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Re B (No. 1) [2011] NSWSC 1075
7 September 2011
15 September 2011
Equity Division - Protective List
White J
Refer to para [83] of judgment.

GUARDIANSHIP - application in parens patriae jurisdiction to set aside order to set aside orders of Guardianship Tribunal - inherent jurisdiction of Court preserved by s 8, Guardianship Act 1987 - approach exercise of parens patriae jurisdiction as if application were an appeal on a question of law or an application for leave - **where no dispute that person in need of a guardian- where Public Guardian appointed as guardian - where family member available - errors of law and errors of process of decision making of Guardianship Tribunal - Public Guardian should not be appointed in circumstances in which order can properly be made in favour of another person - s 15(3), Guardianship Act 1987 - Guardianship Tribunal failed to make necessary factual findings -**Guardianship Tribunal's orders set aside - whether matter should be remitted to the Guardianship Tribunal - further hearing ordered before the court as to who should be appointed guardian - status quo maintained in the interim Guardianship Act 1987 Aged Care Act 1997 (Cth)

W v G [2003] NSWSC 1170; (2003) 59 NSWLR 220
PV v The Public Guardian [2009] NSWADTAP 68
Re Victoria [2002] NSWSC 647
Re Elizabeth [2007] NSWSC 729

Supreme Court
New South Wales

Category:
Parties:
Representation:
File Number(s):
S v S [2001] NSWSC 146
K v K [2000] NSWSC 1052
P v D1 [2011] NSWSC 257
EB v Guardianship Tribunal [2011] NSWSC 767 Slinko v

Guardianship and Administrative Tribunal [2006] QSC 039;
[2006] 2 Qd R 279
Application of SJ [2011] NSWSC 372
Principal judgment

The Plaintiff (Plaintiff)
NSW Trustee & Guardian (1st Defendant)
Guardianship Tribunal (2nd Defendant)
John (3rd Defendant)
Mrs B (4th Defendant)
In person (Plaintiff)
C Phang, solicitor (Defendant)
2011/46118

JUDGMENT

HIS HONOUR: On 13 September 2011 I made the orders in para [83] below.

These are my reasons.

This is an application in the Court's *parens patriae* jurisdiction **to set aside orders of the Guardianship Tribunal ("the Tribunal") appointing the Public Guardian as guardian of the plaintiff's mother, whom I will call Mrs. B, and removing the plaintiff as the person responsible for the decisions concerning the medical care of Mrs. B. Mrs. B is 94 years old.**

Orders of 24 July 2007

On 24 July 2007 the Guardianship Tribunal ordered that Mrs. B be placed under guardianship and that her guardian be the Public Guardian. It made a continuing guardianship order under s 16(1)(b) of the *Guardianship Act* 1987. The Tribunal ordered that the Public Guardian have the following functions in relation to Mrs B, namely:

" ***a) Accommodation To determine where*** **[Mrs. B]** ***may reside***
b) Health Care *To determine what health care and major and minor medical and dental treatment* [Mrs. B] *may receive*
c) Medical and dental consent Where [Mrs. B] *is not capable of giving a valid consent to her own treatment, to make substitute decisions on her behalf about medical or dental treatment proposed for her by others under the provisions of part 5 of the Guardianship Act.*
d) Services To make decisions on her behalf concerning major services to which she should have access. **"**

In its reasons for orders made on 24 July 2007 the Tribunal said that it was satisfied that Mrs. B was a person in need of a guardian, being incapable of making decisions on her own behalf by reason of a disability. There is no issue about the correctness

of that decision. **There was an issue before the Tribunal as to who should be appointed guardian.**

The plaintiff sought an order that he be appointed as his mother's guardian.

The plaintiff has two brothers, **Harry and John**. They are all the children of Mrs B. John proposed that his son James be guardian of Mrs B. **The Tribunal concluded that there was a history of disagreement and distrust between the brothers that had an adverse effect on Mrs. B and that it was not possible for important and necessary decisions to be made within the family due to the level of conflict.**

The Tribunal formed the view that it was in Mrs. B's best interests **that the Public Guardian be appointed as her guardian for a period of 12 months.**

The Tribunal did not consider s 15(3) of the *Guardianship Act*.

Section 15(3) provides:

"*15 Restrictions on Tribunal's power to make guardianship orders*
...
(3) A continuing guardianship order appointing the Public Guardian as the guardian of a person under guardianship ***shall not be made in circumstances in which such an order can be made appointing some other person as the guardian of the person.*** **"**

The Tribunal did not decide that the plaintiff was not a proper person to be appointed as Mrs. B's guardian. It did not decide that his plans for his mother's care or accommodation were not in her interests. Nor did it make any such findings concerning Mrs. B's grandson James. Unless the Tribunal had concluded that neither the plaintiff nor Mrs. B's grandson could properly be appointed as Mrs B's guardian (and it made no such finding) it ought not to have appointed the Public Guardian (W *v* *G* [2003] NSWSC 1170; (2003) 59 NSWLR 220 at [25]-[26]).

There was no appeal from the Tribunal's orders of 24 July 2007.

Orders of 28 March 2008

On 28 March 2008 the Guardianship Tribunal reviewed the guardianship order concerning Mrs B made on 24 July 2007. The review was both an end-of-term review and a review at the request of the plaintiff. The Tribunal recorded that in July 2007 Mrs. B was in Sutherland Hospital and there was a major issue to be resolved about her accommodation and care. Mrs B was admitted to a high-level aged-care facility known as Garrawarra Aged Care Centre ("Garrawarra" or "Garrawarra Centre") at Waterfall.

The Tribunal recorded that by the time of the hearing on 28 March 2008 Mrs. B had become settled at Garrawarra Centre and that the plaintiff had had his mother on overnight stays in her former home.

The Nursing Unit Manager at Garrawarra, Ms. Melinda Buchanan reported that Mrs. B found enjoyment spending time with her family and she could see no harm in her continuing to have overnight stays in her own home. There was then no major contention in relation to health and care services being provided at Garrawarra. John opposed his mother having overnight stays with the plaintiff.

Prior to the hearing the plaintiff had indicated that in his view there should be no need for a guardian, whereas the Public Guardian had felt that guardianship should continue with the same functions.

The Tribunal ordered that the Public Guardian should remain as Mrs B's guardian. However, the Tribunal ordered that the guardianship should continue only on the basis that the Public Guardian decide issues about accommodation, including any decisions that might be needed about stays away from Garrawarra for over a week at a time, but that shorter stays could be worked out between Garrawarra and the family member who sought the stay.

The Public Guardian also had authority to obtain professional assessments needed to inform accommodation decisions. This was the only function conferred on the Public Guardian in relation to Mrs B's guardianship.

The Tribunal determined that the plaintiff, as the “person *responsible* " for Mrs B pursuant to Part 5 of the *Guardianship Act* , should be the person responsible for making decisions relating to the health care of Mrs B.

Consequently the plaintiff became the person with the authority to give or withhold consent to proposed medical or dental treatment for Mrs B.

The limited guardianship order was for continuing guardianship for a period of three years, unless earlier varied suspended or revoked.

