

**CITATION:** SLRT [2017] QCAT 92

**PARTIES:** SLRT

**APPLICATION NUMBER:** GAA2458-17

**MATTER TYPE:** Guardianship and administration matters for adults

**HEARING DATE:** 14 March 2017

**HEARD AT:** Brisbane

**DECISION OF:** Senior Member Endicott

**DELIVERED ON:** *Ex tempore* on 14 March 2017

**DELIVERED AT:** Brisbane

**ORDERS MADE:**

1. **SLRT does not have capacity for personal matters including making decisions about her involvement in the National Disability Insurance Scheme.**
2. **The Public Guardian is appointed as guardian for SLRT for the following personal matter:**
  - (a) **Provision of services including decisions about the National Disability Scheme for SLRT.**
3. **This appointment remains current until further order of the Tribunal. The appointment is reviewable and is to be reviewed in two (2) years.**

**CATCHWORDS:** GUARDIANS, COMMITTEES, ADMINISTRATORS, RECEIVERS AND MANAGERS – APPOINTMENT – where an adult has impaired capacity for making personal decisions – where the adult is eligible for funding support from the National Disability Insurance scheme – where the adult does not have any informal support network with decision-making – where decisions are required about the involvement of the adult in the National Disability Insurance Scheme –

whether a guardian should be appointed

*Guardianship and Administration Act 2000*  
(Qld), s 5, s 12(1)

**APPEARANCES:**

**APPLICANT:** Amelia Barker, from the Office of the Public Guardian

**OTHER ACTIVE PARTIES** Clinton Miles, Director of Disability Services, of The Public Trustee of Queensland  
Melissa Meldrum, from The Public Trustee of Queensland

**REASONS FOR DECISION**

- [1] So today, I'm considering an application for the appointment of a guardian for SLRT. This application has been brought to the tribunal by the Public Guardian. The application seeks the appointment of a guardian, specifically in relation to decisions that will be required to be made, involving SLRT's involvement with the National Disability Insurance Scheme.
- [2] The matter has had an unusual history. There had been a prior application of a similar type brought to the tribunal by The Public Trustee of Queensland, and a hearing was held on the 26<sup>th</sup> of October 2016, when, on the evidence then available to the tribunal, it was considered that support for the decision-making process involved with the NDIS could be adequately provided by an advocate or some other means. At that stage, the tribunal was satisfied that the need for a formal guardian had not been established.
- [3] Subsequent to that time, and in the information provided in support of this current application, there has been information, particularly from the advocate, ADA Australia, Lindy Harland, of the efforts that she has taken in relation to trying to work with SLRT in relation to the NDIS. In particular, Ms Harland said, in an email that was given into evidence in the tribunal, that she met with SLRT at her supported residence in about November 2016. At that time, it was noted that SLRT has a cousin, CR, who used to be an active support in SLRT's life, but, unfortunately, CR's support for SLRT has decreased over time, due to CR's ill health. Therefore, at that stage, SLRT Saturday was solely reliant on her support workers from Cootharinga.
- [4] The report from Ms Harland referred to discussions she had with support workers from Cootharinga, who have been working with SLRT for at least five years, and the opinions that they expressed that SLRT Saturday would have difficulty in understanding the concepts, in general, about the

NDIS, and that also, they raised the concerns that SLRT is, in fact, open to suggestion. She's easily influenced and is suggestible, and she tends to be compliant with requests made of her. The support workers confirmed their views that SLRT is happy and stable in her accommodation, health and activities at Cootharinga, and that Cootharinga Customer Connect was arranging for some support for SLRT, through the planning process for the NDIS.

