



SAT

State
Administrative
Tribunal

Western Australia

Guardianship and Administration Act 1990

DECISIONS BULLETIN

No 11 July 2007

This Bulletin contains summaries of written reasons published by the Tribunal in July 2007. The full text of decisions and reasons can be found on the Tribunal's website at www.sat.justice.wa.gov.au

EA and KD, TA, LA, BA & VT [2007] WASAT 175

5 JULY 2007

MR J MANSVELD

Guardianship and administration - Application for legal costs from the represented person's estate under s 16(4) of the *Guardianship and Administration Act 1990* (WA) - Principle that parties bear their own costs - Whether principle may be displaced when legal assistance is necessary for the Tribunal to make a determination in the best interests of the represented person - Party's ability to pay is not a relevant consideration - Deterrence from making future applications not a relevant consideration - Award of costs can be made when the Tribunal is provided with information that it is unlikely to secure relying on its own processes alone - Section 16(4) does not apply to a represented person or proposed represented person

The Tribunal received two applications for legal costs to be paid from the estate of a man (the represented person) whose estate had initially been found by the Tribunal to be in need of immediate protection and at a subsequent hearing of the Tribunal, had been found to be in need of formal administration.

An application for legal costs was made by the represented person himself and an application was made by his children. The children had been the applicants in the application for administration for the man heard earlier by the Tribunal (see ***EA and KD, TA, LA, BA, & VT***[2007] WASAT 3).

The application by the represented person was dismissed because the Tribunal found that the section of the *Guardianship and Administration Act 1990* (WA) under which the application was made did not apply to the legal costs of the represented person. The decision whether to pay his legal costs fell to the Public Trustee, firstly in the role given to him by the Tribunal to immediately protect his estate, and later in his role as formal administrator.

Costs were allowed in part, in the application made by the represented person's children. In all the circumstances of the case, the Tribunal was satisfied that the legal assistance obtained by the children in respect of the assessment of the represented person's capacity provided the Tribunal with information that it was unlikely to secure relying on its own processes alone. The information about the represented person's capacity was critical to

the Tribunal being able to come to its determination to appoint an administrator for the represented person.

It was appropriate therefore for there to be an award of costs to the children from the represented person's estate in respect of that aspect of the proceedings. The Tribunal was not satisfied, however, that an order for costs should extend to the legal advice and representation the applicants obtained in respect of the balance of the proceedings.

An award of costs of \$10 000 was made in respect of the application by the children.

ZJ [2007] WASAT 179
6 JULY 2007
MS F CHILD (MEMBER)

Guardianship and Administration - Review of administration order - Represented person with intellectual disability but able to manage his financial affairs - Complex legal matters for which the Public Trustee acted as administrator completed - No need for an administrator - Order revoked

On review of an administration order made under the *Guardianship and Administration Act 1990*, the Tribunal revoked the appointment of the Public Trustee as limited administrator of the estate of a 49-year-old man with intellectual disability. Although the man had a cognitive impairment, he was, according to the expert opinion, able to manage his day-to-day financial affairs himself with some family support. Legal proceedings for which the Public Trustee had been appointed administrator to conduct on his behalf had been completed and there was no current need for the administration order.

The revocation of the order was consistent with the principles of the *Guardianship and Administration Act 1990* which provide that no order should be made if a less restrictive alternative for the management of the person's affairs is available.

PUBLIC ADVOCATE and F [2007] WASAT 183
10 JULY 2007
MS J TOOHEY (SENIOR MEMBER)
MR J MANSVELD (MEMBER)
MS F CHILD (MEMBER)

Guardianship - Public Advocate limited guardian with authority to consent to treatment and health care - Community Guardian Program - Proposed appointment of community guardian - Close personal relationship - s 119(3)(e) - Effect of Memorandum of Understanding would be that community guardian and Public Advocate would act jointly - Delegation - Public Advocate appointment as limited guardian confirmed - Public Advocate authorised to delegate her function to community guardian

F was a 53-year-old man with an intellectual disability who had lived for many years in supported accommodation. He had no family and, apart from workers at his residence, only a former carer had occasional contact with him.

For some years the Public Advocate had been F's limited guardian with authority to consent on his behalf to what was fairly routine treatment and health care.

The Public Advocate asked the Tribunal to revoke her appointment and appoint instead a community guardian to consent to F's medical treatment.

The Community Guardian Program is an initiative of the Office of the Public Advocate. It aims to develop relationships between persons with a disability in need of a guardian and volunteers from within their local community, with a view to the volunteer being appointed guardian.

This application was the first for the appointment of a community guardian.

G, the proposed community guardian, had met F some months previously and was developing a supportive relationship with him. The Tribunal considered whether the relationship was such that G would have authority under s 119(3)(e) of the *Guardianship and Administration Act 1990* to consent to F's medical treatment, making a formal appointment unnecessary. It decided that the relationship would need more time before it could be considered a close personal one within the meaning of s 119(3)(e).

The Public Advocate proposed that, if appointed, G would sign a Memorandum of Understanding undertaking to consult with the Public Advocate about any complex or contentious medical decisions to be made for F. In the Tribunal's view, the effect of the Memorandum of Understanding was that, rather than G, as sole guardian, making decisions on F's behalf, she and the Public Advocate would act as joint guardians, at least in relation to any complex or contentious treatment decisions. The Tribunal considered that, insofar as she would not fully perform the functions vested in her, G could not be considered suitable to act as guardian under the proposed arrangement.