Proposal to adjust Mrs. B's medication

The plaintiff deposed that arrangements for care of Mrs B were stable and were proceeding well until October 2008. Mrs B was prescribed the drug Warfarin to reduce the risk of a stroke associated with atrial fibrillation.

It appears from reasons provided by the Tribunal for a decision made on 24 February 2010 that following a review by a geriatrician, Dr. Stathers, on 31 October 2008, it was recommended that the administration of Warfarin be ceased and an alternative treatment be commenced.

A Nursing Unit Manager of the Garrawarra Centre explained to the Tribunal that the dose of Warfarin had to be adjusted regularly according to the results of a blood test called "INR".

The INR results should be maintained between 2.0 and 3.0. The Nursing Unit Manager said that Mrs. B's levels were reported to be very difficult to maintain and sometimes her readings could be quite high. This put Mrs B at risk of spontaneous cerebral bleeds and could threaten her life if she were to sustain injury caused by a fall.

The plaintiff did not agree with the recommendation that the Warfarin medication be discontinued. He pointed to an earlier occasion in December 2005 when the medication had been discontinued that resulted in Mrs B suffering a stroke. He deposed that it was only after Mrs. B had been discharged into his care following the stroke and he took her to. his home, that his mother recovered her memory and speech.

It was the plaintiff's position that his mother needed the drug and that the nursing home should be capable of adjusting the dosage according to the results of the INR readings. On 11 February 2009 he wrote a letter to the manager of the Garrawarra Centre observing that Mrs. B had suffered a stroke in January 2006 after she had been taken off the drug. He said that for a period of one and a half years (prior to Mrs B's admission to the Garrawarra Centre) the average INR for Mrs. B was 2.0 and did not exceed 2.2.

He said that in October 2008 Garrawarra was locked down due to a spreading infection that inhibited the effectiveness of the medication and INR stability. He said that Mrs B's diet affected the INR and that stability could not be expected whilst the nursing home included broccoli in the diet.

He said that this was a temporary situation that could be corrected with closer management, but complained that the reaction of the staff at Garrawarra was not to prepare a plan to improve the situation, but to recommend that Mrs B be taken off Warfarin and that it be replaced by another drug that was inappropriate for atrial fibrillation.

He stated that he was now checking each INR and each adjusted dose and that the result of this closer monitoring had given continued stability on a lower dose level which meant a lower risk.

He said that Mrs. B showed no side effects and was at low risk on the medication. He disputed a contention raised by the Garrawarra Centre that Mrs B was at risk of falls.

He advised that he had taken Mrs B to her long-term general practitioner on 21 January 2009 who had advised that Warfarin (under its trade name Coumadin) was appropriate medication.

Dr. Joseph provided a report which the plaintiff provided to the Garrawarra Centre which stated amongst other things that "*she had been on Warfarin from 2005 for stroke under my care.* ***Please continue medicine according INR levels*** **".**

The plaintiff concluded his letter to Garrawarra Centre as follows:

"The *situation is now largely resolved by improved monitoring, better management and stability and safety of the new dose level. To proceed on a journey of taking a person off their only life support medication is to move in the wrong direction and is an error and that journey needs to stop. Interfering with a person's life support medication is a very serious matter where there is no effective replacement. I ask for your support, in* [Mrs B's] *best interests, that* [Mrs. B] *continue with her life support medication for without it, life expectancy is minimized. And that this advice be accepted for the value that it offers with the acceptance of the facts and that further consultation is not necessary.*
I look forward to your consideration and reply."

The plaintiff deposed that he did not receive a reply.

On 25 February 2009 Ms. Buchanan, the Nursing Unit Manager of Garrawarra Centre, filed an application with the Guardianship Tribunal requesting a review of the guardianship order made in March 2008.

Ms. Buchanan sought an urgent review so that the Public Guardian, and not the plaintiff, could be given the function of giving medical consent and health care in order, so it was said, that Mrs B could attend appropriate medical specialists. Mrs. Buchanan evidently said that a number of medical appointments were made for Mrs. B were not kept.

On 17 March 2009 the plaintiff took his mother to a cardiologist, Dr Schiva Roy. Dr. Roy advised that Mrs. B was stable on her current medical regime and he was not inclined to interfere with it.

Orders of 12 June 2009

On 12 June 2009 the Guardianship Tribunal reviewed its orders of 28 March 2008 on the request of **Ms. Teresa Gibbs, a Nurse Unit Manager at Garrawarra Centre, who was substituted as applicant for Ms Buchanan**.

It appears from the Tribunal's reasons that in March 2009 the Tribunal had suggested that Mrs B be assessed by an appropriate health care professional. This was agreed to. Although it is not clear from the Tribunal's reasons, I infer that Dr Roy was consulted pursuant to that suggestion.

The Tribunal recorded that Ms. Gibbs attended the hearing by telephone. The Tribunal said that she referred to her concerns in detail in a letter addressed to the

Tribunal and dated 11 June 2009. She asserted that she found the plaintiff to be " ***illusive*** **[sic]** ***manipulative and untruthful*** **".**

The Tribunal recorded that this had led Ms. Gibbs to have concerns over the plaintiff's management of Mrs. B's health care and medical decisions.

Ms. Gibbs is said to have accused the plaintiff of trying to play one staff member off against another, of hearing only what he wanted to hear, of not being objective or rational, of complaining about his mother's diet both that she was being given " *sweets* " and that fruit was omitted from the diet, of complaining that she was being given cups of tea, of complaining about his mother gaining weight, and resisting pain-relieving measures.

Ms. Gibbs referred to a fall experienced by Mrs B in May 2009. In relation to that matter it seems that the plaintiff had complained that the Garrawarra Centre had not provided his mother with hip protectors, notwithstanding that the Authorized Visitor had supported the purchase of hip protectors to minimize the risk of hip fracture, and that on **13 March 2009** a Disability Adviser in the Office of the Protective Commissioner had spoken to the Nursing Unit Manager, Ms Buchanan, about the provision of hip protectors.

The adviser's note was that Ms. Buchanan would order the same and send the invoice to the Office of the Protective Commissioner. **That was not done prior to Mrs B's fall in May 2009. Ms. Gibbs stated that the suggestion for Mrs. B to have hip protectors was not previously seen as a requirement by the plaintiff**, but they had been purchased in the light of her recent fracture.

The most substantial ground of the application before the Tribunal in June 2009, so far as it can be discerned from the Tribunal's reasons, was a complaint that Mrs. B had not attended medical appointments.

It does not appear from the Tribunal's reasons what medical appointments were not kept. The Tribunal made no findings about Ms. Gibbs' allegations that the plaintiff was elusive, manipulative or untruthful. It recited no specific allegations that would be capable of that description.

The Tribunal recorded that the plaintiff had not told the nursing home about Mrs. B's appointment with the cardiologist Dr. Roy on 17 March 2009.

The plaintiff apparently told the Tribunal that he was upset that an application had been made to the Tribunal and that the first he knew about it was on receiving the documentation about the hearing.

The plaintiff said that it was for that reason that he did not wish to communicate with the nursing home management in respect of the appointment with the cardiologist or the report prepared by the cardiologist.

