[2011] WASAT 144

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
STREAM	**:**	HUMAN RIGHTS
ACT	**:**	GUARDIANSHIP AND ADMINISTRATION ACT 1990 (WA)
CITATION	**:**	RS and ANOR and DV [2011] WASAT 144
MEMBER	**:**	JUSTICE J A CHANEY (PRESIDENT) MS D TAYLOR (SENIOR MEMBER) MS J STANTON (SENIOR SESSIONAL MEMBER)
HEARD	**:**	29 AUGUST 2011
DELIVERED	**:**	9 SEPTEMBER 2011
FILE NO/S	**:**	GAA 924 of 2011 GAA 1221 of 2011 GAA 1222 of 2011 GAA 1223 of 2011
BETWEEN	**:**	RS and ANOR Applicants AND DV Represented Person

Catchwords:

Guardianship and administration - Validity of enduring power of guardianship - Validity of enduring power of attorney - Whether donor of full legal capacity - Whether need for guardian - Whether need for administrator - Conflict between siblings of proposed represented person and medical advisors

Legislation:

Guardianship and Administration Act 1990 (WA), s 4, s 4(2), s 43, s 44(1), s 45, s 64(1)(a), s 64(1)(b), s 68, s 110B, s 110J, s 110K, s 110N(1)(a), s 104, s 109

Result:

Enduring power of guardianship declared invalid
Limited guardian appointed
Limited administrator to be appointed subject to consent

Category: B

Representation:

Counsel:

Applicants	:	Self-represented
Represented Person	:	Ms J McCahon

Solicitors:

Applicants	:	State Solicitor's Office
Represented Person	:	Legal Aid Commission of Western Australia

Case(s) referred to in decision(s):

Nil

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 The applicants are case workers at a government mental health service. They brought applications seeking the appointment of an administrator and guardian for DV who has, for some years, been diagnosed as suffering from schizophrenia. In support of the application, a report was prepared by DV's treating psychiatrist. Upon learning that an application for appointment of a guardian and administrator was to be made, certain of DV's siblings assisted him to prepare and execute an enduring power of guardianship and an enduring power of attorney. When that was brought to the attention of the applicants, a further application was made to set aside the enduring power of guardianship on the basis of DV's alleged lack of capacity to execute that document.

2 The Tribunal was called upon to determine the validity of the enduring power of guardianship, and to consider whether a guardian and administrator should be appointed as a substitute decision-maker for DV. The Tribunal considered that DV lacked the capacity to execute the enduring power of guardianship and that it should be set aside. It also determined that DV lacked capacity to make decisions concerning his person and to a degree, his finances and that there was a need for the appointment of a guardian and an administrator with limited powers. In view of the level of conflict between DV's family members and his treating team, the Tribunal considered that, at least while attempts were made to improve communication between those parties, an independent decision-maker should be appointed in relation to DV. Orders were made accordingly.

Introduction

3 DV is a 37 year old male. According to the information provided to the Tribunal, DV referred himself to a suburban mental health service (health service) at the age of 19 years, with encouragement and support from his father. His mother had been diagnosed with schizophrenia. He remained in sporadic contact with the health service for a number of years. Initially he was believed to suffer from a schizotypal personality disorder or, possibly, schizophrenia. However, following a period of assessment and treatment as a voluntary patient in hospital in 2005, he was formally diagnosed as suffering from schizophrenia, and prescribed anti-psychotic medication to address its symptoms. He appears to have been treated as an out patient for long periods of time.

4 Up until approximately 18 months ago, DV lived with his parents. Because of his parents' advancing years, alternative living arrangements became necessary. DV has three sisters and four brothers. With the assistance of one of his sisters, C, and other siblings, supported accommodation was found for DV, and he moved into that accommodation (DV's present accommodation) in May 2009.

5 In January 2011, DV's condition apparently deteriorated, and he was admitted to a suburban public hospital where he remained for a period of one month. He was diagnosed as suffering from chronic paranoid schizophrenia with comorbid alcohol abuse/dependence. Some time after his admission, DV came under the care of a psychiatrist, Dr H, who worked within the health service.

