



HUMAN RIGHTS

DECISIONS BULLETIN

for the period 01 August 2008 - 31 August 2008

This Bulletin contains summaries of all written reasons for decisions published by the Tribunal in the Human Rights stream for the period 01 August 2008 - 31 August 2008. The full text of decisions and reasons can be found on the Tribunal's website at www.sat.justice.wa.gov.au. If you would like the monthly bulletin emailed to you directly, please enter your email address and details at our subscription page.

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GUARDIANSHIP AND ADMINISTRATION ACT 1990 (WA)

PUBLIC TRUSTEE AND KMH [2008] WASAT 171
05 AUGUST 2008
MS S GILLETT (SENIOR SESSIONAL MEMBER)

Administration - Presumption of capacity - Mental disability

An application was made by the Public Trustee for the appointment of an administrator for KMH, an eighteen-year-old girl who was the sole beneficiary of her mother's estate. The applicant submitted that KMH might lack capacity to deal with her substantial inheritance due to the effects of past substance abuse, concerns as to possible mental health problems, and an inability to withstand demands from others wishing to obtain access to her monies.

KMH told the Tribunal that she wished the Public Trustee to manage her inheritance as she was concerned that she would "blow all of the money". In the absence of any medical evidence that KMH had a mental disability, the Tribunal adjourned the hearing of the application in order to allow for an investigation by the Public Advocate.

After hearing from the Public Advocate's representative and allowing further time for medical reports to be obtained, the Tribunal dismissed the application for administration on the ground that KMH did not have a mental disability which rendered her unable to make reasonable judgments in respect to her estate. Whilst the Tribunal appreciated KMH's considerable vulnerability as a very young adult living independently in the

community and connected to others involved in illicit drug use, the requirements for the making of an administration order were found not to be satisfied.

RC [2008] WASAT 180

11 AUGUST 2008

MS F CHILD (MEMBER), DR G HAMILTON (SENIOR SESSIONAL MEMBER), MS S GILLETT (SENIOR SESSIONAL MEMBER)

Guardianship and Administration - Review of orders - Represented person suffering acquired brain injury as a result of a stroke - Diagnosis of life-threatening illness - Need for orders - Continuing conflict between the adult children and the partner of the represented person - Wishes of the represented person - Independent decision-maker needed to make personal decisions - Public Advocate appointed limited guardian - Son appointed administrator with directions for financial support of the represented person and his partner

On review of orders made three months previously for an elderly man suffering acquired brain injury as a consequence of a stroke, the Tribunal reappointed the Public Advocate as guardian to make personal decisions, including where he was to live and the contact he should have with others, and to give consent to medical treatment and services on his behalf.

The Tribunal decided that an independent guardian was needed because of continuing conflict between the adult children of the man and his partner, and the risk that the conflict would impact on the decisions made about his care and treatment.

The Tribunal confirmed the appointment of the adult son of the man as the administrator, as the son was familiar with the management of the estate, which included a working farm. The Tribunal gave the administrator directions regarding the financial support of the man and his partner.

JC AND BP [2008] WASAT 184

19 AUGUST 2008

MS J TOOHEY (SENIOR MEMBER), MS M JORDAN (SENIOR SESSIONAL MEMBER), DR D STEPNIAK (SENIOR SESSIONAL MEMBER)

Guardianship - Review of order appointing Public Advocate limited guardian - Application by daughter to be appointed - Application opposed by siblings - Continuing conflict about where the represented person should live - Whether applicant suitable to be appointed guardian - Difference between suitability as carer and suitability as guardian - Views and wishes of the represented person - Whether in represented person's best interests for applicant to be appointed

The applicant sought review of an order appointing the Public Advocate limited guardian for her mother, BP. The Public Advocate had decided that BP should continue to live in a nursing home in a country town some distance from the applicant; the applicant maintained her mother wanted to live with her and that it was in her best interests to do so.

Against a background of long-standing conflict with the applicant, BP's three other adult children opposed the application, maintaining their mother wished to remain where she was and that it was in her best interests to do so.