The Tribunal made no findings in respect of the matters in issue between the plaintiff and Garrawarra Centre. It made no findings as to whether or not the

plaintiff was justified in seeking to insist upon the nursing home continuing to administer Warfarin to Mrs B. It made no findings about the allegations contained in Ms. Gibbs' letter of 11 June 2009. It made no findings as to whether the discontinuance of that medication as proposed by Garrawarra Centre would be in the interests of Mrs. B, or whether the plaintiff's opposition to the discontinuance of that treatment was justified.
The Tribunal stated that:

"... ***at the heart of this application for review were serious issues relating a lack of communication between the medical decisions*** **[the plaintiff]** ***made on behalf of*** **[Mrs. B]** ***and providing medical and health care information to the nursing home that provided day to day care for*** **[Mrs B]** ***including administering*** **[Mrs B's]** ***medication.*** **"**

The Tribunal made no finding as to who was responsible for the lack of communication.

The Tribunal recorded that the Public Guardian had "grave *concerns"* over the "contentious *communication between* [the plaintiff] *and the nursing home and the lack of communication between* [the plaintiff] *and the Public Guardian in respect of over-night visits.*"

As the Administrative Decisions Tribunal was later to record, this appears to be based upon a misunderstanding by the Public Guardian or the Guardianship Tribunal, or both, of the orders made on 28 March 2008, whereby the Public Guardian's guardianship function did not extend to overnight visits.

Grave concerns about the tension and lack of communication between the plaintiff and the nursing home were understandable.

A question for the Tribunal was what underlay those concerns. In particular, **what was in Mrs. B's interests? Was the plaintiff's objection to the proposal to discontinue Warfarin medication justified? If that resistance was the trigger of the dispute between the plaintiff and the nursing home, was it in Mrs. B's interest that responsibility for medical decisions be taken out of the hands of the plaintiff?**

These questions were not addressed. The Tribunal concluded that because of the breakdown in communication between the plaintiff and the nursing home the guardianship order should be varied to give the Public Guardian the authority to make decisions on Mrs. B's behalf in relation **not only to accommodation**, **but also to health care and medical and dental treatment.**

The Tribunal deleted the exception contained in the orders of 28 March 2008 to the guardian function concerning accommodation in relation to stays of up to one week. That is to say, the Public Guardian was given full authority to determine where Mrs. B should reside, including on a short-term basis.

Appeal to the Administrative Decisions Tribunal

The plaintiff appealed from the orders of the Guardianship Tribunal of 12 June 2009 to the Administrative Decisions Tribunal Appeal Panel.

On 25 November 2009 the Administrative Decisions Tribunal Appeal Panel ordered that the decision of the Guardianship Tribunal of 12 June 2009 be set aside (*PV v The Public Guardian* [2009] NSWADTAP 68).

The matter was remitted to the Guardianship Tribunal to redetermine the application.

The principal reason for the decision was that the Administrative Decisions Tribunal found there had been a denial of procedural fairness at the hearing on 12 June 2009.

That was because the applicant to the Guardianship Tribunal had been permitted to rely on the letter of 11 June 2009 written by the Acting Nursing Unit Manager that contained highly prejudicial allegations against the plaintiff that were directly relevant to the issue the Tribunal had to determine, namely whether the plaintiff should continue to have responsibility for decisions about his mother's health care and medical and dental treatment, or whether those decisions should be made by the Public Guardian.

The Administrative Decisions Tribunal found that the plaintiff had not been provided with a reasonable opportunity to respond to those allegations (at [12]-[16]).

The Administrative Decisions Tribunal Appeal Panel also dealt with other grounds of appeal. It said:

"21 [The plaintiff] *wrote a letter to the Manager of the Nursing Home on 11 February 2009. That letter sets out his understanding of his mother's medical issues and the views of his mother's general practitioner Dr. Joseph. He said that the Tribunal should have referred to that letter and taken Dr Joseph's opinion into account. In our view, Dr. Joseph's opinion was relevant and should have been taken into account because it supported* [the plaintiff's] *view as to the treatment his mother should be receiving.*

When determining whether the Public Guardian or* [the plaintiff] *was the most suitable person to be making substitute decisions about* [Mrs B's] *health and medical treatment, it was relevant for the Guardianship Tribunal to consider whether* [the plaintiff's] *previous decisions had been in his mother's best interests.

Again, that is a matter which can be addressed when the Guardianship Tribunal hears the application again. "

The Appeal Panel was right in saying that it was relevant for the Guardianship Tribunal to consider whether the plaintiff's previous decisions had been in his mother's best interests. It was necessary for the Guardianship Tribunal to address that question in order to determine what was in the best interests of Mrs B. Sections 4 and 17 of the *Guardianship Act* provide:

"4 *General principles*

It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:

(a) the welfare and interests of such persons should be given paramount consideration,
(b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,
(c) such persons should be encouraged, as far as possible, to live a normal life in the community,
(d) ***the views of such persons in relation to the exercise of those functions should be taken into consideration****,*
(e) ***the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,***
(f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,
(g) such persons should be protected from neglect, abuse and exploitation,
(h) the community should be encouraged to apply and promote these principles.
...
17 Guardians

(1) A person shall not be appointed as the guardian of a person under guardianship

(1) A person shall not be appointed as the guardian of a person under guardianship unless the Tribunal is satisfied that:

(a) the personality of the proposed guardian is generally compatible with that of the person under guardianship,
(b) there is no undue conflict between the interests (particularly, the financial interests) of the proposed guardian and those of the person under guardianship, and
(c) the proposed guardian is both willing and able to exercise the functions conferred or imposed by the proposed guardianship order.
(2) Subsection (1) does not apply to the appointment of the Public Guardian as the guardian of a person under guardianship.
(3) If, at the expiration of the period for which a temporary guardianship order has effect, the Tribunal is satisfied:
(a) that it is appropriate that a further guardianship order should be made with respect to the person under guardianship, and
(b) that there is no other person who it is satisfied is appropriate to be the person's guardian, the Tribunal may, in accordance with this Division, make a continuing guardianship order appointing the Public Guardian as the guardian of the person.
(4) The Public Guardian shall be appointed as the guardian of a person the subject of a temporary guardianship order. "

There was <u>no conflict between the plaintiff and his mother</u> that precluded the plaintiff being given any of the functions of a guardian pursuant to s 17.

The Guardianship Tribunal might have reviewed of its own motion the previous orders appointing the Public Guardian as Mrs. B's guardian.

If it did not, the question for it was whether it was in the interests of Mrs. B that responsibility for medical decisions be transferred from the plaintiff to the Public Guardian.

That question could not be answered merely by finding that there was conflict between the plaintiff and the nursing home.