- [5] Ms Harland then went on to describe in considerable detail how she went about trying to assess whether SLRT could engage with her as an advocate in this process. The evidence before the tribunal is that Ms Harland sat and drew pictures with SLRT for a little over an hour. While doing this, they were able to chat about general topics, and, also, more specifically, about the NDIS.
- [6] Ms Harland was able to state that in her view, SLRT lacks understanding of the NDIS or even what disability funding is, in general; that even with a tailored approach, SLRT could not demonstrate comprehension of what the NDIS is. She found it difficult to tell Ms Harland what her needs were, other than a very simple example of what she needs to eat, both currently and in the future. She didn't understand or demonstrate an understanding of what her goals were for her support, and she couldn't identify any goals for herself. She was able to tell Ms Harland what she liked, such as shopping, going to Cairns and drawing and fishing, but later on, perhaps in that same conversation, she would then say she didn't really like some of those activities.
- [7] Ms Harland stated that SLRT's answers to her questions were inconsistent, and that SLRT was unable to follow the topics of conversations, even general topics, such as what people were doing for Christmas. Ms Harland formed the view, and expressed the view, that SLRT was vulnerable to suggestion and she was acquiescent.
- [8] In view of that period of time in dealing with SLRT, Ms Harland formed the view that in the absence of prolonged and intensive decision-making support, that SLRT is currently unable to be supported by an advocate to make her own decisions in relation to the NDIS. Ms Harland concluded a view that SLRT would benefit from having a formal decision-maker appointed, such as a guardian from the Public Guardian, to protect SLRT's rights and interests in relation to the NDIS.
- [9] There was also information that is contained in material filed in the tribunal, which, in fact, is the NDIS plan that was sent to SLRT under a letter dated the 16<sup>th</sup> of November 2016. That followed a meeting on, I think, the 14<sup>th</sup> of November, and sets out the types of funding arrangements that the NDIS considered could be put into place as a result of the planning session. That letter gave SLRT a three-month opportunity to seek an internal review of the decisions made through the planning process. The plan was able to set out what was considered to be the

goals of SLRT, and noted that SLRT was not able to identify any long-term goals, and that this can be explored during the period of her first plan. The information provided by the plan sets out, under specific categories, funding that will be made available by the NDIA to assist SLRT with improved daily living, increased social and community participation, support coordination, transport and core supports, which is the major part of the available funding, which relates to the assistance in sharing accommodation and some other associated costs.

- [10] The tribunal also has taken into account the evidence from the applicant, the Public Guardian, who endorses the views expressed by Ms Harland from ADA Australia, and who urged the tribunal to put into place formal decision-making for SLRT for the NDIS process, due to her inability to engage with advocacy, and due to the absence of any identified informal support networks, such as family, who could provide adequate and appropriate support for SLRT during this process.
- [11] The Public Trustee of Queensland, who is a statutory party to any such application to the tribunal, continues to support the appointment of a guardian. This is on the basis of what was said initially and has been adopted in this current application – that if the tribunal found that SLRT was unable to make her own decisions about the NDIS process, then there would be a need for a formal guardian to be in place, in order to give adequate support for SLRT, as a person who has needs and is vulnerable due to the extent of her disabilities.
- [12] The tribunal, when it looks at appointing a decision-maker of any type for any power, has to apply the law set out in the *Guardianship and Administration Act*. The tribunal must be satisfied, in accordance with section 12 of that Act, of the factors set out in that section, namely, has to consider and be satisfied that SLRT has impaired decision-making capacity for making her own decisions about her involvement in the NDIS; I have to be satisfied that there is a need for a decision about that matter; and, lastly, that if there is no appointment of a guardian for that matter, the tribunal has to be satisfied that the needs would not be adequately met of SLRT, or her interests would not be adequately protected.
- [13] In looking at those issues, the tribunal will first look at the issue of decision-making capacity. There have been, before the tribunal, for some years now, information about the decision-making capacity of SLRT. That information had established, back in 2001, that SLRT had been diagnosed with an intellectual impairment – intellectual disability, as it was called, arising specifically from the Fragile X syndrome. The tribunal was informed in that very early report that she has a lack of comprehension and a lack of understanding of information on which decisions were based. It was also recognised that SLRT had limited schooling, and that that would be a factor that impacted upon her ability to understand information.