6 Dr H formed the view that, upon discharge, there was a need for an application to be made for the appointment of a guardian and an administrator for DV. There was a concern that DV's condition rendered him vulnerable to exploitation by others, and that he had in fact been exploited by residents at the present accommodation. This had resulted in DV expending a large proportion of his accumulated savings, including an excessive amount on alcohol. Concerns were also raised about DV's health and safety generally.

7 A family meeting was held between members of DV's treating team and two of his sisters. The sisters apparently expressed opposition to the appointment of a guardian or administrator. They were told, however, that it was proposed to proceed with an application to the Tribunal for those appointments.

8 In order to avoid the appointment of the guardian or administrator, three of DV's siblings T, M, and C, took steps to arrange the execution by DV of an enduring power of attorney (EPA) and an enduring power of guardianship (EPG), which DV duly executed on 5 March 2011. According to C, whose evidence we accept, the process of drawing up the documents, taking DV through them and explaining them, and then executing the documents, took about six hours.

9 On 25 March 2011, an application was lodged with the Tribunal by RS, DV's case manager at the health service, seeking appointment of a guardian and an administrator.

10 On 19 April 2011, MM, a case manager looking after DV's case whilst RS was on leave, lodged (on behalf of RS) an application pursuant

to s 110N(1)(a) of the *Guardianship and Administration Act 1990* (WA) (GA Act) seeking to revoke the EPG executed by DV on 5 March 2011.

11 On 27 April 2011, T, the appointee under the EPG wrote, in that capacity, to the health service, purporting to terminate the services of the suburban mental health service and to discharge DV into the care of a nominated general practitioner. It is apparent that the treating team declined to act on that instruction, no doubt based upon the view that the EPG was not valid because of DV's lack of capacity, and upon the treating team's belief as to DV's best interests.

The application under s 110N

12 Section 110N of the GA Act empowers the Tribunal to make an order revoking an EPG. That power falls to be exercised where the Tribunal finds an EPG to be invalid by reason of some formal defect, or because of the requirements for the making of an EPG, which are prescribed by s 110B of the GA Act, are not met. Section 110B provides that, in order to make an EPG, a person must have reached 18 years of age and have full legal capacity. If either of those requirements is not met, then an EPG is not valid and effective.

13 An application for revocation of an EPG may be made by a person who, in the opinion of the Tribunal, has a proper interest in the matter - GA Act s 110J. Pursuant to s 110K, the Tribunal may make a declaration as to the validity, or invalidity, of an EPG.

14 In our view, the applicants, RS and MM, have a proper interest in the question of validity of the EPG. That is because they are members of the donor's treating team, and in order to fulfil their duties to DV, they need to be in a position to know with certainty the person whose consent is required to medical treatment and other decisions in respect of matters relating to DV's health, safety and person. They therefore have standing to make the present application under s 110N of the GA Act.

15 The issue for determination as to the validity of the EPG is the question of DV's capacity to execute that document. For a person to make a valid appointment under an EPG he must, at the time of the appointment, understand the nature and effect of the formal document he is signing and the nature and extent of the powers he is entrusting to his substitute decision-maker. A person with full legal capacity to make a valid EPG will have a clear understanding of the nature and effect of the document and its implications.

16 The Tribunal had before it a number of reports concerning DV's capacity.

17 A report of Dr H was prepared for use in the Tribunal proceedings on 25 February 2011, little more than a week before the execution of the EPG and EPA. In that report, Dr H stated that she had diagnosed DV as suffering from chronic schizophrenia with negative symptoms and comorbid alcohol abuse. She described DV as having a severe and enduring mental illness with residual symptoms. She described DV as incapable of making personal health care decisions, decisions in relation to financial affairs, and expressed the view that, in relation to decisions concerning his living situation, he was capable but may struggle with decisions if he became acutely unwell. She subsequently amended her opinion in relation to decisions concerning his living situation in a letter dated 20 April 2011, when she expressed the view that he was incapable of making decisions in that area.

