

CITATION: *Dasgupta v E.G.* [2003] NTMC 054

PARTIES: MADHU DASGUPTA  
Applicant  
  
v  
  
E. G.  
Respondent

TITLE OF COURT: Local Court

JURISDICTION: Adult Guardianship Act

FILE NO(s): 20118829

DELIVERED ON: 10 November 2003

DELIVERED AT: Darwin

HEARING DATE(s): 22 July 2003

JUDGMENT OF: H. B. Bradley CM

**CATCHWORDS:**

GUARDIANSHIP – ADULT GUARDIAN

Powers generally under Adult Guardianship Act – power to sell property.

*Adult Guardianship Act* (NT) 1989 s 15, s 16

*Aged and Infirm Persons' Property Act* (NT) 1989 s 16, s 17

**REPRESENTATION:**

*Counsel:*

Applicant: Ms G Martin  
Respondent: Ms S Polden

*Solicitors:*

Applicant: Solicitor for the Northern Territory  
Respondent: Diana Elliott

Judgment category classification: A  
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Number of paragraphs: 38

IN THE LOCAL COURT  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20118829

[2003] NTMC 054

BETWEEN:

**MADHU DASGUPTA**  
Applicant

AND:

**E. G.**  
Respondent

REASONS FOR DECISION

(Delivered 10 November 2003)

Mr H BRADLEY CM:

1. This application is made to the Local Court under the *Adult Guardianship Act* (1988) (the Act) in respect to an order which was previously made to assist E. G. The application is in the nature of a review of the court's standard order which was made setting the powers of E. G's guardian or alternatively for authority to enable the sale of property within the estate of the assisted person. The application was primarily brought because there were doubts whether or not the guardian appointed under s 16 has such power under the order which was previously made by the court to manage the estate.
2. E. G. is a gentleman who suffers from severe dementia and it is clear from the material in the file that he is a person in respect of whom it is appropriate to have an order for guardianship.
3. The matter comes before me for reconsideration because it seems he has property or some incidental household property worth approximately \$200

and the guardian has already incurred something like \$400 for the storage of that property to date. The applicant therefore seeks to clarify whether the Public Guardian can with confidence proceed to sell the property under the existing order or with the clear authority of a separate court order. The question therefore that really arises is for the court to decide whether the court has jurisdiction to grant that power to the guardian.

4. I don't think there is any dispute between the parties as to the need for these things to happen. It is clearly ludicrous that the guardian feels obliged to spend more than the property is worth simply to preserve it.
5. It seems to me that the Local Court has no inherent right to make a declaratory order as to the meaning and intent of the legislation in the same way the Supreme Court has specific power to make declaratory orders under the *Supreme Court Act*. This court does however have power under the Act generally and specifically under s 11 to make guardianship orders with or without limitations or conditions, to review such orders and to order or give directions as may be best to assist it in carrying out its functions. S 11 is in the following terms;

**“11. Jurisdiction of Court**

- (1) The Court has jurisdiction in all matters relating to adult guardianship, has the functions required of it under this Act, and has the power to carry out those functions.
- (2) In particular, the Court may –
  - (a) hear and determine applications made to it under this Act;
  - (b) make guardianship orders, whether with or without limitations or conditions;
  - (c) review, amend, or revoke guardianship orders; or
  - (d) make such other order or give such directions as may best assist it in carrying out its functions”.

