



SAT

State
Administrative
Tribunal

Western Australia

Guardianship and Administration Act 1990

DECISIONS BULLETIN

No 9 May 2007

This Bulletin contains summaries of written reasons published by the Tribunal in May 2007. 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.

TJC [2007] WASAT 105

10 MAY 2007

MS F CHILD (MEMBER), MR J MANSVELD (MEMBER), MR J JAMES (SENIOR SESSIONAL MEMBER)

Guardianship and administration – Guardianship – Represented person with acquired brain injury from birth – Cross applications for the appointment of a guardian – Allegations of neglect – Need for a guardian – Need for certainty as to authority for decision-making – Need to determine the contact with family living in New South Wales – Mother and direct carer appointed for personal decision making other than contact – Public Advocate appointed to determine contact with others – Recognition of orders made in Western Australia

The mother of a 19-year-old man, who had suffered a severe brain injury at birth, was appointed his limited guardian by the Tribunal to decide where he was to live, with whom he was to live, and to consent to medical treatment and services on his behalf. Because of intense conflict between the mother and some other family members, including the father of the young man, the Tribunal also appointed the Public Advocate as his limited guardian to determine the contact he should have with his family in NSW, including his father and grandmother.

The guardianship appointments were made in the context of longstanding conflict between the parents of the young man, and between his mother and paternal grandmother as to where he should live and the arrangements for his care. The Tribunal decided that there was a need for a guardian to provide certainty about who had authority to make decisions for him and to determine the contact he had with other family members.

The Tribunal did not follow the recommendation of the Public Advocate's representative to appoint the Public Advocate as his plenary guardian. The Tribunal accepted that the mother had experienced difficulties in the past in managing the young man's care needs. In particular, there had been a lack of continuity in his dental care and the recommended specialist monitoring of his epilepsy. Despite this, the Tribunal was not persuaded that it was necessary to appoint the Public Advocate as guardian to ensure that the relatively recent engagement with these services continued.

The decision of his mother at short notice to move back to NSW in 2005, which had further delayed his treatment and disrupted his living environment, was of concern but on balance the Tribunal found the mother suitable to be appointed his limited guardian.

The Tribunal determined that the mother was the appropriate appointment as guardian to make personal decisions for him as she had now engaged with health care and other service providers, and the dental and other health needs of the young man were now being managed by the appropriate health care professionals. She proposed that her son remain living with her and her other children in a country town in WA, and that he continue to access the services which had been engaged, including an alternative to employment programme which he enjoyed.

The mother had been his primary carer for the whole of the young man's life and he was settled living with her and his brothers and sister. While his family life had been unsettled in the past, and a recent attempt at reconciliation in 2005 with his father had resulted in violence towards the mother by the father and had contributed to the lack of stability and possible financial loss to the young man, the Tribunal considered that, at the time of the hearing, his needs were being met and his living situation with his mother and siblings should be supported and maintained.

There remained some uncertainty as to the durability of the arrangements given the history but this was not sufficient in the view of the Tribunal to make a finding that the mother was not suitable to be appointed his guardian, and to, in effect, displace the role that she had played and continued to play in his life.

The father proposed that he be appointed guardian and that a shared care arrangement for the young man of six months living in WA and six months living in NSW be made. This proposal was not considered by the Tribunal to be in the young man's best interests. The father's application for appointment as guardian was dismissed.

The proposal by the paternal grandmother for her appointment as guardian was also not considered appropriate given her proposals for his future care and the animosity which was evident in her relationship with the young man's mother.

The Tribunal considered that there was a need for an independent guardian to determine the contact the young man had with his family in NSW in light of the longstanding conflict between the adults in his life. The guardianship orders were made reviewable in one year.

The Tribunal had previously confirmed the appointment of a trustee company as the plenary administrator of the young man's \$6 million estate which consisted of funds paid in settlement of a claim for personal injuries he had suffered at birth.

NOTE: This decision is currently the subject of an appeal to the Supreme Court of WA.

Y [2007] WASAT 106

10 MAY 2007

MS J TOOHEY (SENIOR MEMBER), MS D DEAN (MEMBER), DR E LEIPOLDT (SENIOR SESSIONAL MEMBER)

Administration - Public Trustee investigation into estate - Further time required for investigation - Conflict of interest - Donees of Enduring Power of Attorney directed not to act on powers during period of the appointment

On 21 August 2006 the Tribunal appointed the Public Trustee administrator for Y, an elderly woman whose husband had built up a large estate over his lifetime; by the time of her husband's death, his estate was apparently almost exhausted. Y's daughters believed their brothers, to whom their mother had entrusted all her financial dealings, and one of whom was the executor of their father's will, had acted to their own benefit rather than to their mother's. The Public Trustee was directed to inquire into the estate and report to the Tribunal. The Tribunal directed Y's sons not to act pursuant to an enduring power of attorney she had made in their favour, pending the outcome of the investigation.