18 DV was also assessed by a clinical psychologist in January and February 2011. The psychologist assessed DV as being placed in the extremely low range of intellectually capacity. He concluded that DV experiences difficulty in generating solutions to complex situational challenges and adaptive tasks presented by his day to day environment. He considered that DV may often be dependent on the integrity and good will of people who provide him with direction and motivation and that his needs would be more effectively met when he is:

- in a highly supportive environment;
- given clear instructions around single process, or sequential, visually oriented activities;
- not required to engage in complex decision-making;
- provided with frequent external motivation in the way of prompting.

19 More recently, DV was seen by another psychiatrist, Dr C. Dr C confirmed what he described as a long standing diagnosis of schizophrenia and expressed the view that his psychiatric illness alone would mean that DV lacks capacity to make an EPG. That view, he said, was strengthened by the psychologist's assessment concerning reduced intellectual capacity.

20 The medical evidence strongly supports the conclusion that DV lacked the full legal capacity necessary, as at 5 March 2011, to execute a valid EPG.

21 C and M expressed the view that DV did understand the EPG, and said that they were at pains to explain the document to him at the time it was signed. They note that it was witnessed by a registered nurse who did not otherwise know DV personally. T, prior to her removal from the hearing (which will be discussed more fully below) protested strongly that the EPG was valid, and indicated that, if it were set aside, she would simply have a further EPG executed.

22 DV attended the hearing. A number of questions were put to him by the Tribunal as to his understanding of the nature and effect of the EPG. His answers demonstrated a lack of understanding of the document. It was suggested by C during the course of the hearing that DV had a tendency, when uncertain as to the answer to questions put to him, to simply answer 'yes'. That was evident in the exchanges between the Tribunal and DV during the course of the hearing. We accept that, as C asserted, attempts were made at the time of execution of the document to explain its contents to DV. We do not consider, however, in light of all the medical evidence, that DV's responses to questions as to his understanding are reliable. We are satisfied, having listened to DV, and having considered the observations of the psychiatrist and psychologist as to DV's capacity to understand complex matters, that DV did lack the capacity to understand the nature and effect of the document which he signed.

23 It follows that DV did not have full legal capacity as at 5 March 2011. He was therefore incapable of executing an EPG. The EPG dated 5 March 2011 is thus invalid, and should be revoked.

The application for guardianship

24 In considering an application under the GA Act for the appointment of a guardian and administrator, certain principles must be born in mind.

25 The first is that the primary concern of the Tribunal is the best interests of the person in respect of whom the application is made, in this case, DV - GA Act s 4(2)(a).

26 Every person is presumed to be capable of making decisions and managing their affairs until the contrary is proved - GA Act s 4(2)(b).

27 A guardianship or administration order shall not be made if the needs of the person in respect of whom the application is made could be met by other means less restrictive of the person's freedom of decision - GA Act s 4(2)(c).

28 A plenary guardian should not be appointed if the appointment of a limited guardian would be sufficient to meet the needs of the person in respect of whom the application is made - GA Act s 4(2)(d).

29 An order appointing a limited guardian or administrator must impose the least restrictions possible in the circumstances on the person's freedom of decision and action - GA Act s 4(2)(e).

30 Finally, in considering whether to make an order, the Tribunal is required to ascertain, so far as possible, the views and wishes of the person concerned - GA Act s 4(2)(g).

31 Section 43 of the GA Act sets out the criteria to be met for the appointment of a guardian. Before appointing a guardian, the Tribunal must be satisfied that the person for whom the order is sought is:

i) incapable of looking after her or his own health and safety;

ii) unable to make reasonable judgments in respect of the matters relating to her or his person; or

iii) in need of oversight, care or control in the interests of his or her own health and safety or for the protection of others.

32 If the Tribunal is satisfied of those matters, then it must consider whether there is a need for an appointment of a guardian and if so, who that person should be.

