Submission No. 32

Guardianship Tribunal

Professor Neil Rees
Victorian Law Reform Commission
GPO Box 4637
Melbourne VIC 3001

Dear Professor Rees,

Review of Victoria's Guardianship and Administration Laws: Information Paper (January 2010)

Thank you for the invitation to comment on the above Information Paper.

The Guardianship Tribunal's submission does not intend to cover all the issues raised in the Discussion Paper as many are specific to the legislation and guardianship system which operates in Victoria.

However, the Tribunal would like to provide comments on the following questions as set out on pp58-59 of the Information Paper.

DISABILITY

The question of whether it is necessary for a person to have a disability before a guardian is appointed for them is currently under consideration in New South Wales. The Social Issues Committee of the NSW Legislative Council released its Report: *Substitute Decision making for people lacking capacity* in February 2010[1]. The Report recommends the removal of disability from the definition of "person in need of a guardian" which is currently one of the criteria which must be satisfied before a guardianship order can be made.

It is the Tribunal's view that to remove the disability criteria in the NSW legislation would considerably expand the Tribunal's jurisdiction. It may be that there would be a comparable effect in Victoria if criteria of capacity or vulnerability are employed without the need for a finding of disability. The focus on disability in New South Wales has meant that people with drug and alcohol addictions, gambling problems or 'eccentric' behaviour have not been the subject of guardianship orders if the applicant has been unable to establish that their incapacity to make decisions has been based on a disability.

Some might argue that enabling guardianship orders to be made for persons who are incapable of making decisions, regardless of the cause of that incapacity, has the potential for those who make "bad" decisions to be encompassed by the guardianship system.

[1] http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/EEDCC12FC63D6EC7CA2575EC00003769

2A Rowntree Street, Locked Bag 9, BALMAIN NSW 2041
Phone: (02) 9556 7600 Toll-free: 1800 463 928 Fax: (02) 9555 9049
Web: http://www.gt.nsw.gov.au E-mail: gt@gt.nsw.gov.au Telephone Typewriter (TTY): (02) 9556 7634

The question raises the ubiquitous issue of the extent to which personal autonomy should be overborne by the appointment of a substitute decision-maker on the basis of protection of the person's interests, including their physical, emotional and psychological well-being.

BEST INTERESTS

A best interests guide to substitute personal decision-making can be useful but the difficulty with it is that it is extremely broad and discretionary. It may be helpful to set out factors which should be taken into account when determining what is in a person's best interests and to provide a hierarchy of the importance of each factor or limits on decision-making. For example, restriction of a person's freedom of physical movement should only be consented to as a last resort after all other options have been tried and the restriction is necessary to prevent harm to the person.

The extent to which the represented person should be able to make 'bad decisions' and the extent to which the person's views and wishes should be sought and acted upon by a substitute decision-maker are issues of ongoing debate within the guardianship system. They are part of the tension between personal autonomy and protection which is at the heart of the practice of modern guardianship and is sometimes referred to as "the dignity of risk".

While best practice guardianship should always attempt to identify the represented person's wishes, it does not follow that a guardian should always follow those wishes. This should only happen if the wishes are not contrary to the person's best interests.
The classic example is the often strongly held wish of an older person to remain living in their own home rather than move to a residential aged care facility. It would be contrary to the purpose of guardianship for a guardian to accede to this wish if to do so would put the person at real risk of continued or potential harm through neglect of medical care needs, malnutrition, falls or continued abuse or exploitation by a carer or family member. It should also be acknowledged that a disability itself may impair a person's ability to make judgements about potential risk or consequences of certain decisions so that expressed wishes should not be taken at face value. It may be that if the person's judgment were not impaired, they would not express that particular wish or preference.

Similarly, the freedom to take risks and make bad decisions is one which most members of the community exercise and it is inequitable to deny this right to people with impaired cognitive abilities. However, it is vital to assess the extent to which a person has the capacity to understand the risks or consequences of a bad decision. It is also necessary to assess the severity of the risk or the consequences. It would be antithetical to guardianship to allow a cognitively impaired person to take a risk or make a bad decision where they have limited understanding of the risks and the possible consequences for the person are very serious and put them in harm's way, for example, permitting a person to hitchhike from one place to another. On the other hand, some risks or bad decisions may be of less concern, for example, a decision to allow a young person to attend a rock concert with friends or to have overnight stays with friends.

SUBSTITUTE DECISION MAKING

Continued need for guardianship laws

In the Tribunal's view, there is an ongoing need for substitute decision-making laws. One of the benefits of a modern guardianship system is the safety net it provides for people with disabilities. The establishment of decision-making bodies with the power to appoint guardians enables the ongoing review of the substitute decision-maker's appointment and allows the person with a disability to challenge that appointment by seeking a review.

If there were no substitute decision-making laws, then substitute decisions would be made in the private sphere with no public accountability. Whilst this may work for many people, there will always be some people whose best interests are not served by their support network and who will require a substitute decision-maker who can make decisions to assure their protection and well-being.

