

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *VR* [2020] QCAT 208

PARTIES: **In applications concerning *VR***

APPLICATION NO/S: GAA3022-20; GAA3023-20; GAA6018-20; GAA6019-20; GAA6020-20; GAA6021-20

MATTER TYPE: Guardianship and administration matters for adults

DELIVERED ON: 10 June 2020

HEARD AT: Cairns

HEARING DATE: 25 May 2020

DECISION OF: Member Johnston

ORDERS: **ENDURING POWER OF ATTORNEY**

1. The following Enduring Power of Attorney for VR is overtaken by the making of these appointments and in accordance with s 22(2) of the *Guardianship and Administration Act 2000* (Qld) can no longer be acted upon to the extent that these appointments have been made:

- (a) The Enduring Power of Attorney dated 22 May 2015 appointing VSI and MG jointly as Attorneys for financial, personal and health matters.**

GUARDIANSHIP

1. The appointment of the Public Guardian as guardian for VR for the following personal matters is continued:

- (a) Accommodation; and**
(b) With whom VR has contact/and or visits.

2. This appointment remains until further order of the Tribunal. This appointment is reviewable and to be reviewed in six (6) months.

ADMINISTRATION

1. The appointment of the Public Trustee of Queensland as administrator for VR for all financial matters is continued.

2. The Tribunal dispenses with the requirement for the administrator to provide a financial

management plan.

- 3. The Tribunal directs the administrator to provide accounts to the Tribunal when requested.**
- 4. The appointment of The Public Trustee of Queensland remains current until further order of the Tribunal.**

HEALTH LAW – GUARDIANSHIP, MANAGEMENT AND ADMINISTRATION OF PROPERTY OF PERSONS WITH IMPAIRED CAPACITY – OTHER MATTERS – NEED FOR A GUARDIAN AND ADMINISTRATOR – appropriateness considerations – relevance of a conflict of interest.

Guardianship and Administration Act 2000 (Qld), s 12, s 15, General Principles

APPEARANCES &
REPRESENTATION:

VR – adult
 VSI – son
 JN – Public Guardian
 KT – Public Trustee of Queensland
 LR – daughter
 MG – daughter
 MA – son-in-law
 VS – son
 AD – Public Guardian
 Jane Griffin – Public Trustee of Queensland
 FJ/TT – solicitor for VSI

REASONS FOR DECISION

- [1] On 9 December 2019 the Tribunal made a number of orders and findings including a finding that the adult VR lacked capacity for both personal and financial matters (see paragraph 195 of the decision of 9 December 2019). The Tribunal also declared an Enduring Power of Attorney of the adult dated 20 August 2018 invalid and also declared that the adult did not have capacity for transferring the title of her property in Brownsville on 20 September 2017 to her son VSI. These later two mentioned matters are the subject of an appeal. The Tribunal notes also that no stay of the decisions on appeal has been granted. This hearing is therefore about the status of an Enduring Power of Attorney and a review of the appointments made on 9 December 2019 and the new applications of MG and VSI.
- [2] This hearing has come about because an earlier Enduring Power of Attorney dated 22 May 2015 appointing VSI and MG jointly for financial and personal health matters has come to the attention of the appointees. The existence of this document has led to the suspension of the appointment of the Public Guardian as guardian for the adult and the Public Trustee of Queensland as administrator for the adult. The Tribunal notes further that an Interim Order was made on 10 March 2020 overriding the Enduring Power of Attorney dated 22 May 2015 and appointing the Public Guardian as guardian for the adult and the Public Trustee of Queensland as administrator for the adult on an interim basis.

What is the status of the Enduring Power of Attorney dated 22 May 2015?

- [3] The solicitor for VSI stated that her instructions were that this document had been revoked by the creation of the later enduring document (the Enduring Power of Attorney dated 20 August 2018). When queried by the Tribunal that the later enduring document had been declared invalid the solicitor told the Tribunal that her instructions were that the joint appointment between VSI and MG was unworkable because of the significant conflict between the attorneys.
- [4] When the Tribunal asked MG about her position on the enduring document she told the Tribunal that due to conflict between the attorneys she would not be able to work with VSI which made the enduring document unworkable.
- [5] The Tribunal makes the following finding:
- (a) there is substantial conflict between the appointed attorneys such as to make the operation of the Enduring Power of Attorney dated 22 May 2015 unworkable.
- [6] The Tribunal will in these circumstances override the Enduring Power of Attorney dated 22 May 2015.
- [7] The effect of this determination leaves the appointments of 9 December 2019 which were suspended in place.

