

CITATION: *JW v CW and ors* [2009] NTMC 052

PARTIES: JW
v
CW
&
CEO Department of Health and Families
&
Public Guardian

TITLE OF COURT: Local Court

JURISDICTION: Darwin

FILE NO(s): 20713617

DELIVERED ON: 9 November 2009

DELIVERED AT: Darwin

HEARING DATE(s): 18 September 2009, 8 October 2009

JUDGMENT OF: Ms Melanie Little SM

CATCHWORDS:

Adult Guardianship Act, Appointment of Adult Guardian, Whether sole or joint order, Whether proposed guardian will act in the best interest of the represented person, Whether joint order: Section 14 Adult Guardianship Act

REPRESENTATION:

Counsel:

Applicant: Ms Farmer
1st Respondent: Ms Marris
2nd and 3rd Respondent: Ms Day

Solicitors:

Applicant: Withnalls Barristers & Solicitors
1st Respondent: Marris and Co.
2nd and 3rd Respondent: Department of Health and Families

Judgment category classification: C
Judgment ID number: [2009] NTMC 052
Number of paragraphs: 40

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

No. 20713617

[2009] NTMC 052

BETWEEN:

JW
Applicant

AND:

CW
First Respondent

AND:

**CEO DEPARTMENT OF HEALTH AND
FAMILIES**
Second Respondent

AND:

PUBLIC GUARDIAN
Third Respondent

REASONS FOR DECISION

(Delivered 9 November 2009)

Ms Melanie Little SM:

1. CW is the recipient of an Adult Guardianship Order under the *Adult Guardian Act NT* (the "Act"). The original application for an order under the Act was made in 2007 by JW, CW's grandson and primary carer. A series of orders have been made since that time. Pursuant to s 23 of the Act a review of the order was undertaken in 2009. It was proposed that the Public Guardian be appointed the sole guardian. JW sought to be appointed as joint guardian with respect to all powers save and except management of the finances and estate of CW. JW agreed with the proposal that the Public

Guardian be appointed as sole manager of the finances and estate of CW. The Executive Officer of Adult Guardianship (the second respondent), the Public Guardian (the third respondent) and CW's legal representative opposed JW being a joint guardian and a hearing was conducted.

2. The Act empowers the court to make certain orders. If all parties agree with a proposed course of action, the court must still consider the matter and make orders as it thinks appropriate. The court also has a supervisory role in cases under the Act.
3. The Court may regulate its own procedure and is not bound by rules or practice as to evidence but may inform itself in such manner as it thinks fit (section 12 of the Act). In this case affidavits were filed and where required the deponents were cross examined. Submissions were made by the parties.
4. Section 13 of the Act allows a variety of people to make representations before the court. In this case JW (who is both the initial applicant and a near relative), the Executive Officer Adult Guardianship, the Public Guardian and CW's legal representative made representations.
5. At the hearing JW was represented by Ms Farmer, Ms Marris appeared on behalf of CW and Ms Day appeared on the second and third respondent. The most up to date Court report and a number of affidavits were tendered by consent. Two witnesses were called. Affidavit material from Sara Bagglely from the Public Guardian's office and Monique Politis from the Executive Office of Adult Guardianship was tendered and then they were examined and cross-examined. JW did not give any evidence nor call any witnesses. No evidence was called by CW's lawyer. Submissions were made at the end of the hearing. The matter was then adjourned pending a home based assessment as to CW's present situation including whether it was in her best interests to remain in the care of her grandson or whether it was an appropriate time for a move to an aged care facility or nursing home. This report was sought under the powers in section 12(3) of the Act – where

the Court can call upon the Executive Officer (the second respondent) to provide a report on any matter relating to the proceedings. Further submissions were heard after receipt of those assessments and I reserved the decision in the matter. All evidence has been considered in the making of this decision.