33 In relation to the appointment of an administrator, the Tribunal must be satisfied that the person for whom the order is made is unable, by reason of a mental disability, to make reasonable judgments in respect of matters relating to all or any part of his or her estate - GA Act s 64(1)(a). The Tribunal must then be satisfied that the person is in need of an administrator (s 64(1)(b)).

34 We are satisfied, having considered the evidence of Dr H and Dr C, and the report of the clinical psychologist, and having heard from DV, that he is unable to make reasonable judgments in respect of matters relating to his person, and is in need of oversight, care or control in the interests of his own health and safety. We are satisfied that DV lacks the capacity to make decisions of any complexity in relation to his personal well being. Although that was not conceded by DV's siblings, the fact

that they considered it necessary to have him execute an EPG and an EPA, so that they could assist DV in making decisions, suggests that they, too, accept that DV lacks capacity, at least to some degree. The presumption of capacity is displaced by the evidence before the Tribunal.

35 We are satisfied, given that decisions will need to be made from time to time concerning DV's living arrangements and medical treatment, that he is in need of a guardian to ensure that those decisions are taken in his best interests. The need is heightened by the current level of conflict between DV's siblings and his treating team and accommodation service providers. DV told the Tribunal that he knew about the conflict between his family and the treating team, and that it was having a bad effect on him.

36 In our view, it is appropriate that a guardian be appointed. We have considered whether a less restrictive means is available to meet the needs of DV. DV's siblings C, M and T argued that the EPG should be left in place because it represented a less restrictive alternative to a guardianship order. However, given the conclusion that we have reached that the EPG is invalid, it cannot stand as an effective less restrictive alternative.

37 The evidence does not suggest that it is necessary that the guardian have plenary powers to perform all of the functions set out in s 45 of the GA Act. Given the expressed wish by DV to remain in his present accommodation, and the proposal by family members to look for alternative accommodation, we consider that a guardian should have the function of deciding when and with whom DV should live. We also consider that it is necessary that a guardian be appointed to make treatment decisions given his incapacity to make such decisions and the conflict as to treatment between the treating team and DV's siblings, in particular T. For the same reason the guardian should have the function of determining the services to which DV should have access.

38 The question then arises as to who should be appointed to fulfil the role of guardian. The position of the applicants and Dr H was that, while they did not put forward any specific or forceful recommendation as to the identity of a guardian, they considered that the appointment of any of DV's siblings to the role might be problematic from the point of view of decision-making in DV's best interests in relation, in particular, to his medical treatment. Particular concern was expressed at the prospect of T being appointed given her attitude to medical issues as discussed below.

39 The position of C and M was that an independent guardian ought not be appointed, but rather there should be an appointment of one of DV's siblings, and preferably, T. T's position was that the Tribunal lacked any jurisdiction to make any appointment and that she would countenance no outcome other than that she would continue to act as substitute decision-maker for DV pursuant to the EPG executed on 5 March 2011, or some other EPG which she said she would obtain if the EPG of 5 March 2011 was revoked.

40 To understand the concerns expressed by the applicants and Dr H, it is necessary to have regard to T's conduct in relation to these proceedings, and to DV's treatment at the hands of his current treating team.

41 T has, since the proposal by the treating team to apply for the appointment of a guardian and an administrator was first made known to her, taken a particularly adversarial role with regard to all concerned with DV's present treatment and accommodation. She has apparently commenced proceedings against them in the District Court for damages, presumably on behalf of DV. She has also, apparently, sought to commence proceedings in the Supreme Court against various people or organisations, including the health service and the Tribunal.