6. Such a jurisdiction seems to me to enable this court to make an order to resolve this issue which has now been brought before it in a way which creates no undue costs or formal process (see s 12). I note in passing that s 16 also provides the court with power to vary or terminate an order relating to the property of the represented person.
7. The history of this matter seems to be that the *Aged and Infirm Persons' Property Act*, the *Adult Guardianship Act* and the *Mental Health Act* were all passed together in 1988 and were then perceived as being a package sufficient to enable people with disabilities to be looked after and people who lived independently but needed care and assistance or management of their property to have that property managed. I must presume that parliament had intended a sensible and workable arrangement to be put in place for people found to be incapable of managing their property or their affairs. If this were not so then ridiculous results would be possible. An example is in fact the present case, where goods of relatively small value and no worth to the person being assisted, cost the estate more than their value for mere maintenance.
8. It is possible I suppose in such cases for the guardian simply not to pay the payments for maintenance and storage etcetera and to allow the sale of the property under relevant legislation. That is a less than satisfactory result and obviously should not be used as a mere mechanism to achieve the result which is or should be achieved under the *Adult Guardianship Act*.
9. An alternative for the public guardian is to apply to the Supreme Court for an order under the *Aged and Infirm Persons' Property Act*, but often and indeed in many estates such as this one it would result in the undue depletion of funds of the estate. Costs of such applications can be substantial. I consider the average cost for such an application is likely to be in the order of \$3000. Obviously the cost of the application here would far exceed the value of the goods.

10. Assuming therefore that parliament has intended a sensible result to be achieved, what does the legislation achieve? A preamble to the *Adult Guardianship Act* says that it is an Act for making provision for a scheme of guardianship for certain adults under an intellectual disability and for related purposes. S 4 of the Act clearly sets out that the functions of the court are to be exercised in the best interests of the represented person.
11. S 11 (above) is where the court gains its powers in terms of its jurisdiction to make guardianship orders with or without limitations or conditions and to review and amend and revoke such things and to give or make alternative orders. That section also permits the court to give such directions as may best assist it in carrying out of its functions. I believe therefore the function of the Act is to look after people who are intellectually incapable of managing their affairs. S 12, I note also says that a court is not to be bound by the rules of procedure of evidence and that means that in this court we are able to proceed in a pragmatic way thus enabling this matter to be determined at a minimal cost.
12. S 16 of the act then is the critical one to which we now need to refer. When the act was first passed in 1988 s 16 provided;

**“16. Property of represented person**

- (1) The court, at the hearing of an application for a guardianship order under this Act, may order the Public Trustee or any other person to make an application under the *Aged and Infirm Persons’ Property Act* for a protection order in respect of the estate of the person who is the subject of the application.
- (2) Notwithstanding subsection (1), if the Court is satisfied that the estate of the person who is the subject of the application consists of –
  - (a) cash from or entitlements to social security benefits;

(b) other property appearing to have a value of not more than \$2000, more or less; or

(c) both,

the Court may require the adult guardian, if one is appointed, to manage the estate in accordance with the terms of the guardianship order.

(3) Unless otherwise provided in a guardianship order, a manager under subsection (2) shall, at least once a year, give the Executive Officer an account of the management of the represented person's estate, showing assets and liabilities and receipts and payments in respect of the estate.

(4) The Executive Officer shall report on the management of the estate to the Court at the time the guardianship order is reviewed pursuant to section 23.

13. It can be seen that s 16(2) provided then that notwithstanding s 16(1) the Local Court could, under the *Adult Guardianship Act* require the adult guardian to deal with Social Security money and other property not exceeding \$2000 in value. There is then a provision for accounting in relation to that property and to the executive officer to report to the court in due course.
14. If one were to apply to maximum "expressio unius, est exclusio alterius" there are obvious limitations in the old form of s 16; it made no reference to any cash that might have been in the estate other than cash received by way of Social Security and it will be rare to find someone without a bank account that didn't have as much as 5 cents in it. It would be ridiculous if the adult guardian could not deal with the 5 cents in the balance of a bank account.
15. There was also a \$2000 limit in respect of other property which seems to me to be an extraordinary low limit in the circumstances of modern life. If the protected person owned a pogo stick or an iron or a plate or a cup then there is power in this section to deal with it but not if the total value of property exceeded \$2000. Unless the order for the management of this very limited

estate was to be part of the guardianship order itself the power did not naturally flow from a general order for guardianship under s 17.