The Public Trustee subsequently reported to the Tribunal that, in his view, one of Y's sons, if not both, had not acted in Y's best interests; however, further time was needed to consider whether legal action should be pursued on her behalf to recover any property.

The Tribunal was mindful that the continued appointment of the Public Trustee would be at a cost to Y's estate; also that her clear wish had been that her sons manage her financial affairs. It appointed the Public Trustee for a further period to determine whether legal action should be pursued and again directed Y's sons not to act pursuant to the EPA during the period of the appointment.

SA and JG [2007] WASAT 113

16 MAY 2007

MS D DEAN (MEMBER), MS H LESLIE (SENIOR SESSIONAL MEMBER), DR D STEPNIAK (SENIOR SESSIONAL MEMBER)

Application for guardianship - Allegations of physical and emotional abuse - Capacity - No need for a guardianship order - Less restrictive alternative to an order available

An application for guardianship in respect of JG was made by an ex-carer. JG was a young man who, several years previously, suffered a serious head injury leaving him with significant cognitive and physical deficits. JG received a large compensation payment for his injuries, enabling him to live in his own home with 24-hour paid care. JG's mother recruited and managed the carers and continued to play a significant role in his life. The applicant alleged that the mother was both physically and emotionally abusive toward JG and that this had caused the applicant significant trauma from which she had not fully recovered.

Based on evidence from the parties, including medical and allied health professionals, the Tribunal found that JG was a person for whom an order could be made as he lacked the capacity to make decisions for himself.

From the evidence before it, the Tribunal was satisfied that JG was not being abused and that his needs were being adequately met by the care and support arrangements in place. Additional support and monitoring of JG's situation was planned with the reintroduction of a case manager to oversee his care and welfare.

The Tribunal dismissed the application on the basis that there was no need for a guardianship order.

**LC and JS [2007] WASAT 127
25 MAY 2007
MR J MANSVELD (MEMBER)**

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 - That principle may be overturned 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 - Good intentions insufficient reason to make an award of costs - Balance of convenience is not a reason to make an award of costs

The sister of an elderly woman who had suffered a stroke made an application for her legal costs to be paid from the woman's estate.

The sister had applied to the Tribunal for an administrator to be appointed for the woman who, because of the stroke, was now unable to make reasonable judgments about her estate. An application for administration and guardianship was already before the Tribunal.

The applications made to the Tribunal expressed a concern that the woman's estate was at risk and that she had executed an enduring power of attorney when she was incapable of doing so. As it emerged, there was no evidence or information presented to support an assertion that there had been misappropriation of the woman's estate.

In all the circumstances of the case, it could not be said that the legal assistance obtained by the sister justified her legal costs being paid from the woman's estate. The Tribunal did not doubt the intentions of the sister, but this was not sufficient to warrant an award of costs.

In dismissing the application for costs, the Tribunal took the view that it should not depart in this case from the principle that parties bear their own costs in proceedings.

**AD [2007] WASAT 123
25 MAY 2007**

**JUSTICE M L BARKER (PRESIDENT), MS F CHILD (MEMBER), DR A MCCUTCHEON
(SENIOR SESSIONAL MEMBER)**

Guardianship and Administration- Application for consent to sterilisation - *Guardianship and Administration Act 1990 (WA)* s 63 - 22-year-old woman with intellectual disability and history of behavioural disturbance - Alternate less restrictive means of menstrual management and contraception effective - Sterilisation not in the best interests of the represented person - Consent refused

The Tribunal heard an application for consent to sterilisation of a 22-year-old woman with intellectual disability, brought by her mother who was also her guardian.

The mother, as guardian, applied to the Tribunal under s 59 of the *Guardianship and Administration Act 1990 (WA)* for consent for a hysterectomy to be performed for her daughter's comfort and safety and for reasons of hygiene. She also maintained that the history of behavioural problems the young woman had experienced since puberty were associated with her menstruation. The father of the young woman and the coordinator of the residential service where she lived supported the application.

The Tribunal took evidence from a psychiatrist and two consultant gynaecologists and the young woman's general practitioner regarding her medical treatment and whether a hysterectomy was indicated in the circumstances. The medical evidence provided did not support the need for a hysterectomy on either psychiatric grounds or gynaecological ones. The psychiatric treatment the young woman was receiving, including the use of medications, had settled her extreme agitation which her mother believed was associated with her menstruation. The evidence of the gynaecologists and others confirmed that her menstrual cycle was suppressed so that a hysterectomy was not indicated for contraceptive purposes or for menstrual management.