The Tribunal accepted that BP had throughout the proceedings expressed the wish to live with the applicant. However, in light of evidence from her doctor about the extent of her cognitive impairment, and evidence from her other children, the Tribunal was not satisfied that her wishes as stated were a reliable indication of what her wishes would have been had she not been impaired, or that they outweighed other considerations of her best interests.

The Tribunal accepted that the applicant, who had nursing qualifications, could provide care for her mother at home, although it doubted that such an arrangement was sustainable long-term. However, it was not satisfied, in all the circumstances, that the applicant was a suitable person to be appointed guardian.

The Tribunal was not satisfied that the applicant appreciated sufficiently the obligations of a guardian. Despite her good intentions towards her mother, the Tribunal was not satisfied that she would set aside her long-standing conflict with her siblings, her fixed ideas about her mother's needs and wishes, and her own need to care for her mother, and act in her best interests within the meaning of the *Guardianship and Administration Act 1990* (WA).

None of BP's other children proposed themselves as guardian because of the continuing conflict with the applicant. The Tribunal found that it was in BP's best interests to have an independent guardian and confirmed the appointment of the Public Advocate.

PJB [2008] WASAT 190
22 AUGUST 2008
MR J MANSVELD (MEMBER)

Guardianship and administration - Enduring power of attorney - Whether an attorney has a right to access a copy of a will obtained by the Tribunal in respect of person for whom an application has been made and determined under the *Guardianship and Administration Act 1990* (WA) - The application for access to the will decided pursuant to s112(4) of the *Guardianship and Administration Act 1990* (WA) - Competing interests and tensions in the operation of s112(4) of the *Guardianship and Administration Act 1990* (WA) - People who provide information to the Tribunal in respect of applications under the *Guardianship and Administration Act 1990* (WA) should have confidence that the information will not routinely find its way into other arenas of conflict - The Tribunal is not the appropriate place to seek access to a will

An application was made by CJS, son of PJB, to have access to a copy of her will lodged with the Tribunal in 2006 in respect of an application for guardianship for PJB. The will had been provided by the former solicitors for PJB upon a request routinely made at the time by the Tribunal when an application was made under the *Guardianship and Administration Act 1990* (WA). The practice of requesting a copy of the will of a person for whom an application has been made has now ceased.

The former solicitors for PJB had submitted at the time of the guardianship application that the will was being provided to the Tribunal as a privileged and confidential document and should not be made public.

CJS made the application in his role as attorney for PJB under an enduring power of attorney executed by her in 2005. He submitted that he was entitled to have access to the will in his authority as attorney for PJB. He also expressed his concerns that PJB's estate was not being managed in her best interests and required protection. He wanted access to the will as it would assist him in ascertaining PJB's interests and intentions with respect to her estate.

The former solicitors for PJB submitted that the application to have access to the will was not for the purposes of any application then before the Tribunal and s 112(4) could not apply. It was also submitted that a will was not relevant to the exercise of the powers of an attorney under an enduring power of attorney and therefore there was no basis for its disclosure.

The Tribunal decided not to allow CJS access to the will. It was therefore not necessary to consider whether an attorney is entitled, by virtue of their role as attorney, to such a document.

The Tribunal relied upon the decision of the Full Board of the former Guardianship and Administration Board in **MB** [2004] WAGAB 25. It found that there were competing

interests and tensions inherent in the operation of s 112(4). It was a matter of judgment in any particular case as to how the discretion available to the Tribunal under s 112(4) should be exercised.

The Tribunal decided that what must be preserved was the confidence of the public that in providing the Tribunal with information that might be relevant to proceedings under the *Guardianship and Administration Act 1990 (WA)*, the information would not routinely find its way into other arenas of conflict. Whether or not CJS, as attorney for PJB, was entitled to her will, the Tribunal was not the appropriate place to seek access to it.

**EW [2008] WASAT 195
27 AUGUST 2008
MS D DEAN (MEMBER)**

Section 86 application by represented person to review administration and guardianship orders - Capacity of the represented person - Represented person with acquired brain injury - Represented person with mental illness - Need for an order - Best interests of the represented person - Public Trustee confirmed as administrator - Public Advocate confirmed as guardian

In 1991, EW, the represented person, suffered a brain haemorrhage leaving her with significant cognitive impairment. She was subsequently diagnosed with Bipolar Affective Disorder which further compromised her cognitive functioning.