6. CW was born in Wales on 24 December 1918 and she is 90 years of age. She currently resides with her grand son JW and his family in the Darwin rural district. She is assessed as being incapable of making reasonable decisions in her daily life and her medical history includes dementia and Alzheimer's disease. Based on the material before the court I am satisfied that her intellectual condition will not improve and is likely to decline. She is totally reliant on carers for all of her needs. She is dependant on carers for all facets of her mobility. Her physical health reflects a person of reasonable health for a person of her age. Dr Kulatunga has stated her current health status to be "reasonable for her age". (ex R2-1).
7. I find that CW is a person under an intellectual disability and is still in need of an adult guardian.
8. The decision as to who should be appointed as guardian is guided by s 14 of the *Adult Guardianship Act* which sets out as follows:

14 Persons eligible as guardians

- (1) The Court may appoint as a guardian any natural person who has attained the age of 18 years and consents to act as guardian if the Court is satisfied that that person –
 - (a) will act in the best interests of the proposed represented person;
 - (b) is not in such a position that the person's interests conflict or may conflict with the interests of the proposed represented person; and

- (c) is a suitable person to act as the guardian of the proposed represented person.
- (2) In determining whether a person is suitable to act as the guardian of a represented person, the Court shall take into account –
 - (a) the wishes of the proposed represented person;
 - (b) the desirability of preserving existing family relationships;
 - (c) the compatibility of the person proposed as guardian with the proposed represented person and with the manager (if any) of the proposed represented person's estate if an order is made under the *Aged and Infirm Persons' Property Act*; and
 - (d) whether the person proposed as guardian will be available and accessible to the proposed represented person so as to fulfil the requirements of guardianship of that person.
- (3) Where a near relative of a proposed represented person is proposed as the guardian that person is not, because of that fact only, to be taken to be in a position where the person's interests conflict or may conflict with those of the proposed represented person.
- (4) Where it appears to the Court that –
 - (a) the person in respect of whom the application is made should have an adult guardian appointed; and
 - (b) no other person fulfils the requirements of subsection (1) for appointment as the guardian of that person,

the Court may appoint the Public Guardian as the guardian of that person.

- (5) This section does not prevent the Court from appointing persons (including the Public Guardian and any other person) as joint guardians of the proposed represented person if –

- (a) each person fulfils the requirements of subsection (1); and
- (b) the Court considers it appropriate to do so.

9. The Act gives the Court a discretion as to who is appointed as Adult Guardian or Guardians. That discretion must be exercised judicially and is guided by the factors as set out in the legislation.
10. As far as I am aware there are no Supreme Court cases decided with respect to s 14 of the *Adult Guardianship Act*. The decision by Mr Wallace SM in the matter of *Sunana v Laming* [2009] NTMC 002 delivered on 30 January 2009 relates to the appointment of an adult guardian and provides the court with some assistance with respect to s14 of the Act.
11. The initial application for an order under the Act was made by JW on 4 May 2007 and he remains the named applicant. A history of the orders made under the Act with respect to CW are as follows:
 - 4 June 2007 temporary order made for 90 days appointing JW as the sole guardian as to all matters, including as sole manager of the finances and estate of CW;
 - 27 August 2007 an order was made for 2 years appointing JW and the Public Guardian as joint guardians of CW with respect to decisions relating to residence, health, day to day care and instructing solicitors. The Public Guardian was appointed as the sole manager of finances and estate;
 - On 27 October 2008 the order of 27 August 2007 was varied to remove the Public Guardian as joint guardian leaving JW as the sole guardian and appointing JW as the sole manager of the finances and estate of CW. This variation was made prior to the anticipated review date, which would have been on or shortly before 27 August 2009. The order of 27 October 2008 was made for 6 months;

- 1 June 2009 an order was made that JW and the Public Guardian were appointed as joint guardians of CW with respect to decisions where she is to live, health care and day to day care. The Public Guardian was appointed as the sole manager of finances and estate of CW. The matter was then listed for hearing and the order of 1 June 2009 has continued during the adjourned periods. Despite the terms of the order, the joint guardians have not been acting as joint guardians in the adjourned period. Accordingly there is no material the court can consider as to how the latest order has been working in practice, as it was intended to be working.