Does the adult currently have capacity?

- [8] Dr SM, the adult's GP, in her letter of 9 March 2020 says that the adult has deteriorated due to Alzheimer's dementia and that the adult is now fully incontinent and gets confused and disoriented. The adult also had delusions and hallucinations and is sometimes aggressive. A CT Scan was organised by Dr SM on 21 November 2018 which showed small vessel ischemia reflecting an underlying vascular dementia.
- [9] Dr A from Geriatric Medicine wrote on 9 November 2018 that functionally the adult was fully dependent on all IADLs and needs some assistance with some of the ADLs. In summary Dr A stated that the adult appeared to have multi-domain cognitive deficits comparable with moderate to severe mixed type dementia syndrome. She appeared to have significant executive dysfunction and appeared to have the capacity to make simple lifestyle choices; however, she lacked capacity managing her financial matters or deciding on complex lifestyle choices or health related matters.
- [10] The Tribunal told the parties that on the basis of the evidence set out above it was of the view that the adult did not have capacity. The members of the adult's family present at the hearing agreed on the basis of this evidence that the adult lacked capacity at this time.
- [11] The Tribunal finds:
- (a) that the adult has a diagnosis of mixed dementia of a moderate to severe basis;
- (b) this impacts on the adult's cognitive and executive functioning.
- [12] The presumption of capacity is rebutted for personal and financial matters.

What need is there for the appointment of a guardian?

- [13] The Public Guardian was appointed on 9 December 2019 for the matters of accommodation and contact. The basis for these appointments for historical reasons are set out in paragraphs 200 to 207 of the decision delivered on 9 December 2019. The appointment for contact was based on the level of family disharmony around visitations with the adult. The appointment around accommodation was based on a need for suitable, secure appropriate accommodation decision being made in the adult's best interests. This would have stemmed from the significant conflict between family members about who should have care for the adult and where she lived.
- [14] The Member found at paragraph 100 that VSI had restricted family members from visiting and telephoning the adult. The Tribunal notes paragraphs 113 to 114 in this regard.
- [15] VSI's solicitor agreed there was a need for a guardian and the big issues were around contact between VSI and his mother and where she lived. She objected to contact having to be supervised in circumstances where there were no allegations of VSI having caused any harm to his mother. The Tribunal is of the view that VSI is part of the adult's support network and reasonable and appropriate efforts need to be made for this to occur. These should be documented so that the Tribunal can be fully informed on review.
- [16] The rude way in which one of the family members opposed to VSI's application interjected while he was speaking emphasised the difficulties the Public Guardian would have had in engaging with family to organise contact for VSI with his mother. This also emphasises that the nature of the conflict is significant and well entrenched.
- [17] The Tribunal having heard from the parties in relation to the need for appointment has come to the view that the areas where a need remains are:
- (a) accommodation; and
 - (b) contact.
- [18] There remain significant differences between family members over where the adult should live. The role of the Tribunal is not to make a determination on where the adult should live but to appoint a decision-maker power to make that decision. There also remain significant differences between family members over the contact that the adult has with VSI.
- [19] The Public Guardian also stated that with movement restrictions and conflict between family members it had been difficult to arrange contact and when arrangements fell through the family members blamed each other for the breakdown of contact efforts.
- [20] The Tribunal makes the following findings:
- (a) there has been significant conflict between family members over where the adult should live; and
 - (b) there has been significant conflict between family members around the adult's contact with VSI.
- [21] The Tribunal concludes:

- (a) without appointment there would be unreasonable risk to the health and welfare of the adult; and
- (b) without appointment the adult's needs would not be adequately protected.

Who should be appointed as guardian for the adult?