Two types of decision-maker or one?

The Tribunal has limited views about whether there should continue to be two types of decision maker- a guardian and an administrator.

However, one factor to consider is that having a separate guardian and administrator avoids the conflict of interest which may arise if they were combined in one decision-maker. For instance, a guardian may decide that a person should be allowed to go on a holiday organised by their group home however the administrator may consider that all the person's savings should be preserved for future contingencies, even though they could afford the holiday.

In NSW, guardians and financial managers generally work together to make decisions which serve a person's personal and financial interests however a financial manager will leave the initial decision making on personal decisions to the guardian and will then consider whether the finances are available to implement that decision.

Plenary Orders

The Tribunal has rarely made plenary guardianship orders in its 20 year history. The Tribunal agrees that it would be preferable for VCAT to specify the guardian's functions in the Order. This also provides clarity for the guardian and the represented person about the extent of the guardian's powers.

The Tribunal currently makes "plenary" financial management orders but can exclude part of the estate from management. The Tribunal agrees that it would be beneficial to limit management to particular parts of the estate and notes the challenge would be in properly identifying the relevant parts of the estate and the practical concerns in co-ordinating management by the person or an attorney and the appointed administrator.

Restrictions on guardian's functions or additional functions needed

Traditionally, the law has held that there are some decisions which are so personal they cannot be made by a substitute decision maker or an agent. These include voting, decisions to marry and the making of a will. In the Tribunal's view, there is merit in specifying in legislation some decision-making areas for which a guardian cannot be appointed which includes not only the above but also decisions about personal relationships and consent to sexual relationships.

There are some decisions which people make which are not made for their own benefit but to benefit others or the broader community. Under the guardianship system, the focus on the best interests of the person limits the ability of a guardian or administrator to make decisions which have no beneficial outcome for the person but only benefit others. One example of this is the decision to donate tissue or organs to a family member or to participate in research about the disability which the person has, including genetic testing, which either benefits other family members or the community at large.

In 2005, the NSW Supreme Court[2] considered that it was in the best interests of a young man with an intellectual disability to consent to a bone marrow transplant from the young man to his brother who was also his carer. Although the young man received no direct benefit from the procedure, the Court reasoned that it was in his best interests because he loved his brother, did not want to see him die and his brother was his carer and would be providing future care if he survived as a result of the transplant. It may have been difficult for a guardian to consent to the procedure because it did not promote the young man's health or well-being directly.

Similarly, an appointed substitute financial decision-maker is usually bound to make financial decisions solely in the interests of the represented person. In practice, this may mean that gifts or payments to close family members, including spouses, that the person may have made when they were capable are no longer made by the financial manager because they cannot be described as being in the financial interests of the person. While there are sound reasons for this approach, it may be worthwhile considering some flexibility particularly if the person has previously indicated they would like such payments to be made, for example by appointing an attorney with the authority to give gifts or benefits to others.

Supported decision making

In the Tribunal's view, any scheme of supported decision making should have clear and comprehensive legislative safeguards. Such safeguards should prescribe how any scheme for supported decision making can guarantee the welfare and best interests of people with disabilities.

The existing substitute decision-making schemes in Australia have the safeguard of guardianship tribunals having the power to review guardianship orders and replace guardians if they are not making decisions in the best interests of a person with a decision-

[2] Northern Sydney and Central Coast Area Health Service v Ct by his Tutor Et [2005] NSWSC 551 (10 June 2005)

making disability. Some jurisdictions also provide for review of the guardian's decision itself.

Careful consideration needs to be given to whether supported decision making schemes in existence elsewhere could be successfully transferred to the Australian context and whether they are necessary given the recognition in guardianship systems and legislation of the importance of informal decision-making.

REVIEW

The Tribunal supports the need for independent review of decisions of guardians and administrators. In NSW, the Administrative Decisions Tribunal performs this function but only for the Public Guardian and the NSW Trustee & Guardian and not for private guardians or managers.

CONFIDENTIALITY AND PRIVACY

The Tribunal is aware of the need to strike the appropriate balance between a person's privacy and proper transparency of decision-making by VCAT when appointing a substitute decision-maker.

The Tribunal's view is that procedural fairness is a right which should be afforded to all parties before a guardianship tribunal and this should include disclosure of documents being considered by the tribunal. However, the Tribunal also notes that there are well-established exceptions to procedural fairness and these could be one basis on which documents are not released.

The Tribunal does not release documents to persons other than parties so the disclosure of private information is restricted to a small group. The NSW legislation also forbids publication or broadcast of information relating to a person under guardianship or financial management or for whom an application has been made. The Tribunal is also able to close its hearings to the public if necessary.

The VCAT rules currently provide scope for limited inspection of documents and one option would be to expand and clarify these provisions.

Conclusion

Thank you for the opportunity to comment on the review of Victoria's guardianship Laws. I would be happy to discuss further any matters raised in this letter if required.

Yours sincerely

Malcolm Schyvens
Acting President
14 May 2010