12. The second and third respondents are now seeking an order that the Public Guardian is the sole guardian with respect to all matters. This application is supported by CW's legal representative. JW is not seeking to be appointed as manager of the finances and estate of CW. He is seeking to be joint guardian with respect to decisions regarding where CW is to reside, health care and access to support services. This is the first contested hearing with respect to CW.
13. Upon undertaking the review of the orders made it is noted that I made the order of 27 August 2007. That order appointed JW and the Public Guardian as joint guardians save and except with respect to the question of finances. The Public Guardian was appointed the sole guardian with respect to finances. The decision of 27 August 2007 was made based upon material and reports before the Court at that time and will not have any direct bearing on the decision to be made upon this review. This decision will be based upon the evidence currently before the court and findings will be made based on that evidence.
14. Sections 17 and 18 of the Act set out the types of decisions a guardian appointed under the Act is empowered to make on behalf of the represented person. Where a decision is made, action taken, consent given or thing done by a guardian that decision, action, consent or thing has effect as is it had

been made, taken, given or done by the represented person in circumstances when the represented person had the legal capacity to do so.

15. The Guardian must act in the best interests of the represented person (section 20 of the Act). A Guardian is considered to be acting in the best interest of the represented person if, as far as possible, they act as an advocate for the represented person, in such a way as to encourage the represented person to participate as much as possible in the life of the community, encouraging and assisting the person to become capable of caring for themselves and making decisions with respect to themselves, consulting with the represented person as far as is possible and acting in such a way as to protect the represented person from neglect, abuse or exploitation. (Section 20(2) of the Act). Section 4 of the Act is an overriding section and sets out that every function, power, authority, discretion, jurisdiction and duty conferred or imposed by this Act is to be exercised or performed in the least restrictive means, wherever possible taking account of the wishes of the represented person and ensuring that the best interests of the represented person are promoted.
16. Section 5 of the Act sets out that the Minister is the Public Guardian and by delegation pursuant to section 6 of the Act the Minister may delegate powers to persons specified by way of an instrument of delegation.
17. It is apparent that the Act focuses upon the best interests of the represented person. There is a significant level of responsibility attached to the role of a guardian.
18. Section 14 of the Act sets out that the Court may appoint as guardian any natural person who has attained the age of eighteen years and consents to act as a guardian provided the Court is satisfied of certain criteria. The focus of this case has centred upon section 14(1)(a) of the Act and in particular whether JW will act in the best interests of CW if he is appointed as joint guardian. The Court must be satisfied that any person who is appointed as a

guardian will act in the best interests of the represented person. Whilst there is a future focus in what is being considered, a significant amount of material relied upon in making that decision will be based upon past behaviour. In this case there is history of the proposed guardian being a sole guardian under the Act as well as being a joint guardian with the Public Guardian. This means there is material before the court as to specific decisions made by JW whilst empowered under the Act and how he interacts with service providers and agencies, and how he works with the Public Guardians office as a joint guardian.

19. In this case there is considerable evidence that JW has not acted appropriately as the manager of the finances and estate of CW. Whilst he is not seeking to be appointed Joint Guardian with respect to this aspect of the affairs of CW, it was submitted by the respondents that this material demonstrates that he will not always act in the best interests of CW.
20. The first question to be considered is whether this material is relevant to the consideration of who is appointed guardian with respect to where CW is to reside, health care and access to support services; that is the non-financial powers of a guardian. These matters are not directly related to the question of the management of the finances and estate. Nevertheless they are inter-related, for example, there is a need to ensure that funds are kept aside (as far as that is possible) should there be an immediate or urgent call on funds for accommodation or respite care.
21. The Act separates the question of management of the finances and estate and all other powers by way of discrete empowering sections. Section 16 of the Act relates to the management of the estate and finances of the represented person. Section 14 of the Act does not distinguish between types of decisions to be made or whether the proposed guardian will act in the best interests of the represented person in discreet areas. It is recognised that a person who is a good manager of finances may not be in a position, or

qualified, to make decisions as to the most appropriate care options or give consent to matters with respect to medical procedures. There is also a difference between those who do not have the skills to manage finances as opposed to a person who makes inappropriate decisions with respect to finances.

