



SAT

State
Administrative
Tribunal

Western Australia

Guardianship and Administration Act 1990

DECISIONS BULLETIN

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This Bulletin contains summaries of written reasons published by the Tribunal in January 2008. The full text of decisions and reasons can be found on the Tribunal's website at www.sat.justice.wa.gov.au

**JP [2008] WASAT 3
MR J MANSVELD (MEMBER)
8 JANUARY 2008**

Guardianship and administration - Need for a guardian - Meaning of treatment under the *Guardianship and Administration Act 1990 (WA)* limited to the alleviation or prevention of a deterioration of a medical condition - Restraint as the intentional control of a person's behaviour or movement other than the treatment of a diagnosed mental illness - Control by medication of the behavioural effects of a brain trauma as restraint

JP, a 59-year-old man, was involved in a workplace accident in 2005 which left him with severe residual physical, cognitive and behavioural deficiencies as a consequence of a brain trauma.

In September 2006, the Tribunal appointed the Public Advocate as the man's limited guardian for 12 months with the functions of consenting to his treatment and health care; to determine what contact he should have with others; to investigate any need to consent to the use of chemical or physical restraint, and to investigate the need for and availability of any further rehabilitation treatment.

At the hearing for the review of the guardianship order, evidence was given that the man would not benefit from further rehabilitation and that his behavioural difficulties (including agitation, aggression and bullying) were managed by the prescription of antipsychotic medication.

It was submitted by the Public Advocate and the Director of Nursing from the aged care facility where the man lived that the antipsychotic medication was treatment for the effects of the man's condition, namely the brain injury.

The Tribunal disagreed and found that the antipsychotic medication was a form of chemical restraint because it was given with the intention of controlling the man's behaviour albeit that the behaviour was not conducive to the man's functioning in the aged care facility in which he lived.

The Tribunal found that, given the seriousness of any action to restrict the man's movement or behaviour, it would be more productive to take a cautionary stance and to name the

restriction rather than defining the behaviour as part of the process of a disease (and by doing so, describing the intervention as treatment).

To do so was to make the intervention transparent and to put squarely in front of the guardian, as decision-maker, the need to consider whether the intervention was beneficial for the man and not for the convenience of care or medical staff of the institution in which the person was residing.

The Tribunal decided that a guardian was still needed to consent to the man's treatment and health care, and to consent to any restraint that he might require from time to time.

The Tribunal decided to appoint his daughter as the man's guardian. She was the only person to propose as guardian and her appointment was supported by the man's sister and his former *de facto* spouse.

**AT [2007] WASAT 324
MS D DEAN (MEMBER)
9 JANUARY 2008**

Review of administration order - Incorrect assessment of assets and income - Underpayment of Centrelink Benefits and overpayment of nursing home fees - Unnecessary depletion of the represented person's estate - Public Trustee confirmed as plenary administrator

In October 2000 an order was made by the Guardianship and Administration Board appointing the Public Trustee plenary administrator of the estate of the represented person with a direction that the administrator arrange a repayment program for loans made by the represented person to her sister RM.

This order was reviewed in May 2002 by the Guardianship and Administration Board. The appointment of the Public Trustee was confirmed, again with a direction that the repayment program be arranged.

The order made by the Guardianship and Administration Board was reviewed in June 2007 at which it transpired that a Deed of Agreement for repayment of the loan to RM had been entered into in September 2005. The Deed provided that the loan was to be repaid out of RM's share of the estate of her mother upon her death.

At the time of the hearings, the represented person was residing in a nursing home and her home unit was being rented to subsidise her nursing home fees. Evidence provided at the hearings indicated that although the Public Trustee was alerted by the nursing home that the represented person may have been incorrectly assessed by Centrelink for her pension and the Department for Health and Ageing for her nursing home fees, the Public Trustee had not investigated the matter. It was not until after the matter had been raised in the review hearing in June 2007 that the Public Trustee entered into negotiations with Centrelink resulting in the reinstatement of the full pension and the reduction of the nursing home fees. Reimbursement of the overpayment of fees was backdated a few weeks.

Because the incorrect assessment had occurred in July 2005 with changes in the relevant legislation, the Public Trustee appealed the decision in relation to backdating the reimbursement and agreed that if the appeals were not successful, the Office of the Public Trustee would guarantee reimbursement of the overpayment of fees to the estate of the represented person.

The Tribunal confirmed the appointment of the Public Trustee as plenary administrator for a further six months.

RE IO; EX PARTE VK [2008] WASAT 8

22 JANUARY 2008

MS F CHILD (MEMBER), DR R CLARNETTE (SENIOR SESSIONAL MEMBER), DR D STEPNIAK (SENIOR SESSIONAL MEMBER)

Guardianship and administration - Application for legal costs from represented person's estate under s 16(4) of the *Guardianship and Administration Act 1990 (WA)* - Application for costs under s 87(2) of the *State Administrative Tribunal Act 2004 (WA)* - Costs relative to the proceedings

The daughter of an elderly man with dementia applied to the Tribunal for the appointment of a guardian and administrator for him. The daughter had made the applications following a transfer of land from her father to her sister in circumstances which raised concerns about his capacity to understand the transaction and to protect his own interests. As a result of the transfer of the property, he had lost his pension entitlement. His other daughter, the transferee of the land, was at the time of the hearing managing all of his financial affairs.