16. It seems to me that it didn't take long for parliament to realise limitations of s 16 and so in 1990 and again in 1991 the section was amended until it achieved its present form. The new section provides:

**“16. Property of represented person**

- (1) The court may, at the hearing of an application under this Act for a guardianship order -
- (a) if it is satisfied that the adult guardian is competent to manage the estate of the person who is the subject of the application, appoint the adult guardian to be the manager of the estate subject to such terms and conditions as it thinks fit; or
  - (b) if it is not satisfied that the adult guardian is competent to manage the estate of the person who is the subject of the application, order the Public Trustee or some other person to make an application under the *Aged and Infirm Persons' Property Act* for a protection order.
- (2) An adult guardian appointed under subsection (1)(a) to be the manager of the estate of the person who is the subject of the application has -
- (a) the powers of a manager of a protected estate under section 17 of the *Aged and Infirm Persons' Property Act*; and
  - (b) subject to section 21(2) of the *Aged and Infirm Persons' Property Act*, the liability of a manager under section 21(1) of that Act.
- (2A) The Court may, at any time, vary or terminate an appointment under s (1)(a).
- (3) Unless otherwise provided in a guardianship order, an adult guardian appointed to be a manager under subsection (1)(a) shall, at least once a year, give the Executive Officer an account of the management of the represented person's estate,

showing assets and liabilities and receipts and payments in respect of the estate.

- (4) The Executive Officer shall report on the management of the estate to the Court at the time the guardianship order is reviewed pursuant to s 23”.

17. It can be seen that the introductory words of the section provide for the court to have specific powers at the hearing of an application for a guardianship order – that is, the guardianship order that might be made under s 17, 18 or 19 for full orders, conditional orders or temporary orders. The power of the court depends on whether it is satisfied that the adult guardian is competent to manage the estate of the person; if so it may order that the adult guardian be the manager of the estate subject to such terms and conditions as it thinks fit.
18. If the court is not satisfied as to the capacity of the adult guardian then once again it can order the Public Trustee or some other person to apply to the Supreme Court under the *Aged and Infirm Persons’ Property Act*. The section then goes on in s 16(2) to describe the powers of a person appointed under s 16(1)(a) as being the powers a person has under s 17 of the *Aged and Infirm Persons’ Property Act* and to make that person assume the same liability as a person has under s 21 of that Act.
19. The section specifically enables the court to vary or terminate such an appointment and provides the same or similar provisions for reporting by the executive officer and for the executive officer to refer to the court for review on a periodic basis.
20. A number of things seem to me to be achieved by these amendments. Firstly, there is no longer a primary obligation imposed by the section to order the Public Trustee or other person to apply to the Supreme Court under the *Aged and Infirm Persons’ Property Act*. Secondly, the order for control of the estate is an order additional to the full conditional or temporary orders made under s 17, 18 and 19. In other words the order is thereby a

more independent order and separate considerations apply, it seems to me for the court to consider this when making an order under s 16.

21. Thirdly, the section specifically says the court may order the Public Trustee or some other person, to make an application under the *Aged and Infirm Persons' Property Act* and thus the issue of competency is introduced to direct this courts attention to what expertise might be required to carry out the task for the management of the estate which is being considered.
22. Fourthly, it seems to me that the words used in the section no longer carry any limitation as to the value of the estate envisaged to be subject to the order. The old s 16 clearly limited the power to manage estates worth less than \$2000. In the new section there is no such limitation. I note that the word 'estate' is used and 'estate' is not defined in the Act. It seems to me that in general terms that expression in law includes all the property or rights of a person, real, personal or equitable such as *chose in action* etcetera of that person. A person's estate at general law is not a technical term and may include real and personal property (see Stroud's Judicial Dictionary of Words and Phrases – 6<sup>th</sup> edition p 835).
23. The word 'estate' therefore seems to me, as I have said, to have no dollar limit. Thus the question may arise in the jurisdiction whether this court should only authorise the dealing with property up to the limit of the court's general jurisdiction. That may be so because of the *Local Court Act* and the restrictions placed in that Act. There maybe no such limit because it seems to me that the Act does not stipulate the limit; it simply grants the court powers to do certain things in respect of an estate (which is not limited as it was in the original legislation).
24. Other legislation such as, the *De Facto Relationship Act*, specifically limits the powers of the court to deal with property within the Local Court jurisdiction. In other words, that Act grants the court powers to deal with estates of people but limits it to the courts jurisdiction. There may therefore

be an argument that the value of the estate is not limited and it is left to this court to decide whether the order is appropriate to be made under the Act or under the *Aged and Infirm Persons' Property Act*.