22. In this case there is evidence that JW did not have an appropriate system to be able to report accurately as to the finances and estate of CW. Further, and in my view more significantly when considering this question, there is material before the Court to suggest that CW's money was being applied inappropriately to family expenses and to members within JW's household. Irrespective of what may have been CW's wishes prior to her intellectual disability, at least since the appointment of an adult guardian in 2007 CW has not been in a position to authorise her funds to be used in any particular way. Pooling of her money with the household money is inappropriate in these circumstances. Use of her money for items which she could not have had any use for, such as a playstation, is inappropriate. While expenses incurred in the daily care of a person can be the subject of a refund or reimbursement, it is not the case that a guardian should be able to claim for expenses that do not relate to the person. The actions of JW with respect to CW's finances while he was a sole adult guardian under the Act represent a significant departure from the standards which an Adult Guardian would be expected to perform and prima facie demonstrate that JW will not always act in the best interests of the represented person CW. The matters with respect to the management of the finances and estate of CW while he was an adult guardian under the Act will be taken into account when considering whether JW will be appointed a joint guardian with respect to the other powers of a guardian.
23. There is now no doubt that JW is caring adequately caring for CW. Indeed there is evidence before the court that JW and his family are providing CW with "a high standard of person-centred care which would not be possible at

the same level in a nursing home” (see ex R2 7 at page 3 – Assessment report of 28 September 2009 prepared by Catherine Brown RN). Further it is stated in the Occupational Therapy Assessment Report “Mrs Willard has high level care needs requiring full-assistance for all facets of her care needs. She requires someone with her at all times. Observations from the morning spent with Mrs Willard and her family indicate she is well cared for and that all her needs are being met. Mrs Willard’s physical condition is very good and this could not be feigned for a one off visit” (see ex R2 7 at page 4 – Occupational Therapy Assessment report of 29 September 2009 prepared by Janice Diamond OT). I find that JW and his family are appropriately and adequately caring for CW.

24. A separate question is whether CW should remain in home care or whether she should be moved to a nursing home or similar type residence. JW does not want this option; he proposes that he continue to care for his grandmother at his home. The recommendation by both Ms Diamond and Ms Brown is that CW remains in the care of JW and his family at their home at this stage (both assessments have been undertaken at the end of September 2009). The assessments are thorough and up to date and there would seem no reason that any appointed guardian would do otherwise at this stage. I stress that that is a matter for the appointed guardian. Nevertheless, given CW’s age, this issue is one that may change in the near future. CW’s situation is unlikely to remain stable for a long period. Regular assessments will be needed to monitor CW’s condition. This is will be an important and ongoing consideration for the appointed guardian. Given JW’s strong views that he does not want his grandmother being placed into institutional care, this issue is likely to be a trigger for dissent as between himself and the Public Guardian if a joint guardian order is made. As CW resides in his JW’s home, access to the house for monitoring of the situation is an important consideration.