In coming to a decision that it was in the best interests of Mrs B that responsibility for such medical decisions be transferred from the plaintiff to the Public Guardian, **the Guardianship Tribunal had to consider whether the plaintiff had acted in the best interests of Mrs. B; whether his opposition to the discontinuance of the administration of Warfarin was soundly based; whether the cause of the conflict between the plaintiff and the nursing home was (as the plaintiff contended) that the nursing home wanted the medication discontinued because its staff lacked the necessary expertise to monitor the results of blood testing and to adjust dosages accordingly; and if so, who should continue to have responsibility for deciding where Mrs. B should be accommodated.**

In the particular factual dispute that had arisen it was incumbent on the Tribunal to determine whether or not the charges made by the applicant against the plaintiff were well founded and if not, to consider what were the implications for a decision as to what was in Mrs B's best interests.

That is to say, if the Tribunal formed the view that the allegations made against the plaintiff were baseless, it might form the view that it was not in Mrs B's interests that responsibility for medical decisions should be transferred from the plaintiff at the nursing home's request.

Whilst the existence of a conflict between the plaintiff and the nursing home was undoubtedly a material issue in deciding whether a variation of the terms of the guardianship orders was in Mrs. B's best interests, the decision could not properly have been made only on the basis that such conflict existed.

There was a further hearing before the Tribunal on 12 February 2010. The Tribunal had before it all the documentation that had been provided since lodgment of the original application in February 2009. The plaintiff's brother, John, was joined as a party.

He indicated that he wished to challenge evidence put to the Tribunal by the plaintiff and indicated to the Tribunal that his view of the plaintiff was that **the plaintiff was " *obstructive and secretive and needs to be out of my mother's life*** ". Upon being granted the status of a party John immediately sought an adjournment as he had not been provided with any of the documentary evidence that was available to the Tribunal.

The hearing was adjourned to 24 February 2010.

Orders of 24 February 2010

At the hearing before the Tribunal on 24 February 2010, the plaintiff sought to be appointed as his mother's guardian.

The Tribunal recorded that the applicant (**Ms. Gibbs**) **and the plaintiff's brother John strongly opposed the plaintiff's being so appointed.**

The Tribunal did not appoint the plaintiff as guardian.

The Tribunal varied its order of 28 March 2008 by making in substance the same orders as had been made on 12 June 2009. **It made a further order that the Public Guardian have the function of deciding whether Mrs B should participate in any activities outside of the care facility, including decisions as to the duration of such activities and who would accompany Mrs. B on them.**

Section 68(1B) of the *Guardianship Act* required the Tribunal to furnish each party to the proceedings with formal written reasons for the decision as soon as practicable after it was made. **No reasons were provided for over a year.**

In the part of the Tribunal's reasons dealing with who should have the function of providing medical and dental consent for Mrs., B, the Tribunal recorded the contentions advanced by both the applicant (Ms Gibbs) and the plaintiff.

The Tribunal noted that a report provided by the Public Guardian had:

"... *provided extensive background information as to the conflicts which had arisen between* [the plaintiff] *and Garrawarra on issues such as the administration of medications, the management of* [Mrs B's] *rehabilitation following a hip fracture, dietary issues and communication difficulties regarding* [Mrs B's] *health and wellbeing. The Public Guardian supported the position that* [Mrs B] *is in need of a guardian with the authority to make decisions as to her health care and to consent to medical and dental treatment as required.*"

That report was not before me on the hearing of the plaintiff's application.

The Tribunal made no findings about the dispute between the plaintiff and Garrawarra. Its reasoning on the question of who should have this function was:

"The *Tribunal concluded that* [Mrs B] *requires the appointment of a guardian with the ability to make decisions as to her health care and to consent to medical and dental treatment as required. Irrespective of whether one favours the evidence of* [the plaintiff] *or the applicant* ***there continues to be conflict between those persons currently engaging in*** **[Mrs. B's]** ***daily care at Garrawarra and the person identified as performing the role of person responsible,*** **[the plaintiff]** ***.***

The appointment of a guardian is required to bring clarity to the decision making process pertaining to [Mrs B's] *health care needs and to allow* [an] *objective review of* [Mrs B's] *current medical conditions, the seeking of appropriate professional advice and to conclude on the best future treatment regime for*[Mrs. B]."

The Tribunal adopted a similar approach in its determination of who should be the guardian.

It did not consider s 15(3) of the *Guardianship Act.*

It recorded the applicant's submission in her letter of 11 June 2009 that the plaintiff had been found to be elusive, manipulative and untruthful. It referred to the issue concerning the use of Warfarin. It also referred to another issue concerning the application of a Norspan patch for pain relief.

The applicant had contended that the plaintiff had acted inconsistently by first approving the application of a Norspan patch to Mrs B to alleviate pain and then changing his mind based on his own views as to whether his mother was in pain, and his own views as to the safety of the treatment.

The Tribunal recorded that the plaintiff stated that he had no recollection of consenting to the treatment, but rather that it was just done and he was told about it later.

The Tribunal recorded that the plaintiff expressed concerns as to adverse side effects his mother had suffered from previous Norspan treatment after an operation.

The Tribunal referred to statements made by the applicant that the plaintiff had been consistently resistant to any form of pain management for his mother. **No findings were made on these issues.**

The Tribunal recorded the poor relationship between the plaintiff and his brother John without explaining the significance of that to the issues it had to decide. The Tribunal found that it was appropriate to appoint the Public Guardian as Mrs B's guardian with all “determined *authority”* for the following reasons:

a) that the plaintiff, whilst well-meaning, lacked an appreciation of his mother's cognitive decline and this impacted on his decision-making for her in regards to her health care.

The Tribunal did not identify the evidence on which that finding was based;

b) that the plaintiff had a poor relationship with the facility where his mother resided and this prevented the flow of information between himself and Garrawarra that was essential to ensure the best health care planning was put in place for Mrs B.

It made no finding as to how the poor relationship arose;

c) the level of communication breakdown and the lack of a working relationship between the facility at which Mrs B resides and the plaintiff meant that the plaintiff was unable to engage in objective and impartial decision-making whilst his mother continued to reside at Garrawarra.

The Tribunal did not consider whether Mrs B should continue to reside at Garrawarra;

d) the plaintiff had a proclivity to reach fixed points of view as to his mother's required treatment, for example, as to his mother's need for the continued treatment with Warfarin and his views on Norspan, and this impeded his ability to seek appropriate expert advice and make objective decisions based on that advice. The basis for the finding that the plaintiff had a "fixed *point of view"* as to his mother's need for continued treatment with Warfarin was that the plaintiff stated that to treat the condition of atrial fibrillation "the *blood must be thinned by appropriate medication to prevent the clot forming. This medication is essential for this condition (AF). The only recommended medication for this condition is Warfarin. Other medications are ineffective and lack protection* "(underlining in Tribunal's reasons).

The plaintiff submitted that he was making submissions to the Tribunal as to the effect of medical publications.

Before me he tendered a publication of the Victorian Government that "studies *suggest that warfarin therapy can reduce the risk of stroke in people with atrial fibrillation by 70 per cent. Warfarin is appropriate and required in the vast majority of people over the age of 65 who develop atrial fibrillation.* "

The Tribunal made no finding as to whether the plaintiff's "fixed *point of view"* on these issues was well based or not.