The evidence was that, while the young woman would remain dependent on others for all aspects of her care, her menstruation was no longer interfering with her activities or her quality of life. The Public Advocate's representative submitted that the young woman's safety could not be assured by the performance of a hysterectomy but only by arrangements for the careful supervision and care of the young woman; these arrangements were in place and supported by her mother.

Legal Aid Western Australia provided separate legal representation of the young woman at the Tribunal's request. The separate representative did not support consent to sterilisation being granted and argued that the facts of the case had not met the requirement that the proposed procedure was in the best interests of the young woman. The Public Advocate, who had appointed an officer from her office to investigate the application, also opposed consent being granted, and submitted that less restrictive means of behavioural and menstrual management and contraception had been effective and produced positive outcomes for the young woman.

The Tribunal concluded that there was no compelling reason for the grant of consent for a hysterectomy to be performed, a procedure which the Tribunal heard had potential risks and complications.

The Tribunal considered the application had been brought in good faith by the mother who was devoted to her daughter, but was not satisfied that the procedure for sterilisation proposed was in the best interests of the young woman.

SMYM (also known as SMPM, SMY and MYM) [2007] WASAT 131

28 MAY 2007

JUDGE J ECKERT (DEPUTY PRESIDENT), MS D DEAN (MEMBER), MS J STANTON (SENIOR SESSIONAL MEMBER)

Review - s 17A - Administration order - Capacity - Need

This was an application by SMYM (also known as SMPM, SMY and MYM) for a Full Tribunal to review a decision by a single member of the former Guardianship and Administration Board to appoint an administrator over her estate. The application was made under s 17A of the *Guardianship and Administration Act 1990* (WA) and the Public Trustee had been appointed administrator.

SMYM was born in England; she insisted on being called by an aboriginal name and she utilised indigenous legal and medical facilities. She owned land that she indicated she wanted put into a trust for the benefit of indigenous people. She spoke of racism suffered by her and others. She had previously been diagnosed as suffering from a schizo affective disorder. SMYM had no insight into her illness. She was articulate and intelligent but could

be irrational in her thought processes, referring to grandiose plans without providing any evidence that demonstrated substance to her claims.

Although the order the subject of the review had been revoked and a new order substituted, and although that order had subsequently been revoked and a third order made, the impact of the first order remained in place, namely, that there was an administrator appointed over SMYM's estate. Accordingly, the Tribunal took SMYM's application to be a review of the declaration that she was in need of an administrator because she was unable, by reason of mental disability, to make reasonable judgments in respect of matters relating to her estate. On that basis, the Tribunal reviewed the decision to appoint an administrator due to SMYM's declared incapacity, rather than the original decision to appoint SMYM's daughter as administrator.

In its review jurisdiction under s 17A, the Tribunal considers the matter *de novo*, looking at all the evidence whether or not it existed at the time the original decision was made. In this case, the applicant provided no new evidence, medical or otherwise, to persuade the Tribunal to revoke the administration orders. The Tribunal had to rely on previous medical reports and files, which were before the former Board. The Tribunal allowed the applicant almost two years to provide new medical reports or other evidence and prompted her on several occasions to do so.

Accordingly, based on the evidence before it the Tribunal found that the applicant was unable, by reason of mental disability, to make reasonable judgments in respect of her estate; that she was in need of an administrator; that there was no less restrictive alternative for managing her estate and that the Public Trustee should remain SMYM's administrator. The Tribunal made the appropriate orders and dismissed the application.

MW [2007] WASAT 125
30 MAY 2007
MS F CHILD (MEMBER)

Guardianship and Administration - Access to medical reports and other documents - Represented person deceased - Access not for the purposes of *Guardianship and Administration Act 1990* - Application dismissed

These reasons related to a determination by the Tribunal that an application for inspection and access to documents be dismissed.

The application by the sister of MW, was made for release of medical evidence submitted for hearing of an application for the appointment of an administrator of the estate of MW heard by the Guardianship and Administration Board in 1998.

The application for release of medical reports and other documents followed the death of MW in 2006 and was for the stated purpose of establishing her capacity to execute a will in 1997.

The application was refused because the purpose for which release of the documents now sought was outside the purposes of the *Guardianship and Administration Act 1990* (WA) and was contrary to the public interest in maintaining the integrity of the Tribunal's processes in dealing with applications made under that Act.