25. Prior to the assessments by Ms Diamond and Ms Brown there was some residual doubt as to whether it was time for CW to be moved to institutional care, and whether CW was being adequately cared for. This doubt had been caused by the lack of access to the house for assessments to be undertaken, which is a consequence of JW and JW's families attitude towards persons who attended at the house to assess CW's situation. There has been limited access to CW and accordingly assessments have not been able to be made as required. There is evidence of clashes with professional service providers and officers which has made it difficult for there to be access to CW. There is evidence that these clashes have involved quite confronting behaviour – the type of behaviour that care workers, professionals and statutory officers should not have to tolerate in their working day. This behaviour is somewhat at odds with the standard of care being provided by JW and his family.
26. It should be noted at this point that JW was the person who initiated the application for an Adult Guardianship Order by his application dated 4 May 2007. He made the application proposing himself as the Adult Guardian and signed the application including the application to consent to act as guardian. It may be that JW did not realise that once he started the process, there would be the need for officers from agencies such as the second respondent to ensure assessments occurred. Once the process commenced, JW was not at liberty to dictate who could have access to CW. Officers on behalf of the second and third respondent are bound to carry out their duties under the Act. Further, the court must be in a position to effectively undertake its supervisory role of cases under the Act. Thorough reports need to be prepared and assessments need to be undertaken. Parliament intended there be both assessment and review processes and these must be undertaken.
27. An Adult Guardian is appointed to act as a decision maker. That person need not be (and very often is not) a carer of the person. If there is more than one decision maker, the joint guardians need to be able to work together to make

decisions. They may not always ‘get on’ in the conventional sense. However, joint guardians must be able to work together in a constructive way to make decisions that are in the best interests of the represented person.

28. There are many cases where orders have been made under the Act appointing guardians who are not caring for a person on a day to day basis. For example the person may be residing in a nursing home being cared for by institutional carers and a family member and/or the Public Guardian may be the adult guardian. There are many cases where the person lives with and are cared for by family members and either those family members are the guardians *or* those family members and the Public Guardian are the joint adult guardians. It is rare that an order is made in the terms sought by the second and third respondent – that is that a sole guardian order is made appointing the Public Guardian where the represented person is being cared for by a family member who is seeking to be a joint guardian. I accept that at times family members caring for the person do not seek to be joint guardians, but that is not the situation here. Here a near relative, who is providing the daily care of the person, seeks to be joint guardian with the Public Guardian. The standard of care by JW and his family is high. There is evidence that JW has been a strong advocate for CW in the past. The decision is not an easy one.
29. Professional carers have a professional relationship with the Public Guardian. Though I accept that from time to time a professional carer becomes more of an advocate than is usual, it is a different relationship that the Public Guardian has with a family member who is caring for the represented person.
30. The court must take care not to place a person with a statutory duty, as the Public Guardian has in a position where their duty and authority is rendered unworkable by the attitude and/or behaviour of another person.

31. The decision of *Sunana v Laming* (supra) will be considered at this point. In that case a 31 year man was the subject of a joint order as between his father and the Public Guardian. The Public Guardian was of the view that they did not have a productive role in the joint order and did not want to continue. It transpired that the father had inappropriately loaned the son's money to a relative and the Public Guardian was to become the sole manager of the estate and finances and so they needed to continue to be a joint guardian with respect to the other powers. The mother and father had separated a long time ago. There was a history of bad relations between the mother and the father. There was a trespass order stopping the mother from attending at the house where the son lived. The mother proposed she become the carer and an adult guardian. A hearing was conducted and the facts which went to the decision are not directly related to this case. In *Sunana* the court found that issues of practicality favoured the status quo. I suspect given the history of bad relations between the mother and the father, there was never consideration of the mother being added as a joint guardian unless she was to become the carer. In that case, the person who was caring for the represented person on a daily basis was given priority over the applicant (who was nevertheless found to have had legitimate reason to have made the application).
32. There are two primary issues in this case which affect whether JW should be appointed joint guardian – the manner in which he used CW's funds and his behaviour towards the Public Guardian and other service providers and agencies.
33. What are the advantages of a joint guardian order in this case? Despite her medical condition and in particular her intellectual disability, the represented person responds positively to JW. While not suggesting that this information can be taken to be CW's wishes, it is evidence of her affection towards JW. He is her grandson. JW is responsible for her day to day care and she resides in his home. It would seem to be practical for JW to be a

joint guardian. Given the latest assessments the court can be satisfied that JW is caring for CW appropriately and that he will continue to do this.