Whilst the Tribunal recorded that amongst the documents it had considered were the plaintiff's letter of 11 February 2009 and Dr Joseph's report of 21 January 2009**, it did not address the question that the Administrative Decisions Tribunal Appeal Panel had said that it should address, namely, whether the plaintiff's previous decisions had been in his mother's best interests.**

The Tribunal made no findings on the allegations made by the applicant against the plaintiff.

In essence, it decided that because there was a conflict between the plaintiff and the nursing home, and between the plaintiff and his brother John, all guardianship functions should be given to the Public Guardian. That approach failed to have regard to s 15(3) of the *Guardianship Act.* **The Tribunal did not make findings on many of the issues in dispute that were relevant to a determination of what course of action was in Mrs. B's best interests.**

It did not refer to the evidence upon which the findings it did make were based.

Request to Public Guardian for Mrs. B's accommodation to be changed

The Public Guardian was called on to decide where Mrs B should be accommodated.

On 14 January 2010 (after the Administrative Decisions Tribunal Appeal Panel had set aside the Guardianship Tribunal's orders of **12 June 2009**, but before the hearings in February 2010) **the plaintiff wrote to the Public Guardian on what purported to be a confidential basis asking to have Mrs B moved to a new facility.**

He made various allegations about her treatment at the nursing home. He gave particulars of those allegations and submitted that her care was compromised by poor management.

At the hearing before me the plaintiff complained that **the Public Guardian had not kept the complaint confidential.** He said that he was concerned that the making of the complaint would adversely affect the care provided to his mother and was critical of the Public Guardian for raising his complaints with the nursing home. That complaint is not justified.

I do not see that the Public Guardian could have acted differently.

The Public Guardian sought comments from the plaintiff's brothers and from Ms. Buchanan of the Garrawarra Centre. Advice from a geriatrician who assessed Mrs. B was also obtained. The geriatrician advised that a change would not adversely affect Mrs B.

The Public Guardian also obtained advice from the Aged Care Complaints Investigation Scheme about the quality of care Mrs B received at the Garrawarra Centre. The Scheme's investigation of the plaintiff's allegations found that the Garrawarra Centre had not breached its responsibilities under the *Aged Care Act* 1997 (Cth).

The officer from the Office of the Public Guardian concluded that there was no compelling evidence to support the plaintiff's contention that his mother was neglected by staff at the Garrawarra Centre or was at serious risk of harm. He determined that Mrs B's best interests were served by her continuing to reside at the Garrawarra Centre, rather than to relocate to one of two other facilities proposed by the plaintiff.

Part of the reasoning was that the Garrawarra Centre provided a high ratio of nursing staff to residents because of the high needs of the residents at the facility.

Another reason was that Mrs B had her own room and ensuite at the Garrawarra Centre and that the facility was very spacious with a variety of indoor and outdoor areas.

The Public Guardian acknowledged that whilst Mrs B no longer displayed a high degree of challenging behaviours (which was apparently a reason she was originally admitted to the Centre which caters for residents with high needs) that was not itself a sufficient reason for her to be relocated. The officer concluded that she appeared to be reasonably settled and was receiving an adequate level of care. Detailed reasons were provided for this conclusion.

The report of the Public Guardian stated that all of Mrs. B's siblings (scil. children) initially supported her transfer, **but that John had withdrawn his support on the ground that he had relied solely on the advice provided by the plaintiff,** but had subsequently formed the view that his mother was settled and happy at Garrawarra as established by a visit to the facility.

The Public Guardian said that had there been consensus between the children this may have provided support for a transfer on the grounds that Mrs B would have wanted her children to come to consensus about how her best interests would be served and for that consensus to be acted on.

The Public Guardian said that as no such consensus existed, this aspect of the proposal had not been considered in detail.

The report referred to two discussions with John on 15 January 2010 and on 17 February 2010 and a written submission made to the Guardianship Tribunal on 17 February 2010.

In the discussion on 15 January 2010, John had expressed support for his mother to be transferred from the nursing home "in *broad terms"* on grounds reported to include:

"* [T] T*he facility is distressing to visit because of the very challenging behaviors exhibited by other residents

...

**** that he dislikes visiting the facility and finds it distressing, as do other family members:***

'takes a week to get over the trauma of visiting her in that situation';

**** he and other family members would visit more frequently if his mother were in a different facility.***

He said he currently visits about once every 3 months.

**** On a cautionary note,* [he] *stated that he is worried about what would happen if his mother was exited from the new facility due to her behaviors.***

***His mother would then have to be placed elsewhere. But* [he] *also said that he felt admission to hospital would be preferable to remaining at Garrawarra.* "**

The Public Guardian reported that on 17 February 2010 **John had changed his view and that his view then was that:**

"He withdrew his consent for* [Mrs B] *to be transferred to* [a new facility] *...***
...
**** He visited his mother at Garrawarra and described it as 'very pleasant' and stated that his mother 'seemed very settled and happy'.* "**

No comment was made about this remarkable change.

The plaintiff deposed that the nurse manager from Garrawarra Centre had asked John to visit the nursing home. He surmised that she had convinced John to oppose the family and align with the nursing home and as a result he had supported the nursing home at the hearing before the Tribunal on 24 February 2010 notwithstanding his previous position.

That is plausible. It is not easy to see why John should so dramatically have changed his position.

The Public Guardian gave its decision rejecting the plaintiff's request that his mother's accommodation be changed on 13 April 2010.

Institution of these proceedings: Hearing before Garling J

The next significant event was that on 14 December 2010 the nursing home stopped administering Warfarin to Mrs B.

The plaintiff did not find out about this change until 4 February 2011.

On **10 February 2011** the plaintiff made an oral application to Garling J sitting as the Duty Judge in the Common Law Division for orders relating to the medication being administered to his mother. Garling J ordered the general manager of the Garrawarra Centre to produce to the court on the following day all records relating to the administration of the medication.

His Honour directed the plaintiff to prepare a summons outlining the relief sought.

On 11 February 2011 the plaintiff filed in court a summons that sought the following relief:

"1 *Set aside the decision of the Guardianship Tribunal for grossly unreasonable delay in delivery of the reasons for the removal of* [the plaintiff] *as the person responsible for the medical treatment and lifestyle and services of* [Mrs. B].

2 That **[the plaintiff]** ***and NSW Trustee and Guardian share joint guardianship of*** **[Mrs B].**

3 **[Mrs B]** ***undergo an independent medical assessment by a cardiologist, nominated by*** **[the plaintiff]** ***to determine Warfarin medication.***

4 **[Mrs B]** ***does require Warfarin and the medication is unable to be administered by the current nursing home staff that*** **[the plaintiff]** ***and the NSW Trustee and Guardian in consultation, agree to alternative aged care accommodation.***

5 That NSW Trustee and Guardian keep **[the plaintiff]** ***fully informed of all medical decisions and intervention concerning*** **[Mrs B].**
...
8 ***Continue Warfarin immediately.*****"**

The defendants to the summons were the Director General of the NSW Trustee and Guardian and Ms. Jan Heiler, general manager of Garrawarra Aged Care Centre.