42 At the commencement of the hearing, T announced that 'the family would do most of the talking', and proceeded to read a prepared statement protesting at the proceedings and criticising, in vehement terms, all those involved in the making of the application to the Tribunal and the Tribunal itself. She described all psychiatrists, and in particular Dr H, as murderers and drug pushers. She described the Tribunal as corrupt and intent on destroying DV's human rights. She made it clear that she would ignore any order made by the Tribunal, and that she was embarking on a path which would have the discipline of psychiatry completely banned. Despite being given an opportunity to speak at some length as to her concerns, and being given an explanation as to the function upon which the Tribunal was about to embark, T continued to interrupt proceedings and speak in highly derogatory terms about various participants in the process. In order to proceed with the hearing in an orderly fashion, it became necessary for the Tribunal to direct that T remove herself from the hearing so as to prevent further disruption. She was ultimately, unwillingly, escorted from the hearing room.

43 T's conduct, and her level of conflict not only with the treating team, but with psychiatrists generally, makes it abundantly clear that T, in her present frame of mind, is wholly incapable of dealing, in a constructive

way, with DV's medical advisors. It is abundantly clear, and indeed was accepted by T's siblings, that DV will continue to require involvement with a psychiatrist. We have no doubt that it is in DV's interest that that be so. T's incapacity to deal rationally with any psychiatrist renders her wholly unsuitable to be appointed as DV's guardian.

44 Neither C nor M volunteered themselves as suitable for appointment as a guardian, although C indicated that she would accept appointment in preference to an independent appointment such as the Public Advocate. Both C and M, who participated in the hearing fully and constructively, maintained that T was the appropriate appointee if an appointment was to be made. M, who is absent from the State with work on a regular basis, did not indicate a willingness to take the responsibility for guardianship for that reason.

45 We do not consider that appointment of C is in DV's best interest. Her capacity to disassociate herself effectively from the extreme and unhelpful views of T is at least doubtful. Her proposal, so far as we were able to ascertain, should a family member be appointed guardian, was that DV would be removed from his present medical treatment regime, and placed with a private general practitioner who would work in conjunction with a privately engaged psychiatrist. Dr C expressed a view that arrangements of that nature frequently fail when problems in management of the patient arise, and patients are cast back into the public system, which offers a full range of support services. The services presently provided to DV, which involve a cooperative arrangement between his present accommodation and the health service, provide a secure arrangement for DV. DV, himself, expressed no dissatisfaction with his present case manager or treating psychiatrist, and did not wish to move from his present accommodation. We are not satisfied that the potential disruption which these proposals by C involve would be in DV's best interests.

46 What is clearly necessary is that there be improved communication between DV's treating team and his siblings. We have no doubt that DV's siblings have his best interests in mind, albeit that we do not consider that the manner in which they seek to achieve those best interests is to be preferred. During the hearing, it was acknowledged by Dr H and Dr C, and particularly the latter, that effective communication and liaison between a treating team and family is an important component of treatment. The Tribunal would encourage ongoing cooperative communication between C and M and the medical advisors who are charged with looking after DV so that the views and wishes of DV's

family can be considered, and the undoubtedly important role which they can play in DV's ongoing welfare can be maximised.

47 In the circumstances, we do not consider that there is any appropriate person for appointment as guardian of DV other than the Public Advocate. The Public Advocate can provide an independent and objective approach to decision-making, and hopefully can facilitate communication between DV's treatment team and his family. In making that appointment, we wish to emphasise that the appointment should not deprive the family of opportunity for significant input into the decision-making concerning DV's personal matters. If family members are to make the most of that opportunity, they will need to give thought to the manner in which their views were conveyed. T is not an effective spokesman for the family. If DV is to benefit from the real contribution his siblings can make to decisions that may need to be made for him, they will need to put his interests before all else, including loyalty to their sister, T.

The application for administration

48 As previously mentioned, the original application to the Tribunal was prompted by concern as to exploitation of DV by others. We are satisfied that there is a risk that DV will, if he retains control of all of his savings, be at risk of exploitation, with a consequent loss of his financial security.

49 That risk was recognised by DV's siblings, and, since the execution of the EPA, T and M have put in place arrangements to invest DV's remaining funds and provide some level of security against DV's savings being wasted or lost.

