SUPREME COURT OF QUEENSLAND

CITATION:	*Pytellek v Evans* [2011] QSC 210
PARTIES:	**MARK ANDREW PYTELLEK** (applicant) **v** **CLIFF EVANS** (respondent)
FILE NO/S:	SC No 5711 of 2011
DIVISION:	Trial
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 July 2011
DELIVERED AT:	Brisbane
HEARING DATE:	12 July 2011
JUDGE:	Atkinson J
ORDER:	**The application is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – PREROGATIVE WRITS AND ORDERS – HABEAS CORPUS – GENERALLY – where the applicant filed an application for the issuance of a writ of habeas corpus – where the applicant sought the release of a woman suffering from Alzheimer's disease from an aged care facility – where the woman in question had an adult guardianship order in place pursuant to orders of the Queensland Civil and Administrative Tribunal – whether the writ of habeas corpus should be issued *Aged Care Act 1997* (Cth) *Guardianship and Administration Act 2000* (Qld), s 12, s 119, s 126, s 129, s 174, schedule 4 *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 142 *Uniform Civil Procedure Rules 1999* (Qld), r 431, r 436(2), r 589(1), r 592(1) *Ruddock v Vadarlis* (2001) 110 FCR 491, cited
COUNSEL:	The applicant appeared on his own behalf M Game for the respondent
SOLICITORS:	The applicant appeared on his own behalf Aylward Game Solicitors for the respondent

[1] The applicant, Mark Pytellek, filed an originating application seeking the following orders:

"1. Bring the woman commonly called Florida Borleis, currently held at Mount Coolum Aged Care Facility. Mount Coolum, Queensland, before the Supreme Court at Brisbane on June 2011 at pursuant to the Writ of Habeas Corpus

2. To release Florida Borleis immediately into the custody and care of her husband Christian Borleis pursuant to the Magna Carta 1215 'No free man shall be taken indeed imprisoned, or outlawed, or exiled, or in any manner destroyed, nor pass over him, nor send him over, except by reason of the legal judgment of his own equals indeed the law of the land (the Common Law)'

3. The respondent pay the applicant's costs of the application, if any"

Material before the court

[2] The applicant filed documents said to be an affidavit of Christian Borleis affirmed 27 June 2011, an affidavit of Mark Andrew Pytellek affirmed 28 June 2011 and an affidavit of Karen Locke affirmed 28 June 2011. The affidavits were not in accordance with the form required by r 431 of the *Uniform Civil Procedure Rules 1999* (Qld) ("UCPR") Form 46. However I gave leave under r 436(2) of the UCPR to the applicant to use the documents as affidavits in spite of their irregularities in form.

[3] Written submissions were tendered on behalf of the applicant set out under the headings (a) Breach of Contract, (b) Faults in the medical assessment, (c) Breaches in Code of Ethics and parties subsequently implicated and (d) Subsequent defective decisions. He complained about, *inter alia*, an alleged breach of contract in keeping Mrs Borleis in a nursing centre, lack of consent to an Aged Care Assessment Team ("ACAT") assessment and the appointment of the Adult Guardian, not taking account of Mrs Borleis' inability to speak English (as she speaks Tagalog), breaches of the Australian Medical Association ("AMA") Code of Ethics, as well as civil wrongs, breaches of State, Commonwealth and international law and various crimes and conspiracies. The allegations are repeated and expanded in the affidavits referred to earlier which contain a mixture of facts, hearsay, opinions, allegations and submissions.

[4] The applicant deposes to being the son of Mr Christian Borleis, the husband of Florida Borleis. The respondent is the manager of an aged care facility. The facility is operated by CPSM Pty Ltd ACN 145 835 981 ("the company"). The company is an approved provider pursuant to the provisions of the *Aged Care Act 1997* (Cth). As an approved provider it carries on the business of providing high and low care aged care services under the name "Mount Coolum Aged Care Service (High Care)" (BN 21097112) and "Mount Coolum Aged Care Facility (Low Care)" (BN 21096820) from premises situated at 15 Suncoast Beach Road, Mount Coolum ("the facility").

[5] Counsel for the respondent raised as a preliminary matter that the respondent was not the correct respondent to any application. However he is in charge of the facility so arguably he is the correct respondent for the purposes of the application before me.

[6] The Adult Guardian, whose statutory role under s 174 of the *Guardianship and Administration Act 2000* (Qld) ("the GA Act") is to protect the rights and interests of adults who have impaired capacity for a matter, appeared to assist the court.