At the hearing before Garling J the legal representative for the NSW Trustee and Guardian, Ms Phang, confirmed that the first the Public Guardian knew about ceasing the medication Warfarin was in a telephone discussion with Dr Jacob on 4 February 2011 who advised that the medication had ceased in December 2010. It seems that Dr. Jacob was a general practitioner treating Mrs B at the nursing home.

Ms. Heiler confirmed that the administration of Warfarin had stopped on 14 December 2010. The court was advised that a registrar at Sutherland Hospital working in the department of geriatric medicine had reviewed Mrs. B and confirmed that it was appropriate that the medication be stopped.

Garling J ordered that the summons be amended so as to delete orders 2-5 inclusive and to delete order 8.

His Honour ordered that the second defendant, Ms. Heiler as general manager of the Garrawarra Aged Care Centre **be removed as a defendant and that the Guardianship Tribunal be joined as the second defendant.**

By ordering that the summons be amended by deleting the claim for relief in order 2, I take his Honour to have summarily dismissed that claim. His Honour said that he would not interfere with the medical decisions that had been made as to the appropriate method of treatment of Mrs B.

Hence his Honour refused the relief sought in the proposed orders

The summary dismissal of the order sought in para 2 of the summons was no doubt based on s 16(3) of the *Guardianship Act* that provides that the Public Guardian is not to be appointed a joint guardian. **His Honour's order did not preclude the**

plaintiff from claiming that he be appointed as Mrs B's guardian either in the court's inherent jurisdiction or by way of appeal from the Tribunal's orders of 24 February 2010, but no such amendment was made.

An amended summons and a further amended summons were filed that deleted orders 2-5 and 8 as sought in the original summons in conformity with his Honour's direction.

Mrs. B was named as the fourth defendant. As well as the Guardianship Tribunal being joined as the second defendant, the plaintiff's brother John was joined as the third defendant. The plaintiff deposed that he served the amended summons on his brother on 7 March 2011. The NSW Trustee and Guardian (for the Public Guardian) filed a submitting appearance. **The plaintiff's brother did not file an appearance.**

Further medical opinion as to administration of Warfarin

Following the hearing before Garling J the Public Guardian sought further medical opinion in relation to the administration of Warfarin. **On 14 March 2011** a consultant physician, Dr James Healey, said that on balance he believed that **Mrs. B should continue to be treated with Aspirin given possible problems with Warfarin therapy.**

On 6 May 2011 Ms. Kaye of the Office of the Public Guardian wrote to the plaintiff referring to this opinion and to the like opinion of the Geriatric Registrar at Sutherland Hospital. She noted that the plaintiff had advised that on **15 February 2011** the plaintiff had taken his mother to see a cardiologist, Dr. George Youssef who also **did not** support Mrs B being put back on Warfarin.

Ms. Kaye advised that the Public Guardian was satisfied following these consistent medical opinions that it was not in Mrs B's best interests to recommence Warfarin.

The plaintiff accepts these opinions. He says that they are based on the assumption that Mrs. B continues to reside at the Garrawarra Centre. He says that he does not seek a reinstatement of the Warfarin medication whilst his mother remains in her present accommodation. **He says the Centre is unable to manage the administration of the drug adequately**. That is one of his reasons for having sought a change of accommodation. I have seen no medical opinion that addresses the question whether Warfarin could be administered to Mrs. B more safely at a different nursing home and if so, whether it would on that account be in her best interests to change her residence.

Adjournment of Tribunal proceedings

The orders of 28 March 2008 provided for a continuing guardianship of three years.

On **12 June 2009** that period was extended to **27 August 2011**, but the order of 12 June 2009 was set aside. The orders of 24 February 2010 did not extend the period of guardianship beyond 27 March 2011. On 21 March 2011 the Guardianship Tribunal adjourned the end of term review for three months. On 7 July 2011 the Tribunal adjourned the review again for another three months.

The parties and the Tribunal appear to have proceeded on the assumption that the orders appointing the Public Guardian as Mrs B's guardian continued. The basis of that assumption is not clear to me, but there may have been other orders that had that effect.

I will assume that such an order was made. **Even if that were not the case, the plaintiff is entitled to have his challenge to the Tribunal's orders determined, lest errors be perpetuated on the hearing of a fresh application.**

Principles for intervention

Section 67 of the *Guardianship Act* confers on a party to a proceeding before the Tribunal a right of appeal to the Supreme Court from a decision of the Tribunal on a question of law and a right of appeal on any other question if leave is obtained. The plaintiff said that his application was not by way of appeal under s 67. It was made in the inherent jurisdiction of the court with respect to guardianship of persons that is preserved by s

Where Parliament has established a statutory tribunal to deal with questions relating to the guardianship of disabled persons and conferred limited rights of appeal on the Supreme Court, it would defeat the statutory scheme if a person dissatisfied with decisions of the Tribunal could simply start afresh by invoking in this court the Crown's *parens patriae* jurisdiction.

In a related area dealing with the exercise of the *parens patriae* jurisdiction in respect of children where proceedings are taken in the Children's Court, it is settled that this court will only intervene in the exercise of the *parens patriae* jurisdiction in exceptional cases (Re *Victoria* [2002] NSWSC 647 at [31]; *Re Elizabeth* [2007] NSWSC 729 at [17]). In *S v S* [2001] NSWSC 146, a case concerning the appointment of a financial manager, Young J (as his Honour then was) said (at [10] and [11]):

"[*10] This Court has a* parens patriae *jurisdiction as well as its statutory powers under s67. It is obliged to pay regard to the best interests of the incapable person without undue emphasis on technicalities.

[11] However, even in cases in the* parens patriae *jurisdiction, as was made clear by Hodgson CJ in Eq in* DOCS v S *[2001] NSWSC 79, the Court does not interfere with the decision of the primary fact-finding tribunal whether the Court or statutory tribunal, unless some error appears in the process leading to the decision, or the decision below is clearly wrong."

I approach the exercise of the *parens patriae* jurisdiction as if this application were an appeal on a question of law or an application for leave. In relation to applications for leave Young J said in *K v K* [2000] NSWSC 1052 (at [15]):

"It *would seem to me that s 67 of the* Guardianship Act *operates so that broad questions of administration and policy and the applicability of policy to individual cases, even if they are not questions of law, may well be subjects on which the Court will grant leave to appeal.*

On the other hand, it is very unlikely that the Court will grant leave to appeal when there is a problem with a fact finding exercise unless there are clear indications that the Tribunal has gone about that fact finding process in such an unorthodox manner or in a way which is likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed. "

This approach has frequently been cited with approval (see, for example, *P v D1* [2011] NSWSC 257 at [58]; and *Application of SJ* [2011] NSWSC 372 at [46]). In *EB v Guardianship Tribunal* [2011] NSWSC 767 at [194]-[199] Hallen

AsJ reviewed the authorities including the helpful analysis in *Slinko v Guardianship and Administrative Tribunal* [2006] QSC 39; [2006] 2 Qd R 279 at [9]-[16]**. I adopt the approach in the authorities referred to, but observe that s 4 of the *Guardianship Act* requires that a decision as to whether or not to grant leave under s 67 must have regard to the matters in that section. That is not to say that leave must be given if the court thinks that it may prove to be in the interests of the disabled person to do so.**