The Public Advocate suggested that she would not require G to enter into the Memorandum of Understanding if doing so would, in effect, fetter G's authority as guardian. However, after hearing from G and representatives of the Public Advocate, the Tribunal decided it was in F's best interests for G to have the opportunity to consult with the Public Advocate and, in effect, make decisions jointly for an initial period, as had been contemplated by the Memorandum of Understanding.

The Tribunal confirmed the Public Advocate's appointment as F's limited guardian for 12 months and authorised her to delegate her authority to G for that period. At the end of that time G's relationship with F could be a close personal one within the meaning of s 119(3)(e) and she would have authority to consent to medical treatment by virtue of that provision; alternatively, she could be suitable to be appointed sole guardian.

**A and J [2006] WASAT 287 (S)
24 JULY 2007 (ORIGINAL DECISION 21 SEPTEMBER 2006)
MS J TOOHEY (SENIOR MEMBER), DR G HAMILTON (SENIOR SESSIONAL
MEMBER), MR S JONGENELIS (SENIOR SESSIONAL MEMBER)**

Costs – Application to appoint guardian and administrator dismissed – Application by proposed represented person for her costs to be paid by the applicant pursuant to s 87 of the *State Administrative Tribunal Act 2004* (WA) – Alternatively for costs pursuant to s 16(4) of the *Guardianship and Administration Act 1990* (WA) – No good reason to depart from the principle that parties before the Tribunal bear their own costs – Section 16(4) does not permit an order for costs of the proposed represented person – No power in Tribunal to order trustees of a trust established for the benefit of the proposed represented person to meet her costs – Application dismissed

J's sister, A, asked the Tribunal to appoint an administrator and a guardian for J who had an intellectual disability. The Tribunal found that J's disability impaired her decision-making capacity in ways that made her vulnerable to exploitation and abuse but, in all the circumstances, it decided against making either appointment and dismissed both applications. Its reasons were published as *A and J* [2006] WASAT 287.

A and J were both legally represented at the hearing. Subsequently, J sought an order, under either s 87 of the *State Administrative Tribunal Act 2005* or s 16(4) of the *Guardianship and Administration Act 1990*, that A pay her costs.

The Tribunal decided there was no good reason in this case to depart from the principle in s 87(1) of the *State Administrative Tribunal Act 2005* that parties to proceedings bear their own costs.

The Tribunal decided that s 16(4) of the *Guardianship and Administration Act 1990* allows a party to have their costs paid by, or out of the assets of, the person whom the application concerns; it does not apply to costs incurred by the person the subject of the proceedings. Even if such an order were possible, it would not be made in this case because the claim was against A in her capacity as trustee of a trust established for J's benefit; any claim against the trustees would have to be made elsewhere.

DD [2007] WASAT 192

24/07/2007

MS F CHILD (MEMBER)

Guardianship and administration - Enduring power of attorney - Application by attorneys seeking authority to make gifts from the estate of the donor

The daughters of an elderly woman suffering from dementia applied as the donees of her enduring power of attorney to the Tribunal for authority to make a gift from the estate of their mother to themselves and their brother.

The daughters had been appointed donees under an enduring power of attorney executed in 2001 when the woman was capable of doing so. The daughters were concerned about the proposal to make the gift and sought direction from the Tribunal.

The woman was the resident of a nursing home. She had a substantial estate with a value of over \$2 million. Her dementia meant that she could not now indicate her wishes or give directions in relation to her estate. She was reliant on her donees to manage her estate on her behalf.

As the donees of her enduring power of attorney, her daughters had fiduciary obligations to their mother arising from their acceptance of the role as donees.

In light of the protective nature of the *Guardianship and Administration Act 1990* (WA) under which the enduring power of attorney had been created and the obligations owed by the donees, the Tribunal determined that it was not appropriate for the Tribunal to authorise a gift from the estate under the application made for directions. This was a matter for the donees to determine for themselves, having regard to the obligations they owed to the donor.

LAM [2007] WASAT 195
31/07/2007
MR J MANSVELD (MEMBER)

Guardianship and administration - Review of administration order - Application by administrator to make a gift to her siblings from the represented person's estate - Discretion available under section 71(5) does not extend to a disposition (or partial disposition) of the person's estate according to the terms of their will

The daughter of an elderly woman suffering from dementia was appointed her administrator in 2005. The woman resided in a nursing home.

The elderly woman's spouse died in 1992. She had three children; a daughter and two sons.

In 2007, the daughter applied for a review of the administration order. She sought authority to make a gift from her mother's estate to enable one of her brothers to be provided with his share of his mother's current estate in accordance with the woman's will. The other brother supported the gift.

Although the *Guardianship and Administration Act 1990* allowed the Tribunal to take a liberal view of a person's best interests when considering whether to authorise an administrator to make a gift from the person's estate, it did not extend, in the Tribunal's view, to a disposition (or partial disposition) of the person's estate according to the terms of their will.

The Tribunal therefore decided to confirm the order made in 2005 appointing the daughter as the woman's administrator. The order did not include an authority to make a gift from the woman's estate.