions about WKX’s future and the Board was not satisfied on the balance of probabilities that that situation would change if either were to be appointed guardian.
37. In relation to Mr KMX the Board was particularly concerned about his belief that all WKX’s wishes should be strictly adhered to regardless of the impact those decisions may have on his future development and relationships. Whilst the Board has no doubt about the love and devotion Mr KMX has for his son and supports the notion that at the very least WKX should be consulted in relation to decisions being made about his future, the Board is firmly of the view that this needs to be tempered in light of the accepted evidence that WKX lacks capacity

to make reasonable decisions about such matters and is easily influenced by others.

38. In this regard the Board was concerned that if Mr KMX were to be appointed guardian, recommendations by his carer's as to rehabilitation programmes, education and the importance of continued contact with Mrs BX would be disregarded if they did not conform to WKX's wishes at any particular time. The Board accepts the evidence presented by Ms Wallace that WKX requires structure in his life, and that whilst it is important that WKX's wishes be taken into account this should not occur to the detriment of that basic structure.
39. The Board was satisfied that the divergent opinion between the two parents as to WKX's rehabilitation and ongoing care arrangements the level of conflict and competing interests of both applicants apparent from their opposing applications and submissions would place them in a position which would conflict with WKX's best interests. The Board was satisfied that WKX has a genuine affection for both his parents and that it important that existing family relationships be preserved and that he not be denied ongoing contact with either of them.
40. The Board was satisfied on the evidence presented to it that in accordance with the provisions of section 21 (1) of the Act the Public Guardian was the appropriate appointment as guardian. It was clear the Public Guardian will act in WKX's best interests, is not in a position where his interests conflict with WKX's interests and is a suitable person to act as guardian. In relation to matters set out in Section 21(2) it was apparent that WKX liked Mr Preece who is the current incumbent of that position and over the period of the two emergency orders a level of rapport appeared to have been achieved. Further the Board is satisfied that the appointment of an independent person as Guardian is most likely to preserve existing family relationships.

THE BOARD ORDERS

1. That the Public Guardian be appointed as the represented person's guardian
2. That the powers and duties of the guardian be those conferred by division 3 of part 4 of the Guardianship and Administration Act 1995
3. That the order remains in effect until 21 October 2007

Philippa Whyte
CHAIR