[7] The respondent is on vacation so Shane Winterton, the acting manager of the facility, has sworn an affidavit. That affidavit shows that on 27 May 2011 Mrs Borleis became a resident of the high care section of the facility and in accordance with the company's standard operating procedures, a Residential Aged Care Agreement was entered into between the company and Mrs Borleis as a resident. That agreement was signed by Mr Borleis on behalf of his wife Mrs Borleis.

[8] Mrs Borleis had been assessed by the Sunshine Coast ACAT on 16 March 2011. That assessment noted that the application was for residential care and residential respite care and was signed by Mr Borleis because the applicant was said to lack capacity to understand an ACAT assessment. The ACAT assessment showed that Mrs Borleis was born on 15 February 1954. It noted that she had used residential respite care and non-residential respite care in the last 12 months. It also noted that she had the diagnosed disease of dementia. The assessment recommended that the living environment most appropriate for her long term care needs was "residential aged care service – high level care". The professions of the people who participated in her assessment included a geriatrician, a registered nurse and a psychologist. It was recommended that she have "high level dementia specific residential respite and permanent care approvals." The assessment said that her husband assisted her with personal activities of daily living and attended all instrumental activities of daily living. She was assessed as lacking "capacity to understand the ACAT process so permanent and residential respite care have been discussed with her husband who has agreed to these approvals." A letter was sent to Mrs Borleis informing her of these entitlements on 18 March 2011.

The QCAT decision

[9] On 9 June 2011 the Queensland Civil and Administrative Tribunal (QCAT) made certain guardianship and administration orders with regard to Mrs Borleis pursuant to s 12 of the GA Act. They were:

> "**GUARDIANSHIP**
>
> 1. The Adult Guardian is appointed as guardian for Florida Borleis for decisions about the following personal matters:
>   (a) Accommodation;
>   (b) Health care;
>   (c) Provision of services.
> 2. Unless the Tribunal orders otherwise, this appointment remains current for twelve (12) months.
>
> **ADMINISTRATION**
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> 3. Christian Borleis is appointed as administrator for Florida Borleis for all financial matters.
> 4. The financial management plan dated 25 May 2011 is approved.
> 5. The Tribunal directs the administrator to provide accounts to the Tribunal by 31 March 2012.
> 6. Unless the Tribunal orders otherwise, this appointment remains current for twelve (12) months.

NOTICE OF INTEREST IN LAND

7. The administrator shall within three (3) months:
   a) identify, by way of a search of the records held by the Registrar of Titles or other means, any interest in real property in the name of Florida Borleis ('the adult').
   (b) lodge with the Registrar of Titles a copy of this order and a notice notifying the Registrar of any interest in land held by the adult which is subject to this administration order.
   (c) provide to the Tribunal:
      (i) a copy of the search of records held by the Registrar of Titles referred to above and;
      (ii) a copy of the lodgement summary with the dealing number showing lodgement of the order in respect of any interests in land held by the adult which is subject to this administration order.
8. If any change is made in an interest in land held by the adult which is the subject of this administration order or if there are any further dealings in land on behalf of the adult by the administrator, the administrator shall lodge with the Registrar of Titles within fourteen (14) days of the finalisation of such interest a copy of this order and a notice (in a form prescribed by the Registrar of Titles), concerning such changes or dealings.
9. The administrator pay, from the adult's funds, any fee associated with the above notices."

[10] That decision has not been the subject of appeal under s 142 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ("the QCAT Act") and so provides not only legal authority for the orders made, but is also a useful source of the reasons for the decision. The decision itself shows that the active parties, under s 119 of the GA Act, were Florida Borleis about whom the application was made, Christian Borleis, her husband, Liway Borleis, Mrs Borleis' daughter, Dr Rachel Kingsbury, a neuropsychologist with Queensland Health, and the Adult Guardian. The interested parties, under s 126 and schedule 4 of the GA Act, were Mrs Borleis' son Raphael Borleis, her step-sons Derek Borleis and Adrian Borleis and her step-daughter Tania Borleis, her step-daughter-in-law Melessa Borleis, her daughter's boyfriend, Liam Habermann, Jan Edmonds, a social worker from Queensland Health, and Eric Jones, an advocate with Carers Queensland. The applicant was not an active or interested party.

[11] The matter was heard by QCAT in Maroochydore on 31 May 2011. The orders were made on 9 June 2011 and reasons delivered on 13 June 2011. Those reasons reveal that at the time of the decision Mrs Borleis, who was then aged 57, was born in the Philippines and had been living at home in Palmwoods with her husband, Christian Borleis. In March 2011 she went into temporary respite care due to carer fatigue. During her time in respite a number of bruises on her body were noticed and on 17 March 2011, in response to an urgent application from Dr Kingsbury, QCAT made an interim order under s 129 of the GA Act appointing the Adult Guardian as guardian for Mrs Borleis for accommodation and service provision. On

31 May 2011 applications for the appointment of a guardian and an administrator for Mrs Borleis were received from Dr Kingsbury, her daughter Liway Borleis and her husband Christian Borleis.