34. What are the disadvantages of a joint guardian order in this case ? The Public Guardian has been threatened and harassed by JW. Other service providers have experienced difficulties with access and lack of co-operation and difficult behaviour. There has been no apology forthcoming. There is no evidence that JW has any real insight into his behaviour. There is evidence he has not acted in her best interest in the past. It is a difficult working relationship.
35. The question to be asked is whether JW's negative relationship towards public authorities such as the Public Guardian will affect his ability to jointly make decisions in CW's best interests? Because of the long time since JW and the Public Guardian have had any dealings it is not easy to predict how a joint order would now work in practice. The hearing process has caused further delays. The original court date for the review was 1 June 2009 and some 5 months later the decision has been delivered. It is also likely that the adversarial nature of a hearing has caused some cementing of positions. Ms Baggley from the Public Guardians office gave evidence that she believed there was a possibility of JW and the Public Guardian being able to work together if there were changes. That is, she did not completely rule out being able to work together in the future. There is no evidence before the court that JW's attitude has changed or that his behaviour is able to be modified so as to be able to work with the Public Guardians office and the Executive Officer of Adult Guardianship.
36. Given the care arrangements and the close relationship between CW and JW in many ways the ideal situation would be as proposed by JW, with a joint order with respect to all except financial matters. CW's legal representative has been acting for and on behalf of CW since the application was made in 2007. She is experienced in this jurisdiction and has considered this matter

from the point of view of the best interests of her client. She does not believe that at this stage a joint order is workable, as JW is not in a position to engage in a joint decision making process. She points to the conflicts in the past. She was encouraged by the fact that the assessments in late September 2009 were positive and that access was allowed for the assessments to take place. She has asked the court to make a short term order with sole guardianship to the Public Guardian. She sees there is a very important role for JW with such an order – that of consultation and co-operation with the Public Guardian. The second and third respondent submitted that if the Public Guardian was appointed sole guardian, that the family could work closely with the Public Guardian. They also sought a short term order, nominating 6 months. JW’s lawyer submitted that the court must take note that there has been a long time since there was any contact between JW and the Public Guardian. Further she submitted that JW was not the best communicator but that he had been listening to the court during the hearing process.

37. I accept that JW is greatly concerned that if a sole guardian order is made that CW will be placed into institutional care. He is worried that any such placement may impact adversely upon CW’s health. The recent assessments do not suggest that such a move would be in CW’s best interests. Ms Bagglely has stated in her affidavit dated 16 September 2009, “Appointment of the Public Guardian as sole Adult Guardian would not result in the automatic removal of [CW] to the Aged Care Facility”(ex R2-6). Not only is that a statement made on oath, the assessments made and contained in ex R2-7 are the most reliable evidence as to what is in CW’s best interests with respect to accommodation and care. Those assessments recommend no change to the care arrangements at this stage.
38. Section 14(4) of the Act requires that if no other person fulfils the requirements of subsection (1) for appointment as the guardian of that person, the Court may appoint the Public Guardian as the guardian of that

person. I find that I can not be satisfied that JW as guardian will always act in the best interests of CW. Further I find there is no other proposed guardian that fulfils the requirements of s 14(1) of the Act. I will order that the Public Guardian be appointed as the sole guardian with respect to CW with respect to decisions concerning where and with whom she is to live from time to time, to make decisions with respect to her health care and to consent to any health care that is in her best interests and to make decisions concerning her day to day care so as to facilitate her access to support services as required. Further the Public Guardian is appointed as the manager of the finances and estate of CW.

39. The final question is the length of the order prior to the next review. In my view there remains the possibility that the relationship between the Public Guardian and JW can be repaired to the extent needed for them to work together in the best interests of CW. For that reason I believe that a short order (as suggested by some of the parties) is appropriate. I will order that these orders be reviewed within 6 months from the date of this order. That will be early May 2010.
40. I publish these reasons for the orders made.

Dated this 9th day of November 2009.

Melanie Little
STIPENDIARY MAGISTRATE