50 The difficulty with the present arrangements is that they have apparently been put in place utilising the EPA. For the same reasons that we do not consider that the EPG is valid, the EPA is not valid. Section 104 of the GA Act requires that a person executing an EPA has 'full legal capacity'. Given the invalidity of the EPA, we do not think it to be in DV's interest that the protection of his estate relies upon that document.

51 Section 109 of the GA Act empowers the Tribunal to revoke or vary the power of attorney, and in view of the conclusions that the EPA is not valid, an order to that effect should be made.

52 It appears that DV has been able to manage his income, which consists of a pension, reasonably adequately without assistance. The difficulty, and the need for someone else to make decisions in respect to

DV's estate, relates to his savings. We do not consider that it is necessary for an administrator to make decisions in relation to DV's management and expenditure of his pension.

53 Although DV's savings have been significantly depleted since he moved from his parents' home, he retains some savings. It is in his interest that those savings be protected from inappropriate use or wastage. The Tribunal was advised that DV may, in the near future, also be in receipt of a significant sum by way of inheritance from his parents' estate, and we consider that there is a need to ensure that that sum is protected so that it is used in DV's best interests.

54 It is appropriate, therefore, that there be an appointment of an administrator, but limited to the functions of control and management of DV's estate, not including his pension.

55 The question arises as to who should be appointed administrator. Section 68 of the GA Act identifies who may be appointed administrator. That section requires that the proposed administrator has consented to act and is a person who, in the opinion of the Tribunal, will act in the best interests of the person, and is otherwise suitable to act as the administrator of the estate of that person.

56 In our view, subject to their consenting to act, and subject to them appreciating the obligations of an administrator under the GA Act, it would be in DV's interest to have his siblings M and C appointed as limited administrators. If they are unwilling to consent, then we consider that the Public Trustee should be appointed as limited guardian.

57 We do not consider that T is suitable for appointment as administrator, notwithstanding that she, along with M, has taken responsibility for DV's finances under the EPA. T has demonstrated, during the course of these proceedings, a complete refusal to engage with those providing services to DV in any constructive way. An administrator will need, at least to some degree, to liaise with the Office of the Public Advocate and those providing services to DV for the purpose of dealing appropriately with DV's funds. T's conduct very strongly suggests that she is incapable of that liaison. We do not, therefore, consider that she would act in the best interests of DV in the role of an administrator, and is not suitable to act in that capacity.

58 Given M's periodic absence from Western Australia, it would be preferable that he not be the sole administrator for DV. C is the obvious person who might fulfil the role jointly with M.

59 It is appropriate that the proceedings be adjourned for the purpose of hearing from both M and C as to whether they consent to appointment as administrators in light of the obligations which they would be assuming under the provisions of the GA Act.

Orders

1. There is a declaration that the Enduring Power of Guardianship made on 5 March 2011 is invalid.

2. The Enduring Power of Guardianship made on 5 March 2011 is revoked

3. There is a declaration that the represented person is:

   (a) incapable of looking after his own health and safety;

   (b) unable to make reasonable judgments in respect of matters relating to his person; and

   (c) in need of a guardian

4. The Public Advocate of Level 1, Hyatt Centre, 30 Terrace Road, East Perth, Western Australia, be appointed limited guardian of DV with the following functions:

   (a) to decide where the represented person is to live, whether permanently or temporarily;

   (b) to decide with whom the represented person is to live;

   (c) subject to Division 3 of Part 5 of the Guardianship and Administration Act 1990 (WA), to consent to any treatment or health care of the represented person; and

   (d) to determine the services to which the represented person should have access.

5. The Tribunal approves delegation by the Public Advocate of her functions as guardian of the represented person to an officer or employee employed in the Office of the Public Advocate.

6. The Enduring Power of Attorney made on 5 March 2011 is revoked.

7. There is a declaration that the represented person is:

   (a) unable, by reason of a mental disability, to make reasonable judgments in respect of matters relating to all or any part of his estate; and

   (b) in need of an administrator

8. The application for the appointment of an administrator is adjourned for further hearing.

I certify that this and the preceding [59] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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JUSTICE J A CHANEY, PRESIDENT