25. There may be difficult issues in an estate that should be decided by the Supreme Court or it may be that the adult guardian or guardians jointly approved are not appropriate to manage the property given the nature of it and then the court may require, as is contemplated by the new s 16, that those people apply to the Supreme Court under the other legislation.
26. In my view this issue of the limitation of jurisdiction does not arise in this case because the property which forms part of the estate and in which the public guardian is interested in, is of very minor value, I understand in the order of \$200 and the estate itself is not substantial. The reason as I have said for this matter to come into the court is the ongoing costs of maintenance which are greater than the value of the goods.
27. Fifthly, the new section expresses the power of the adult guardian, in terms of s 17 of the *Aged and Infirm Persons' Property Act* which I will consider in a moment. Overall there seems to me to be a clear duty now placed on the court to do a number of things under s 16 as it is presently constituted. It is to determine whether a person is in need of guardianship under s 15(1) and if so to appoint an adult guardian under s 15(2) in association with s 17, 18 or 19 as to the terms of the appropriate order.
28. It is then to consider what should be done with the estate of the person and to decide whether to appoint the adult guardian if competent to manage the estate or alternatively ask the Public Trustee or another person to apply under the *Aged and Infirm Persons' Property Act*. If the court then makes an order authorising the adult guardian to manage the estate it can do so under such terms and conditions as it sees thinks fit and amend or vary those terms from time to time in order to ensure that the purposes of the act are achieved.

29. Given that there is a jurisdiction to appoint a guardian and that the guardian has the power to manage the estate, what then are the limits of the powers of management. It seems to me that the powers of the adult guardian in relation to the management of the estate are those set out in s 17 of *the Adult and Infirm Persons' Property Act* limited by the terms of the order.
30. In the absence of any specific order the maximum extent would therefore seem by default to be the provision of s 17 of the *Aged and Infirm Persons' Property Act*. Sections 16 & 17 of the Act read as follows:

**“16. Terms and conditions**

- (1) A protection order may be made subject to such terms and conditions as the Supreme Court thinks fit.
- (2) Without limiting the generality of subsection (1), the terms and conditions to which a protection order may be subject include-
  - (a) terms and conditions requiring the manager of the protected estate to continue to make payments (whether in the same, a greater or a lesser amount) out of the estate which the protected person made, whether regularly or casually, to or for the benefit of any person who was wholly or partly dependent on that person;
  - (b) terms and conditions authorizing the manager of the protected estate to –
    - (i) invest the whole or any specified part of the protected estate in such a manner as is specified in the order (whether or not the investment is one authorized by law for the investment of trust moneys);
    - (ii) sell, mortgage, lease or otherwise dispose of the whole or any specified part of the protected estate; and
    - (iii) exercise any right or power that is exercisable by him if the protection order has not been made; and
  - (c) terms and conditions designed to preserve, so far as possible, the quality, tenure and devolution of the property in the protected estate.

## 17. Powers of manager

- (1) Subject to the contrary intention appearing in the protection order, the manager of a protected estate may –
  - (a) take possession of the estate and recover possession thereof from any person;
  - (b) repair any part of the estate;
  - (c) insure the estate against any contingency
  - (d) demand, recover and receive moneys and personal effects payable to or belonging to the protected person;
  - (e) apply any moneys of the estate for the maintenance or advancement of the protected person, any spouse or de facto partner of that person and in payment of the debts and liabilities of that person;
  - (f) carry on any trade or business carried on by the protected person whether in partnership or not;
  - (g) in the name of and on behalf of the protected person, lodge caveats in respect of land under the provisions of the Land Title Act; and
  - (h) in the name and on behalf of the protected person, execute and do all such conveyances, transfers, leases, deeds, assurances and things as may be necessary to exercise any power or carry out any duty conferred or imposed on him by or under this Act.
- (2) Subject to this Act, the manager of a protected estate shall have such powers and duties in respect of the protected estate as are specified in the protection order.
- (3) Subject to this Act and the terms of the protection order in relation to the protected estate, the Public Trustee has, in the administration of a protected estate, all the powers, duties and obligations conferred or imposed on him by the *Public Trustee Act*".