EW had been married three times and had four children from her first two marriages. From the time of her brain haemorrhage she had little or no contact with her children.

In 1993, the then Guardianship and Administration Board made orders appointing the Public Advocate plenary guardian and the Public Trustee plenary administrator of the estate of EW.

In 1995, EW married for the third time to a man who provided the care she needed to remain living safely in the community. Some months after the marriage the guardianship and administration orders were revoked.

As a result of the findings of the Guardianship and Administration Board that her husband was drinking to excess, leaving her alone for long periods, physically abusing her and mismanaging her finances, new guardianship and administration orders were made in 2003, again appointing the Public Advocate plenary guardian and the Public Trustee plenary administrator of the estate of EW. These orders were to be reviewed in September 2008.

In December 2007, EW applied to the State Administrative Tribunal for review of the guardianship and administration orders stating as her major reason the fact that the guardian had taken out a violence restraining order against her husband who, as a result, no longer lived with her. EW said she wanted the guardianship and administration orders revoked so her husband could return to live with her.

The State Administrative Tribunal accepted the evidence provided at the hearing that EW was a person for whom orders could be made and that she continued to be in need of a guardian and an administrator. The orders appointing the Public Advocate and the Public Trustee were confirmed.

The guardianship order was confirmed for two years with the expectation that if the husband addressed his drinking and anger management problems and was able, and willing, to resume his role as carer there might no longer be the need for a formally appointed guardian. The Tribunal confirmed the administration order for five years based on a finding that an administrator was needed for the foreseeable future to manage EW's finances and to ensure she had adequate funds to meet her everyday needs.

HL AND DC [2008] WASAT 197

29 AUGUST 2008

MS M JORDAN (SENIOR SESSIONAL MEMBER)

Administration - Application brought to reappoint administrator following revocation of administration order in November 2007 on the basis that the then represented person had capacity to make decisions with regard to his finances with the assistance of friends and the capacity to make an Enduring Power of Attorney - Deterioration of his physical and cognitive function - The failure to have made an Enduring Power of Attorney - Not making proper provision for his accommodation and pharmacy expenses - Inability to manage his finances - Appointment of administrator

Mr C was residing in residential care and had an administrator appointed to manage his finances on 3 July 2006. That order was revoked on 2 November 2007 as Mr C was found to be capable of managing his own finances with the assistance of his friends and, further, Mr C was capable of making a valid Enduring Power of Attorney (EPA).

Mr C failed to appoint an attorney and, since November 2007, his condition had deteriorated so that he no longer had the capacity to manage his finances or make an EPA.

The Tribunal appointed the Public Trustee as his plenary administrator for five years.

STATE ADMINISTRATIVE TRIBUNAL ACT 2004 (WA)

SH AND EXECUTIVE OFFICER OF THE STATE ADMINISTRATIVE TRIBUNAL [2008] WASAT 192

26 AUGUST 2008

MS J TOOHEY (SENIOR MEMBER)

Application for review of decision of CEO of Department for Child Protection - Application rejected by Executive Officer of the State Administrative Tribunal under s 44(1)(c) of the *State Administrative Tribunal Act 2004 (WA)* - CEO had not made a reviewable decision - Executive Officer correct to reject the application - Decision to reject the application affirmed

SH lodged an application for review of a decision which he said had been made by the CEO of the Department for Child Protection under the *Children and Community Services Act 2004 (WA)* about the care of his grandson and granddaughter.

On advice from the Department for Child Protection that no relevant decision had in fact been made by the CEO, the Executive Officer of the Tribunal rejected the application pursuant to s 44(1)(c) of the *State Administrative Tribunal Act 2004 (WA)* on the ground that it did not comply with the enabling Act.

SH asked the Executive Officer to refer his decision to the Tribunal for review.

The Tribunal found that SH had not exhausted the procedures in the *Children and Community Services Act 2004 (WA)* for internal review of matters concerning his grandchildren and that no reviewable decision had yet been made. It found that the Executive Officer had correctly rejected the application and affirmed his decision.