
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : GUARDIANSHIP AND ADMINISTRATION ACT
1990 (WA)

CITATION : DJJ [2023] WASAT 17

MEMBER : JUDGE K GLANCY, DEPUTY PRESIDENT
MS J DE KLERK, MEMBER
MS R LAVERY, MEMBER

HEARD : 24 FEBRUARY 2023

DELIVERED : 24 FEBRUARY 2023

PUBLISHED : 15 MARCH 2023

FILE NO/S : GAA 5474 of 2022

DJJ
Represented Person

CJ
Applicant

Catchwords:

Guardianship and Administration Act 1990 (WA) s17A – Review of decision by single member of Tribunal – Appointment of guardian where no less restrictive means available – Less restrictive means than appointing an administrator is available – Reinstatement of Enduring Power of Attorney

Legislation:

Guardianship and Administration Act 1990 (WA), s 3, s 4, s 17A(1), s 43, s 44, s 44(2), s 47, s 51(1), s 51(2), s 64, s 64(1), s 64(1)(a), Pt 5, Div 3

Result:

Orders appointing Public Advocate guardian and CTJ as plenary administrator
revoked

Orders revoking EPA revoked

Orders appointing CTJ guardian with limited functions made

Category: B

Representation:

Counsel:

Represented Person : Mr R Graham

Applicant : N/A

Solicitors:

Represented Person : Vogt Graham Lawyers

Applicant : N/A

Cases referred to in decision:

Nil

REASONS FOR DECISION OF THE TRIBUNAL:

(These reasons were delivered orally.)

Introduction and outcome

1 The Tribunal has come to a view today that the correct and preferable decision in relation to the question of administration is that, whilst DJJ is someone for whom an administration order could be made and is someone in need of an administrator, there is a less restrictive means available in this case by which decisions can be made in relation to the estate so that we will not appoint an administrator. At the conclusion of these reasons, we will revoke the orders that were made which revoked the enduring power of attorney (**EPA**), which means the EPA will again be in force.

2 In relation to guardianship, we have come to the view that the correct and preferable decision is that DJJ is someone who is in need of a guardian, that there is no less restrictive means available for making decisions that need to be made on her behalf than by the appointment of a guardian. In this case, we find that CTJ is suitable for appointment as guardian and will be appointed guardian.

3 We will make orders that give effect to that decision after we have finished giving our reasons.

Application for review

4 CJ has applied, pursuant to s 17A(1) of the *Guardianship and Administration Act 1990* (WA) (**GA Act**), for the review of a decision which was made by a single member of the Tribunal on 14 December 2022.

5 In that decision, the learned Senior Member declared that DJJ was:

- (a) unable, by reason of mental disability, to make reasonable judgments in respect of matters relating to all of her estate;
- (b) in need of an administrator of her estate;
- (c) incapable of looking after her own health and safety;
- (d) unable to make reasonable judgments in respect of matters relating to her person;

- (e) in need of oversight, care or control in the interests of her own health and safety; and
- (f) in need of a guardian.

6 Having made those declarations, the learned Senior Member then made orders in relation to administration in which she appointed CTJ as DJJ's administrator with authority to spend up to \$2,000 per annum on gifts on behalf of the represented person and revoked the EPA which DJJ had made on 22 September 2014.

7 The learned Senior Member made orders about guardianship. She appointed the Public Advocate as DJJ's limited guardian with functions of:

- (i) deciding where DJJ was to live, whether permanently or temporarily;
- (ii) deciding with whom she was to live;
- (iii) making treatment decisions for DJJ, subject to Div 3 of Pt 5 of the GA Act; and
- (iv) determining the services to which DJJ should have access.

8 The learned Senior Member also made an order that the Public Advocate could delegate those functions to an officer or employee employed in the Office of the Public Advocate.

9 Finally, the learned Senior Member made orders that the guardianship and administration orders were to be reviewed by 14 December 2027, so that they were to be in force for five years from the date that they were made.

The nature of the review

10 Before we come to consider the facts in relation to this matter and the decision, we need to consider the nature of a review under the GA Act.