Such an approach would have the potential to emasculate the requirement for leave to appeal on decisions of the Tribunal other than on questions of law. **But in considering the justice of the case, and whether there were errors in the decision-making process, or clear and vital errors of fact, the requirements of s 4 must be kept in mind. In the present case there are errors of law and errors in the process of decision-making that mean that the Tribunal's orders ought to be set aside.**

Error of law

The first such error appears in the reasons of the Tribunal for the order made on **24 July 2007 that the Public Guardian be appointed as Mrs B's guardian**.The time for appeal has long passed. But the error infects the subsequent decision-making in the Tribunal. **The error was repeated in the Tribunal's orders of 24 February 2010.**

On 24 July 2007 the Tribunal was satisfied that important decisions needed to be made for Mrs. B and it was appropriate to appoint a guardian. **That conclusion was undoubtedly correct.**

On the question of who should be appointed guardian the Tribunal said:

" *... John ...* [the plaintiff's brother] *has proposed his son, James ... as guardian. The applicant* [the plaintiff] *proposes himself. It became apparent during the course of the evidence, that there is a history of disagreement and distrust between the brothers. This is having an adverse effect on* [Mrs B] *because communication within the family is impeded and decisions are delayed. It is not possible for important and necessary decisions to be made within the family due to the level of conflict evident. Accordingly, the Tribunal has formed the view that it is in* [Mrs B's] *best interests that the Public Guardian be appointed for a period of 12 months. The guardian shall have the authority to make decisions with respect to accommodation, services, health care and medical and dental consents."*

The first paragraph quoted above sets out reasons as to why a guardian should be appointed.

Disagreement within the family was making it difficult or impossible for decisions to be made by the family as to Mrs B's care. The appointment of a guardian would resolve that issue.

The fact of that conflict between members of the family was not a sufficient reason for appointing the Public Guardian as Mrs B's guardian.

As previously noted, there was no conflict in this case between the plaintiff and Mrs. B and no suggested incompatibility of personality between the plaintiff and Mrs B so as to preclude the plaintiff's appointment as guardian (s 17(1)(a) and (b)). The plaintiff was wishing to act as guardian and there was no finding that he was not able to do so (s 17(1)

(c)). The question under s 15(3) was whether an order appointing some person other than the Public Guardian as guardian of the person in need of a guardian could properly have been made. That in turn should have focused attention on s 4 of the Act in which states the welfare and interests of the person under disability are to be given the paramount consideration.

Section 14 prescribes matters to be taken into account by the Tribunal in deciding whether to make a guardianship order.

They will also be relevant to the decision as to who is the appropriate person to be appointed as guardian. But unless the Tribunal were to decide that it was not in the interests of Mrs B for it to appoint either the plaintiff or Mrs. B's grandson James as guardian, the Tribunal was not entitled to appoint the Public Guardian as her guardian.

This was made clear in *W v G.* There the Guardianship Tribunal dealt with a similar question to that in the present case. The person in need of a guardian was Mrs G. **The plaintiff (Mrs. W) was Mrs. G's niece**. Mrs G's sister, Mrs C, had a long-

standing friend, Ms. M. **Mrs. C did** not seek appointment as guardian and it would not have been appropriate to appoint her. **Ms. M also** did **not seek appointment**. **There was a conflict between Mrs. W and Ms. M** as to the appropriate nursing home at which Mrs. G should be accommodated.

If Mrs. W's wishes prevailed, there would be difficulties in arranging contact between Mrs. G and Mrs. C and Ms. M.

The Tribunal said (quoted at [8]):

"Having *considered the evidence, the Tribunal was satisfied that there was little hope that the question of Mrs. G's future accommodation options could be resolved in the consensual way. This was an issue which needed resolution, and there were clearly strong arguments each way. In the Tribunal's view there was no option therefore but to appoint a guardian to make this decision. In view of the entrenched conflict between the parties, the Tribunal regarded it as inappropriate to appoint anyone other than the Public Guardian. It will be the Public Guardian's role to consider the matter raised by all interested parties, and then make a decision in Mrs G's best interests.* "

Windeyer J set this order aside**. The order did not give effect to s 15(3). His Honor said at [25] and [26])**

"[*25] There is no doubt that an order can be made appointing Mrs. W as guardian. In fact, leaving aside the accommodation question, there is no doubt and it is not disputed she would be a proper person to be so appointed. There would be a considerable number of cases where no person would be available to be appointed. *An example might be a disabled, destitute person with no friend or relative. Such a case might lead inevitably to the appointment of the Public Guardian. Nevertheless appointment of the Public Guardian should not, I think, be restricted to such cases.* ***I consider that the proper meaning to be given to the section is to read it as saying that the Public Guardian should not be appointed in circumstances in which an order can properly be made in favor of another person****. That requires not only that the person be willing, reliable and responsible, but that the appointment will result in the policy considerations and principles set forth in the Act being given effect. In this case, Ms M is not a party. She is not put forward as a guardian. Mrs C cannot be a guardian. The fact that Mrs. W would obviously keep the accommodation of Mrs G as it is does not necessarily mean either, that it would not be an appropriate decision, or that Mrs W cannot be guardian.*

[26] While s 15(3) must be interpreted within the context of the Act and in accordance with its principles, it must be given effect within those bounds. In Lunacy and Mental Health proceedings ***it has always been the policy to appoint a member of the family as committee or guardian of the person if that were possible. The policy is continued under the Act which created the office of Public Guardian. Just because a decision is required about accommodation and there is some dispute about this does not mean that a close family member holding one view ought not to be appointed****. On the other hand if the Tribunal considered the evidence established that such a decision was likely not to be in the interests of the person under guardianship*

then the person who would make such a decision would not be a person who could properly be appointed under s 15(3).
In other words what is described as a 'contest' is not sufficient reason not to appoint a person otherwise appropriate as guardian. This may mean that the Tribunal has to consider the evidence in some little detail. "(Emphasis in original.)

So in the present case, the Tribunal was only able to appoint the Public Guardian as Mrs. B's guardian **if it had considered that the plaintiff could not properly be appointed as Mrs. B's guardian, and that James also could not properly be so appointed. The Tribunal might have so concluded if it had concluded that neither was able and willing properly to perform the role, or that their plans for Mrs B's future welfare were not in her interest.**

No such findings were made.

There was no appeal from the Tribunal's orders of 25 July 2007, but subsequent events have demonstrated the difficulties inherent in the course charted by those orders.

In the Tribunal's reasons of 12 June 2009 (set aside on other grounds) and 24 February 2010 **the same error is perpetuated**. The essential reason for continuing the appointment of the Public Guardian as Mrs. B's guardian and extending its guardianship functions **was a conflict between the plaintiff and the Garrawarra Centre, coupled with the opposition of the plaintiff's brother John to the plaintiff's being appointed guardian.**

The Tribunal did not in terms find that the plaintiff was not a proper person to be appointed as his mother's guardian. It did not address the question as to whether it would be in Mrs. B's interests for her accommodation to be changed to a nursing home in whom the plaintiff had confidence.