The Tribunal considered medical and other evidence at a hearing and determined that the man did not have capacity to manage his personal or financial affairs, and that he needed an independent administrator to assess the circumstances of the transfer and to manage his financial affairs. The Tribunal determined that a guardian was required to arrange an assessment of his living circumstances and to ensure his care needs were met. The informal arrangements in place at the time of the hearing were found to be not adequate, as his daughter, the transferee of the land who was his primary carer, did not appreciate the extent of his disabilities and his need for an increased level of supervision to ensure his safety. The Tribunal appointed the Public Trustee and Public Advocate as his administrator and guardian respectively. The applicant daughter then asked that her legal costs be met from her father's estate.

The Tribunal ordered that part of the costs incurred by her should be paid from her father's estate because it was satisfied that she had acted in his best interests in bringing the application, the application might not have been made but for the legal advice and assistance obtained by her and she was assisted in the presentation of the application by her legal representative.

In view of the conflict in the evidence about the capacity of the proposed represented person; the complexity in relation to the transfer of land which was the reason for the applications being made; allegations that his financial affairs were not being managed in his best interests, and the conflict between his daughters, the Tribunal considered that legal representation was warranted.

The Tribunal accepted the submission of the daughter who was the transferee of the land that serious allegations had been made and that she was entitled to be legally represented at the hearing of the Tribunal. It did not accept the submission that either her father or her sister should pay for that representation. Her application for her costs was dismissed.

In respect of the applicant's costs, the Tribunal determined that not all of the costs charged could be properly said to relate to the proceedings of the Tribunal and so, therefore, should not be paid from the estate. An amount of the costs incurred by the applicant daughter, which the Tribunal determined were relative to the proceedings before it, were ordered to be paid from the estate.

**RE PD [2008] WASAT 13
25 JANUARY 2008
MS F CHILD (MEMBER)**

**Guardianship and administration - Application by plenary administrator for directions
- Represented person with acquired brain damage living apart from spouse -
Proposal to apply to Family Court for property settlement - Need for appointment of
case guardian to make an application**

The administrator of the estate of a woman with an acquired brain injury applied to the Tribunal for directions regarding the administration of her estate. The administrator, a trustee company, sought directions to enable it to apply to the Family Court of Western Australia for the appointment of a case guardian to act in relation to property settlement proceedings on behalf of the woman.

The woman had lived apart from her spouse for some years and had expressed the consistent wish to be divorced from him.

The Public Advocate was the plenary guardian of the woman and had taken the decision that divorce proceedings would not be initiated. The administrator submitted that it was in the financial best interests of the woman that the administrator consider proceedings to settle the property interests of the woman held jointly with her spouse because of the circumstances of the woman and the property.

Directions were sought as the legal advice to the administrator was that it could not apply to conduct the legal proceedings in the Family Court as administrator because, although having plenary powers, the appointed administrator is a company and the Family Court Rules require that a person under disability act by case guardian and that a case guardian is an individual. It was proposed that a senior officer of the company be authorised to apply for appointment as a case guardian.

The spouse and sons of the woman attended the hearing and opposed the direction being given. The spouse argued that the woman had not contributed financially to the property and so the house was his and should not be sold. The daughter of the woman supported the proposed action being taken as this had been the expressed wish of her mother since 2004. The daughter asserted that her mother had financially contributed to the property in particular had paid the balance of the mortgage owing from the proceeds of a compensation payout she had received for the personal injuries she had suffered.

The Tribunal noted that the question of the contributions made by the woman and her spouse were a question for negotiation between the parties (including the administrator on behalf of the woman) and if agreement could not be reached, for the Family Court to determine.

The Tribunal gave the direction sought by the administrator as it determined that, by making the direction, it was enabling the administrator to exercise a power that it had as a plenary administrator.

DMS [2008] WASAT 14

29 JANUARY 2008

MR J MANSVELD (MEMBER), MS F CHILD (MEMBER), MS D DEAN (MEMBER)

Guardianship and Administration - Community Guardianship Program of the Public Advocate - The meaning of "close personal relationship" in s 119 of the *Guardianship and Administration Act 1990 (WA)* - Statutory obligations of an appointed guardian - The appointment of a person other than a parent, next of kin or Public Advocate as a guardian is contemplated by the *Guardianship and Administration Act 1990 (WA)*

The Public Advocate was first appointed the guardian for a severely disabled 60-year-old woman in 1997. The woman had lived in institutions for most of her life and in her current nursing home for over 40 years.

The Public Advocate was the woman's limited guardian with the function of consenting to her treatment and health care.

The Public Advocate applied to the Tribunal for a review of the guardianship order and proposed that a volunteer from her Community Guardianship Program become the woman's decision-maker in place of the Public Advocate.

The Public Advocate asked the Tribunal to consider whether the volunteer could make treatment and health care decisions for the woman without formal guardianship appointment. The Public Advocate referred the Tribunal to section s 119(3)(e) of the *Guardianship and Administration Act 1990 (WA)* which enabled a person, in a hierarchy of persons, to make treatment decisions for a person without the need for a formal order. To fulfil that role, a person such as the volunteer would need to establish that she had a close personal relationship with the woman.

The Tribunal decided that it was not appropriate to rely upon s 119(3)(e) of the *Guardianship and Administration Act 1990 (WA)* and that a formal guardianship order was needed. A guardian has a responsibility under the *Guardianship and Administration Act 1990 (WA)* to act in the best interests of the person for whom they are appointed guardian. This responsibility, when allied with the statutory requirement of the Tribunal to review guardianship orders, provides protection not present in decisions made under s 119, which are not subject to review.

The Tribunal was satisfied that the represented person was in need of a guardian and that the volunteer was suitable as her proposed guardian.

The Tribunal appointed the volunteer as the woman's limited guardian with the same function previously undertaken by the Public Advocate; to make treatment and health care decisions for the woman.

The Tribunal decided to review the order in 12 months.