11 Section 17A(1) of the GA Act permits any party who is aggrieved by a determination of the Tribunal which was made by a single member to request the President of the Tribunal to arrange for a Full Tribunal to review that decision.

12 Reviews under s 17A, as this is, come within the Tribunal's review jurisdiction, and that means that we are conducting a hearing essentially de novo, meaning from the beginning or afresh. That means that we were not confined to matters that were before the learned Senior Member in December last year, and we were permitted to, and did, consider new material. We had regard to new medical evidence, new reports from relevant parties, and also the oral evidence that was given today.

13 The purpose of the review is to produce the correct and preferable decision at the time of the decision on review, so we were not looking for error. As I said in the beginning of the hearing, what we are looking to do is to decide what the correct and preferable decision is today.

Principles governing proceedings under the GA Act

14 There are principles that are set out in the GA Act that govern our decision-making. We are obliged to observe those principles. They are found in s 4 of the GA Act.

15 The primary concern of the Tribunal is the best interests of the represented person: s 4(2) GA Act. We have to have regard to what is in DJJ's best interests. Additionally, everybody is presumed capable of managing their own affairs and making reasonable adjustments about matters relating to their estate, unless the contrary is proved to the satisfaction of the Tribunal: s 4(3) GA Act. That presumption applies in respect of every application made under the GA Act, not just today, but in every case.

16 One of the other principles in s 4 of the GA Act is that the Tribunal must, if it is possible, and as far as possible, seek to ascertain the views and wishes of the person about whom application for guardianship orders has been made: s 4(7) GA Act.

17 Another of the guiding principles is that an administration order should not be made if the needs of the proposed represented person, in the opinion of the Tribunal, could be met by means that were less restrictive of her freedom of decision and action: s 4(4) GA Act.

18 Finally, a plenary guardian is not to be appointed if the Tribunal is of the opinion that a limited appointment would suffice: s 4(5) GA Act. And an order appointing a limited guardian or an administrator needs to be in terms that, in the opinion of the Tribunal, impose the least

restriction that is possible in the particular circumstances on the represented person's freedom of decision and action: s 4(6) GA Act.

The evidence before the Tribunal on the review application

19 Firstly, as I have noted, the Tribunal is required to ascertain the views and wishes of DJJ to the extent that we can. DJJ was present at the hearing by video and participated in the hearing and conveyed to us very clearly what her views and wishes were.

20 We also heard evidence from two of DJJ's children. There was CJ, her son, who is the applicant for review. CTJ, one of DJJ's daughters who is currently the appointed administrator, also gave evidence.

21 We also heard evidence from Ms W, who is a senior guardian at the Public Advocate's Office.

22 And Mr Graham, who is the lawyer representing DJJ, gave some evidence about what was going on in the room in which he was sitting with DJJ by telling us about what he was able to observe her doing today, her note taking and the like, and we have had regard to that also.

23 In addition, as we have already mentioned to the parties, we have had regard to everything that was in the Hearing Book, by which we mean all the medical reports, the service provider reports, the reports from the Public Advocate and the submissions that were filed. We also read the transcript of the hearing that took place in December before the learned Senior Member.

24 We also read the statement of CJ that was provided to us today.

Appointment of a guardian

25 The GA Act says, in s 43, that there are certain criteria of which the Tribunal needs to be satisfied of in order to appoint a guardian.

Age

26 The first of those things is that the person for whom orders are sought needs to be over the age of 18. In this particular case, the evidence is that DJJ is 94 years of age. She is going to be 95 years of age in March, so that criteria is very clearly satisfied.

Incapacity

27 The second criteria is that the person has to be incapable of looking after their own health and safety, or unable to make reasonable judgments in respect of matters relating to their person, or in need of oversight, care or control in the interests of their own health and safety or for the protection of others, and in need of a guardian.

28 Where the Tribunal is satisfied of all of those things, the Tribunal moves on to consider who should be the guardian. As we are satisfied that DJJ is over the age of 18, that means that we have to come to that question of whether she is capable or incapable of doing those things that we have just referred to.