- [22] The Tribunal notes that s 31 of the *Guardianship and Administration Act 2000* (Qld) provides on review of a guardian that a guardian can only be replaced if the appointee is incompetent or another proposed appointee is more appropriate.
- [23] The appropriate starting point for the Tribunal would be the adult's wishes as to who she thought appropriate to support her. Unfortunately the evidence before the Tribunal is that the adult's wishes are not clear as she responds in a favourable manner to whoever it she is with at the time.
- [24] The issue for the Tribunal is that only options for appointment are VSI or the Public Guardian. RL (daughter), MG (daughter), VS (son), and MA (son-in-law) all support the appointment of the Public Guardian and VSI (son) supports himself.
- [25] The appointment of a family member as guardian in circumstances where there is significant conflict and disharmony between family members would impact upon the appointee observing the General Principles and is a significant factor that supports the appointment of an independent guardian.
- [26] There are several factors referred to in VSI's material that are relevant and in his favour. This includes evidence that the applicant organised supporting services and was active in looking after the adult's health care.
- [27] The evidence in relation to VR's care was that she was well looked after living with her daughter and her family. GM gave evidence of her mother noting on a number of occasions that she preferred a woman supporting her with her personal care.
- [28] There are significant differences of opinion between family members making it difficult for a family member to undertake the role. This supports the appointment of an independent guardian. A substantial part of the hearing was hearing the long term grievances between certain family members and VSI. This suggested that the conflict was well entrenched. The Tribunal reminds all the parties that the focus of the hearings was the adult's best interests and they had to put their own animosities behind them and support VR.
- [29] There is a finding of the Tribunal that the transfer of ownership of the adult's house to her son VSI was invalid. This raises a conflict between the interests of the adult and the interests of VSI. This is a significant conflict of interest. The solicitor for VSI has accepted that there is a significant conflict of interest pending the finalisation of the appeal. This supports the appointment of independent guardian. The Tribunal is of the view in this case that this conflict in relation to financial matters is a relevant factor in relation to the appropriateness of the appointment of a guardian as well as being relevant to the appropriateness of an administrator.
- [30] The Tribunal in making its decision has considered the submissions of VSI in paragraphs 37 to 48 regarding his appropriateness.
- [31] The Tribunal in relation to VSI's submissions about the appointment of the Public Guardian paragraphs 12 to 21 makes the following comments. The Tribunal when it appoints a guardian gives the Guardian power to make decisions in the areas of

appointment. The Tribunal accepts their decision to move the adult is a major decision. The Tribunal gave the Public Guardian the power to select the safe and appropriate place for the adult live. The Tribunal on balance is of the view that this placement does meet the adult's best interests. The Tribunal accepts that there are a range of considerations that go into making a decision of that nature. VSI in his submissions makes reference to some of the relevant factors. The Tribunal makes the point that if a family member is aggrieved in relation to the decision-making of the Public Guardian there are a range of internal processes to have such decision-making reviewed. There is no evidence that these have been pursued.

- [32] The Tribunal accepts VSI's submission that the Public Guardian's decision changed the status quo in relation to her living circumstances and will have to some extent disrupted her lifestyle. The Tribunal accepts that VR's needs are currently being addressed in what appears to be a supportive and protective environment with an appropriate level of care. The Tribunal does not accept that this decision means that the Public Guardian has failed to act in the adult's best interests.
- [33] The Tribunal repeats that it does not have the responsibility for determining the best place for the adult to live. The Public Guardian has a difficult role to try and satisfy all the interests of stakeholders when making decisions where there is significant family conflict. The focus of the Guardian must be on the best interests of the adult even if that disappoints some family members.
- [34] The review of the exercise of a guardian's powers in making particular decisions wouldn't normally be the remit of the Tribunal. Where the actions of a guardian are manifestly wrong; appear to be without any proper basis or foundation; or where a guardian is alleged to have acted maliciously or capriciously then all these would go to the appropriateness of the appointee and be a basis for a review of the appointment. Where there is conflict between family members and there is merit or purported merit on both sides the guardian must tread a very difficult line. The Tribunal is not satisfied that the Public Guardian's decisions meet any of the criteria above. They have clearly made decisions in the adult's best interests. VSI is naturally aggrieved because his mother has been removed from his care. The Public Guardian has explained its decision making.
- [35] The Tribunal is satisfied that there is an appropriate relationship between VSI and the adult which stands in his favour over an independent guardian.
- [36] The accessibility of a decision-maker for the adult depends on where the adult lives. In the present case the current situation creates difficulties as VSI has difficulty communicating with his mother and this situation makes the appointment of an independent guardian more appropriate.
- [37] The Tribunal in relation to appropriateness and competence of a party is of the view given the conflict between family members that an independent professional Guardian such as the Public Guardian would be a more appropriate appointee.
- [38] The Tribunal in relation to the submissions of VSI (paragraphs 22 to 30) makes the following points. An appointed Guardian must follow the General Principles. The Tribunal agrees with VSI that this means taking all reasonable steps to ensure that contact be maintained between VSI and his mother. There is clear evidence that VSI has had limited access to his mother. The conflict between family members has exacerbated these difficulties. The different family members are blaming each other for this state of affairs. The Public Guardian must navigate these difficulties and put

together a plan to ensure that contact can occur. This may require some ground rules around contact and/or a communication plan. The guardian may need to make the adult's rights clear to all family members and emphasise that they all need to work in the adult's best interests.