Errors in decision-making process

Even if the continued appointment of the Public Guardian as Mrs B's guardian could be justified, there were other errors in the decision-making process. For the reasons in paras [33]-[37] above, **the Tribunal failed to make necessary factual findings for its orders of 24 February 2010.**

Part of the problem in the way these issues have been managed is that questions as to what is in Mrs. B's best interests have been segregated. Presumably the Tribunal did not address the question of accommodation in its reasons for its orders of 24 February 2010 because that was an issue the Public Guardian was considering and on which it had yet to make a decision. **However, if the plaintiff was otherwise a suitable person to be appointed as Mrs. B's guardian, but the Tribunal thought that that would not be in Mrs. B's best interests because of the conflict between the plaintiff and the staff at the Garrawarra Aged Care Centre, the question it then had to consider was**

whether or not it was in Mrs. B's interests that her accommodation be changed and the plaintiff be appointed her guardian. **It did not address these questions.** Similarly, when the Public Guardian obtained medical opinion in relation to the possible recommencement of the Warfarin medication, the question was apparently considered independently of the question as to where Mrs B should reside.

I was concerned whether the Tribunal's orders could be set aside when the applicant to the Tribunal (Ms. Gibbs) was not a party and the general manager of the Garrawarra Centre had been removed as a defendant. Ms Phang, who appeared for the Public Guardian, made helpful submissions in effect as amicus curiae. She submitted that the nursing unit managers who were applicants before the Tribunal were acting in a representative capacity that the Garrawarra Centre was on notice of the application to set aside the orders of the Tribunal and could have insisted on remaining a party if it wished to oppose those orders. **I agree with that submission**.

Moreover, the applicants before the Tribunal and the Garrawarra Centre were not seeking to enforce any right of theirs. **I do not think that the plaintiff's claim to set aside the Tribunal's orders should be defeated because the general manager of the Garrawarra Centre was removed as a defendant.**

Further hearing

Accordingly, the Tribunal's orders should be set aside. The plaintiff does not suggest that his mother is not in need of a guardian. She undoubtedly has a disability by reason of which she is incapable of managing her person. **Because of the conflict between the plaintiff and his brother John in relation to arrangements for the care of Mrs. B it is desirable that a guardianship order be made conferring power on a person to make decisions for Mrs. B's welfare.**

The plaintiff says that he should be the person so appointed. **However, the further amended summons does not include such a claim.**

Service of the amended summons on the plaintiff's brother John would not have alerted John to the fact that the plaintiff was seeking from this court an order for his appointment as guardian, being an order that the Tribunal had rejected.

The manager of the Garrawarra Centre is a person with an interest in being heard on that question, **given that it was a nurse unit manager at Garrawarra who was the applicant (and substituted applicant) for review of the guardianship order of 28 March 2008.**

Although the Garrawarra Centre was on notice of these proceedings, after orders were made on 11 February 2011 that its manager be removed as a defendant and that the claim in para 2 of the summons be deleted, it could reasonably have taken the view that no order would be made conferring any guardianship functions on the plaintiff, at least without its having a further opportunity to be heard.

Both the Garrawarra Centre and the plaintiff's brother John may wish to be heard on the question of how this court should exercise the *parens patriae* jurisdiction. If they wish to be heard they should be heard so that the court has the necessary materials on which to make a decision.

I do not have all of the material that would be needed to make a decision on what is in Mrs. B's best interests. On the material provided by the plaintiff there is a powerful case for saying that he has acted in his mother's best interests in the past and has devoted himself to a very considerable extent to his mother's welfare. **His brother Harry supports the plaintiff's application.**

The plaintiff produced testimonials as to his fitness, including a testimonial from a cousin who is a Professor of Medicine. He says that if Mrs. B changes her accommodation she will have access to a wider range of services.

Whilst it appears from the Tribunal's reasons that accusations have been made against the plaintiff by his brother and by staff at the Garrawarra Centre, there is no material before me to show whether there is any substance to those allegations. One course would be to remit the matter to the Tribunal. That was the course adopted in *W v G* .

I am reluctant to take that course in the circumstances of this case. There have been four substantial hearings before the Tribunal, three of which have miscarried.

The delay in the provision of the Tribunal's reasons for its orders of 24 February 2010 effectively deprived the plaintiff of a timely right of appeal. In the exceptional circumstances of this case I consider the court should come to its own decision as to the appointment of a guardian. **In the meantime, the status quo should be preserved**.

The orders of the Tribunal appointing the Public Guardian as Mrs. B's guardian may have expired. The Public Guardian should have, and continue to exercise, the functions of guardian that the Tribunal's orders conferred on it until the plaintiff's application can be determined.

For the reasons given earlier, the plaintiff's brother John and the Garrawarra Aged Care Centre should also be given the opportunity to provide evidence and make submissions as to who should be appointed guardian.

I will need the file that was before the Guardianship Tribunal. I will also need a transcript of the hearings before the Guardianship Tribunal on 12 June 2009 and 24 February 2010 if a transcript is available, or a recording of the proceeding if the proceeding was recorded.

For these reasons I made the following orders:

1. Order that all orders of the Guardianship Tribunal concerning the guardianship of the fourth defendant that are currently in effect be set aside.

2. Declare that the fourth defendant is a person who, because of a disability, is incapable of managing her person.

3. Order that the fourth defendant be placed under guardianship.

4. Order that notwithstanding order 1, pending the final determination of these proceedings or earlier further order, the Public Guardian have and continue to exercise all of the functions of guardian in relation to the fourth defendant described in order 5 made by the Guardianship Tribunal on 24 February 2010.

5. Order that within 14 days the second defendant (the Guardianship Tribunal) deliver to the Registrar its file No. C/33264 relating to matters 2007/3452, 2007/4714, 2007/6314 and 2009/1156, and (if available) a transcript or recording of the hearings on 12 June 2009 and 24 February 2010, (or both if both are available).

6. Order that the Further Amended Summons be further amended by the insertion of a further claim for relief that the plaintiff be appointed guardian of the fourth defendant and specifying the guardianship functions the plaintiff seeks to exercise, and by joining as fifth defendant the General Manager of the Garrawarra Aged Care Centre.

7. Order that a Second Further Amended Summons be served within seven days on the third defendant and the fifth defendant, together with the affidavits of the plaintiff of23 March 2011 and 2 September 2011 and the affidavit of Harry Atkins of 1 September 2011.

8. The Second Further Amended Summons also be served on the first defendant seven days. It may be filed in court on 10 October 2011, and should be provided to my associate by 7 October 2011.

9. Order that the plaintiff serve a copy of the reasons for these orders on the third and fifth defendants within three business days of his receiving the same.

10. Order that service on the third and fifth defendants may be effected by email, facsimile or post.

11. Order than any affidavits or outline of submissions to be relied on by the third or fifth defendants be filed and served by 5 October 2011.

12. Stand over the proceedings for further hearing on 10 October 2011 not before noon.

13. Note that these orders do not affect orders made under the *Guardianship Act* in relation to the financial management of the fourth defendant's estate.

that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.