29 The medical evidence before us is that DJJ has been diagnosed with Alzheimer's dementia. That was a diagnosis given by a geriatrician at the time where DJJ was in hospital, after a fall. The evidence of Dr B of more recent times is that DJJ has age-related cognitive impairment or dementia.

30 CJ was not really sure whether one medical opinion was sufficient to be certain of that diagnosis but, having no evidence to the contrary and having two doctors saying that DJJ has a form of dementia, we are satisfied that it is more likely than not that that is correct. In coming to that view, we also had regard to all of the medical evidence that told us that DJJ had some problems with making her own personal decisions and was also incapable of making complex financial decisions.

31 That was consistent with the evidence that was given by CJ and CTJ, who told us that their mother was capable of making simple decisions about the expenditure of her finances on day-to-day matters and took a keen interest in knowing about that sort of expenditure, but that she would not be capable of the complex processing that was required to deal with more complicated financial matters.

32 The medical evidence, looking then at what is required in relation to guardianship, is that DJJ was admitted to hospital four times in the last year; that there were falls; that she was undernourished and, as a result, DJJ was having difficulties living at home; and there were concerns from medical and support staff about DJJ not being accepting of medical treatment that was recommended.

33 DJJ explained to us that the reason she could not have the MRI she needed was that she suffered from asthma. That evidence was not

consistent with what the medical reports had to say about the cause of the failure to have the MRI.

34 The reports say that DJJ was refusing to accept that she should be wearing a splint on her foot that would have assisted with the droopy foot and that she was regularly abandoning her walker. Wearing the splint and using the walker would have helped prevent falls.

35 All of the family members' evidence was that DJJ is someone who is not making good decisions in her own best interests about her personal decisions and in need of oversight in that sort of decision-making. They told us, for example, they are having to insist she uses a walker before they will accompany her on outings.

36 We are satisfied that those first criteria of her being incapable of looking after her own health and safety, incapable of making reasonable decisions about her person, in need of oversight, care or control in the interest of her health and safety have been met.

Need and less restrictive means of making decisions

37 We turn next to consider the issue of whether or not DJJ is in need of a guardian. There is no enduring power of guardianship in place and, we are satisfied, in those circumstances, that DJJ is someone who is in need of a guardian.

Limited/plenary

38 We are going to come back to the functions that should be conferred upon the guardian, but we note that s 4(5) of the GA Act says that a plenary guardian is not to be appointed if a limited guardian would suffice. In this case, we consider a limited appointment will suffice.

Who should be appointed

39 Section 44(1) of the GA Act sets out the criteria for who can be appointed as a guardian. Firstly, a guardian needs to be over the age of 18. Secondly, they need to have consented to act in the role of guardian. Thirdly, the Tribunal needs to be satisfied that they will act in the best interests of the represented person, are not in a position where their interests might conflict with the interests of the represented person and are otherwise suitable to act as a guardian.

40 Section 44(2) the GA Act says:

- (2) For the purposes of subsection (1)(c) the State Administrative Tribunal shall take into account as far as is possible —
- (a) the desirability of preserving existing relationships within the family of the person in respect of whom the application is made;
 - (b) the compatibility of the proposed appointee with that person and with the administrator (if any) of that person's estate;
 - (c) the wishes of the person in respect of whom the application is made; and
 - (d) whether the proposed appointee will be able to perform the functions that are to be vested in him.

41 The GA Act also provides that the Public Advocate is a guardian of last resort; to be appointed where there is not another person willing and suitable: s 44(5) GA Act.

42 We turn then to consider the appointment of the guardian in this particular case. CTJ has proposed herself as guardian. She said she would like to do that jointly with PC, her sister. PC did not attend the hearing. Therefore, we have not been able to ascertain whether she consents to acting in that role, and in the absence of information to that effect from her, we cannot consider her for appointment as guardian.