31. As can be seen, on its own, s 17 of the *Aged and Infirm Persons' Property Act* is not as felicitously expressed as one would wish in terms of being the

source of power to be extended to the adult guardian. When one looks at that legislation it is in fact s 16 of the *Aged and Infirm Persons' Property Act* that grants the power to the Supreme Court to make a protection order. S 17 merely says what that person can do under such an order unless limited by the terms of the order itself.

32. It has been submitted to me that s 16(2) is a limiting factor. That is, unless an order is made under s 16(2) to sell property then a sale cannot be effected because s 17 in its words merely authorises the execution of conveyances, transfers etc. as referred to s 17(1)(h). However all of that seems to me to be very much a lawyer's black letter interpretation without having regard to the purposes or history of the legislation as outlined above. Indeed one could say that the basic power is as broad as the Supreme Court might determine under s 16(1) and that s 16(2) and s 17 are merely illustrative. I do not see them as limiting the power of the Supreme Court.
33. I have looked above firstly at the history of the legislation and I have identified secondly, the apparent attention of parliament to expand the powers of a guardian subject to competency. Thirdly, the clear intention of the Act is to operate for the benefit of the represented person. Fourthly the fact that s 16(2) of the *Aged and Infirm Persons' Property Act* is expressed to be "without limiting the generality of subsection 1", that is, explanatory of the fulsomeness of the nature of the powers intended to be invested on the manager of the protected estate. S 17 thus is in permissive terms and should not be seen as limiting the powers to be granted by the court under s 16. It should be broadly interpreted.
34. Briefly I note the extensive powers given under the *Adult Guardianship Act* to the adult guardian over the person himself or herself. In other words it seems to me that we can do anything with a person's body that a parent can do including effective imprisonment in the sense that you are confining a person to particular facilities or address. We have here dramatic powers as

to the rights and liberties of the individual but arguing about the capacity to sell something worth \$200 even though every week the guardian also deals with, probably, \$300 cash received by way of social security.

35. I note these extensive powers and I know that the law now acknowledges that individuals are more important than property so I note that this is one of the reasons for my overall view that this section should be broadly interpreted.
36. I note also, that if one is to look to s 17 of the *Aged and Infirm Persons' Property Act* as a source of power we see that there is a wide range of powers given. S 17(1) (a) – (d) give wide and general powers in relation to property. S 17(1)(f) provides that the manager can carry on a trade or business. So if the person was the owner of a shop the manager could continue to buy and sell goods but ironically if the contrary argument runs true, could not sell personal household goods of a minor value. The manager can lodge caveats and incur expense and do all of those things under the provisions of the *Land Title Act* and then in subsection (h) we have the following provision;

**“17. Powers of manager**

- (1) Subject to the contrary intention appearing in the protection order, the manager of a protected estate may –
- (h) in the name and on behalf of the protected person, execute and do all such conveyances, transfers, leases, deeds, assurances and things as may be necessary to exercise any power or carry out any duty conferred or imposed on him by or under this Act”.

37. I note that this says “under this Act” and of course that includes things that are stipulated in s 16(1) and (2) as well as s 17. Having said all these things and noted all these things it is absolutely incomprehensible to me that the power does not also include the power to sell property as part of managing the estate. If, as in the present case, one incurs a constant storage fee for

property of a limited value and of no useful benefit to the represented person to the extent that more than the value of the goods is likely to be incurred then that in my view is not managing the estate as is contemplated by s 16 of the *Adult Guardianship Act*.

38. I therefore find that a power of sale of property is, subject to the order of the court, included in the powers of an adult guardian who has in addition to the powers under 17, 18 or 19 been appointed also to manage that persons estate.

Dated this tenth day of November 2003.

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**Hugh Burton Bradley**  
CHIEF MAGISTRATE