- [39] The Tribunal is of the view having weighed up all the evidence that on the balance of probabilities the Public Guardian is more appropriate to be appointed as guardian for VR. The significant factors being the level of conflict between family members and the existence of a significant conflict of interest between the adult and VSI.
- [40] The Tribunal will however expect on review that the Public Guardian has taken steps to address the requirement in the General Principles that provide for the adult to have contact with VSI (her son) as part of her existing support network. The Tribunal would expect the Public Guardian to have taken all reasonable steps to ensure that it is possible for this to occur. The family members of the adult who have the care of her needs have to be reminded that they need to support the efforts of the Public Guardian to maintain the existing supportive relationships which include contact between the adult and VSI. He should be part of that existing supportive network. All family members need to assist the Public Guardian in a constructive way to facilitate contact.
- [41] The final points which the Tribunal must make are:
- (a) that the Public Guardian is only required to take such reasonable steps are appropriate in circumstances; and
 - (b) any contact should take place at times and places that take into account the adult's wishes and well-being.
- [42] The Tribunal makes the following findings in relation to appropriateness:
- (a) there is significant conflict and animosity between family members;
 - (b) any appointed family member would have difficulty meeting the General Principles; and
 - (c) the Public Guardian is an independent professional Guardian who can take into account the wishes of all family members when making the best decisions for the adult.
- [43] The Tribunal will appoint the Public Guardian for a short period of six months so that a review can take place and the Tribunal can look at the efforts of the Public Guardian to facilitate contact between the adult and VSI in accordance with the General Principles.

The need for appointment of administrator?

- [44] The evidence of The Public Trustee of Queensland is that the management of the adult's finances are relatively simple as she receives a pension that is used to meet her daily needs. The issue of complexity relates to the status of the adult's former home which has been transferred into her son VSI's name. The Tribunal has ruled that the transfer was invalid on the basis that the adult did not have capacity to enter into the transaction. This decision is subject to appeal but this has not been stayed. This constitutes a clear and significant conflict of interest between the interests of the adult and the interests of VSI as applicant for appointment as administrator. The Tribunal also notes that during the course of these proceedings VSI has registered a

mortgage over the property thus securing his own liabilities over the property. The solicitor for VSI submitted that a split appointment was appropriate with VSI managing the general day-to-day finances and The Public Trustee of Queensland to deal with the property transfer subject to resolution of the appeal.

[45] There was quite an amount of time spent on discussion in relation to different family members' contribution to the adult's financial situation. In relation to VSI if his appeal were to fail then he would need to mount an argument with the Administrator regarding his contributions, the nature and effect of his long term relationship with his parents and any other relevant issues as to how the issue should be dealt with. This is not a matter for the Tribunal at this time but does highlight the complexity of the issues around administration.

[46] The Tribunal concludes:

- (a) without appointment there is likely to be unreasonable risk to the property and finances of the adult; and
- (b) without appointment the adult's needs would not be adequately protected.

Who should the Tribunal appoint as administrator?

[47] The Tribunal notes that s 31 provides on review of an administrator that an administrator can only be replaced if the appointee is incompetent or another proposed appointee is more appropriate.

[48] The issue for the Tribunal is that the only options are to appoint VSI or The Public Trustee of Queensland. RL (daughter), MG (daughter), VS (son), and MA (son-in-law) all support the appointment of the Public Trustee of Queensland and VSI (son) supports himself.

[49] The Tribunal relies on the discussion of appropriateness set out above in relation to the appointment of a guardian. Those considerations are relevant in this case to the appointment of administrator.

[50] The Tribunal is of the view that a split appointment should only occur in limited circumstances and the circumstances here don't support a split in the responsibilities.

[51] The Tribunal is of the view on the balance of probabilities that The Public Trustee of Queensland is more appropriate to be appointed as administrator.

[52] The Tribunal finds:

- (a) VSI has a significant conflict of interest;
- (b) the status of the adult's legal interest in her former property is uncertain;
- (c) The Public Trustee of Queensland is a professional independent administrator who can best support the adult with her financial affairs.

[53] The Tribunal appoints The Public Trustee of Queensland as administrator for the adult until further order of the Tribunal on a plenary basis.