43 Having raised that issue with CTJ and CJ during the course of the hearing, CJ said, 'well, I propose myself to act jointly with CTJ'. We have determined not to make a joint appointment because that is not in accordance with the wishes of DJJ, who was very clear, in her own words and in the submission put on her behalf by Mr Graham, that she wanted her daughters to be her guardian and, if they could not do it jointly, it was her wish that CTJ act as her guardian. In those circumstances, we have only considered CTJ's suitability for appointment.

44 We are satisfied that CTJ will act in her mother's best interests. The meaning of 'best interests' is set out in ss 51(1) and 51(2) of the GA Act to be the guardian's opinion about what is in the best interests for the represented person, subject to any direction of the Tribunal under s 47 of the GA Act.

45 We did have some concerns about whether CTJ would act in her mother's best interests. Those concerns were raised in our minds because of the reports we had about the absolute commitment CTJ's children have to honouring their mother's wish to remain at home and therefore keeping her at home come hell or high water. Given the risks to her health from remaining at home, it may not be the case that CTJ could make hard decisions that went against her mother's wishes in circumstances where they needed to be made.

46 But having heard Ms W's report about arrangements that are in place, that furniture is being moved so there are not fall risks, that there is care provided essentially 24 hours a day, seven days a week (although that that care might be reduced a little bit as family have decided that there does not seem to be a need for someone to be there overnight), that DJJ has a mobile phone with her at all times, that the family is in very close, regular contact with DJJ to ensure that, if there is any risk when nobody is with her, that is only for a very limited time and that she will not be left for long periods of time on her own, we are satisfied that CTJ can act in her mother's best interests.

47 We are also satisfied that because CTJ is also one of the daughters who is the donee of the power of attorney and that she and her sister, the other donee, get on well, there will be no incompatibility between the guardian and those who are making financial decisions. Additionally, all of the family are content with CTJ being appointed as guardian and we find that her appointment will not be destructive of relationships between members of DJJ's family and, in particular, of relationships DJJ has with members of her family.

48 In all those circumstances, we are satisfied that CTJ is suitable to act as guardian and also that that is in accordance with DJJ's wishes.

Duration of the order

49 We then had to consider how long the order appointing CTJ as limited guardian should be, and we are of the view that five years is an appropriate term. If there are any circumstances that change, applications can be made for review.

Functions of guardian

50 The functions that we propose to confer on the guardian are the same functions that were conferred on the last occasion by the learned Senior Member. The guardian shall have the functions of deciding

where DJJ is to live; with whom she should live; to make treatment decisions for her; and to determine the services to which she should have access.

51 We have decided that those functions are appropriate given the facts that are before us, but also in part because nobody has said that any of those functions are not required or that there should be additional functions conferred. On the evidence before us, we find that DJJ is going to need to have someone make medical decisions on her behalf and that there might be a need to make decisions about where she is to live and what services should be provided in the home in order to keep her in the home for as long as possible.

Appointment of administrator

52 That leaves me then to give reasons on behalf of the panel today for the decision that we have reached about the appointment of an administrator. The GA Act sets out matters about which the Tribunal needs to be satisfied in order to make an administration order. They are set out in s 64 of the GA Act. Section 64(1) says:

... where the Tribunal is satisfied that a person in respect of whom an application has been made is unable by reason of mental disability to make reasonable judgments in respect of matters relating to all or any part of their estate and in need of an administrator then the Tribunal can make a declaration to that effect.

53 Where the Tribunal reaches that conclusion the Tribunal then needs to appoint a person or persons to be the administrator.

54 There are, therefore, three primary questions for the Tribunal on review in respect of administration. First, whether DJJ today suffers from a mental disability. Second, whether by reason of that mental disability, DJJ is unable to make reasonable judgments in respect of matters relating to all or any part of her estate. Third, whether she is in need of an administrator. And if the answer to each of those three questions is yes, the Tribunal then goes on to consider who should be appointed as the administrator.

Mental disability

55 The expression, 'mental disability' when it is used in the GA Act is defined in s 3 to include:

... an intellectual disability, a psychiatric condition, an acquired brain injury and dementia ...