[12] The QCAT member first considered Mrs Borleis' capacity and was satisfied on the basis of the evidence before her that Mrs Borleis had been diagnosed with Alzheimer's disease and that she was dependant on others for all significant decisions. She was satisfied that the presumption of capacity for personal and financial matters for Mrs Borleis had been rebutted.

[13] The QCAT member recognised that Mrs Borleis had experienced some significant and tragic events and had some cultural and language issues. However there was reliable evidence on which the diagnosis of Alzheimer's disease was based. In the past few months she had been comprehensibly assessed by a team within Queensland Health which included at least one neuropsychologist and various geriatric specialists. In addition, magnetic resonance imaging of her brain had been used to inform the professional opinions.

[14] The QCAT member then turned to the question of guardianship. She noted the difficulty in managing Mrs Borleis' condition and her erratic and argumentative behaviour. She also noted a strong disagreement between various interested parties as to where Mrs Borleis should live, the appropriate health care including medication and the management of her challenging behaviour. The QCAT member considered that three of her personal and health matters warranted the appointment of a substitute decision-maker: accommodation, service provision and health. The QCAT member considered in detail the various options for guardianship being either Mr Borleis alone or with various family members or the Adult Guardian. She noted Mr Borleis' and the rest of the family's strong attachment to her. She noted Mr Borleis' view of Mrs Borleis' treatment needs which are not supported by the medical evidence. She also noted the high level of disagreement and some conflict within the family and the fact that, despite the high level of support given to Mr Borleis, he maintained poor insight into dementia and the medical opinion was that by his ongoing denial of the diagnosis and prognosis, he remained unable to understand Mrs Borleis' specific needs and was therefore unable to provide proper care and management.

[15] The QCAT member was persuaded that there would be at least some unacceptable risk to Mrs Borleis' health, safety and wellbeing if her husband were to be appointed as her guardian. She decided therefore that a short appointment of the Adult Guardian was appropriate, with a review within a year to consider Mrs Borleis' needs at the time as well as the appropriateness of any future appointee. The advantage articulated of the appointment of the Adult Guardian was that the Adult Guardian is an independent decision-maker with extensive skills and experience who would be able to assess the relative merits of various options for Mrs Borleis and make decisions that best met her needs. She noted the importance of maintaining Mrs Borleis' existing supporting relationships. With regard to financial matters the QCAT decision ordered that Mr Borleis should be the financial administrator.

Habeas corpus

[16] The writ of habeas corpus is dealt with in the UCPR in Chapter 14 Part 5. An application for the writ of habeas corpus may be started only by application. The jurisdiction to issue a writ of habeas corpus or to order the release of a person from restraint is exercisable by a single judge pursuant to r 589(1) of the UCPR. The application may be made by the person under restraint or by another person.

[17] Rule 592(1) sets out the orders that a court may make on the hearing of an application for a writ of habeas corpus. It provides that the court may:

> "(a) order the respondent to release the person who is under restraint; or
> (b) order the issue of a writ of habeas corpus directed to the respondent and to anyone else and give directions as to the course to be take under the writ; or
> (c) dismiss the application."

[18] The writ of habeas corpus is directed at securing the release of a person unlawfully detained. It is the command of a superior court to a person detaining another to bring the person detained before the court and show legal cause for their detention. Mrs Borleis was in fact present in court during the hearing of the application so no occasion arose to require her to be brought to court. As to the restraint on liberty, as French J (as his Honour then was) observed in *Ruddock v Vadarlis*:[1]

> "In the end it is necessary to consider whether on the facts of the case there is a restraint on liberty which is not authorised by law."

[19] The applicant has not satisfied me that Mrs Borleis is unlawfully detained. Apart from the fact that she was present in court, thus obviating the need for the issue of any writ to bring her to the court, her residence in the aged care facility is governed by the contract entered into by her husband on her behalf with CPSM Pty Ltd. Furthermore any decision about her accommodation is now governed by the order made by QCAT on 9 June 2011, such decision being reserved to the Adult Guardian. There is no evidence that there is any restraint on her liberty which is not authorised by law.

Conclusion

[20] I am not satisfied that there is any justification for the writ of habeas corpus to issue and I dismiss the application. I shall hear submissions as to costs.

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1 (2001) 110 FCR 491 at 547.