56 It is not an exhaustive definition, other things could also come within that definition, but those are matters defined that definitely do come within the definition. In this particular case, the evidence which we have accepted is that DJJ is someone with a mental disability, because she has dementia, whether that is Alzheimer's dementia or some other form of dementia.

57 CJ is not certain of any diagnosis, but for the reasons we have already given in relation to the issue of the medical condition when dealing with guardianship, we are satisfied on the evidence that there is a diagnosis of dementia and that, therefore, she has a mental disability under s 3 of the GA Act. That is the diagnosis given by Dr B and Dr G, who was the consultant geriatrician who gave a report in November 2022.

Unable by reason of mental disability to make reasonable judgments in respect of matters relating to all or part of their estate

58 We are also satisfied that the evidence establishes that it is because of that mental disability that DJJ cannot make reasonable decisions in relation to her estate.

59 There is a subjective and an objective test involved in that assessment because the Tribunal needs to consider whether DJJ is able to make reasonable judgments about her estate, and that requires us to decide that in relation to her actual estate. That constitutes a subjective test. At the same time, we have to consider whether or not the ability to engage in the mental processes exist or do not exist, and that is an objective test.

60 In this particular case we heard evidence, mostly from DJJ, but confirmed by family members, about her estate. Her estate is relatively small, consisting of a property that she has owned, firstly with her husband and now on her own, and the two pensions, one from Malaysia and one from the Australian Government, which she receives. There was reference to the value of those in the Public Trustee's reports. DJJ also told us that she has somewhere between \$8,000 – \$10,000 in her bank account. So, it is not a small estate, though it is not a very large estate either. Nevertheless, DJJ, as a result of her cognitive decline is, her family accept, unable to make big decisions about complicated things that might arise in respect of her estate.

61 We know that is not what she wishes and not what her family
wishes, but if it had to be done, the family accept that she could not
make a decision about how to go about selling her property.

62 We accept the evidence established that DJJ can make decisions
about smaller matters regarding her estate. We are satisfied on DJJ's
evidence that she has a good understanding of what is in her bank
account and how to pay bills and what bills she has, but the evidence
also was that a lot of the management of that bill paying is done with
the assistance of CTJ.

63 We are also satisfied that it is because of that cognitive decline
that DJJ cannot make decisions about part of her estate any longer.
We are therefore satisfied that the requirements in s 64(1)(a) of the
GA Act are met in that case.

In need of an administrator for estate

64 We are satisfied that there is a need for some form of
administration of DJJ's estate. But we are also satisfied that there is a
less restrictive means available by which that can occur. In this
particular case, there is an EPA that was made in September 2014, by
which DJJ appointed two of her daughters, CTJ and PC, jointly to act as
the attorney. We are satisfied on the evidence before us that CTJ has,
in the past, acted in her mother's best interests, and that there is no
reason for us to be concerned that she would not continue to do so.
She told us she and her sister work well together even though acting
jointly is sometimes practically difficult because it requires both sisters
to attend the bank to transact on DJJ's accounts. CTJ says that they are,
nevertheless, willing and able to do so because it is their mother's wish.
We accept that evidence. For that reason, we are satisfied that, as a less
restrictive means is available, there is no need to make orders
appointing anyone to the role of administrator at this time.

Orders

65 The Tribunal orders:

1. The guardianship and administration orders made by Senior
Member Dr Wilson on 14 December 2022 are revoked.

Guardianship

2. The Tribunal declares that the represented person, DJJ, is:
 - (a) incapable of looking after her own health and safety;
 - (b) unable to make reasonable judgments in respect of matters relating to her person;
 - (c) in need of oversight, care or control in the interests of her own health and safety; and
 - (d) in need of a guardian.
3. CTJ of [address] Western Australia is appointed limited guardian of the represented person 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) to make treatment decisions for the represented person, subject to Division 3 of Part 5 of the *Guardianship and Administration Act 1990* (WA); and
 - (d) to determine the services to which the represented person should have access.
4. The guardianship orders are to be reviewed by 23 February 2028.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

MA
Associate to Deputy President Judge Glancy

15 MARCH 2023