- [14] The tribunal has, helpfully, though, more recent information in the form of a report from Dr Rupesingh, who provided a health professional's report in the form preferred by the tribunal and dated the 10<sup>th</sup> of February 2017. Doctor is a GP, has known SLRT for about five or six years. The doctor had stated that there was a diagnosis made some years ago of Fragile X syndrome and cerebral palsy, together with, subsequently, a diagnosis of diabetes and also bronchial asthma. The doctor referred to an opinion that SLRT has an intellectual impairment, due to her Fragile X syndrome. The doctor also said that there was an absence of formal assessment documentation because SLRT was unable to perform the usual range of assessments that are usually available for the purpose of assessing a cognitive functioning ability in relation to decision-making. Doctor mentioned that SLRT requires prompting and needs directions in relation to her activities of daily living, that she's not able to make her own decisions in some areas relating to health care, and that she needs some motivation at times to assist her in looking at those decisions.
- [15] In lifestyle and accommodation decisions, Doctor is of the view that SLRT is unable to make decisions about any of those matters, that she requires a level of support and prompting in every day instances involved with her lifestyle conditions. Doctor was also of the view that SLRT could not make decisions freely and voluntarily, and that she receives a lot of positive support from her service providers. Doctor also confirmed in his opinion that the intellectual impairment affected the receptive and expressive communication skills of SLRT, and Doctor concluded that SLRT could not make simple or complex decisions due to her intellectual impairment. At the hearing, those persons who know SLRT were able to generally agree and confirm the opinions expressed by the doctor. Ms Bowker, who's from Cootharinga, the service provider, stated that SLRT gets very confused; at times, she wouldn't know what day it is. And even when the day is mentioned or an activity is foreshadowed on a particular day, she would get confused and muddled about what day that is to occur, that she does not understand service provision issues or health decision, and she has difficulties with some processes.
- [16] Ms Harland ADA Australia has already, as I mentioned, met with SLRT and was able to express opinions about the deficits that she had seen demonstrated in SLRT's ability to understand information, but she confirmed orally to the tribunal that in her discussions with SLRT, the answers to questions or the issues raised, even in the course of one conversation, were quite variable, and, therefore, her comments at one time are not necessarily reliable, because they're contradicted later in the conversation, even on simple matters. But more importantly, Ms Harland said that the impression given by SLRT is that she is very much open to suggestion and that she would not be able to follow information of the complexity involved in the NDIS.
- [17] I accept all that evidence. It is all relatively consistent. I make the following findings of fact: that SLRT has been diagnosed with a Fragile X

syndrome and cerebral palsy. I find, as a result of the Fragile X syndrome, she also has demonstrated an intellectual impairment. I find that she demonstrates regular confusion, lack of constancy in the views that she expresses. She has demonstrated that she is very much subject to influence and that she will vary what she has said as a result of suggestions put to her. I find that she has difficulties with both receptive and expressive communication skills associated with her intellectual disability.

- [18] The tribunal, when it looks at capacity for decision-making, must apply the definition of capacity that's set out in the *Guardianship and Administration Act*. That definition, in essence, is this. A person has capacity for decision-making if they can understand the nature and the effect or the nature and consequences of decisions about a particular matter. They can make decisions freely and voluntarily about that matter, and they can communicate those decisions to other people. So if one or more of those three features from the definition is missing or impaired, that gives the tribunal a basis on which a conclusion can be reached, that there's some relevant impaired decision-making capacity for that matter. The tribunal is required by law to commence each consideration of capacity from the point of view that the person – SLRT in this case – does have capacity to make her own personal decisions. However, that is a rebuttable presumption. I'm satisfied that the evidence in this case does have the effect of rebutting that presumption of capacity. SLRT, based on the evidence which I've accepted, has demonstrated an inability to understand information on which personal matters are based, both of a simple, but, more particularly, of a complex nature. She wouldn't be able to understand the range of information that is required in order to make a decision in the context of a complex matter like her involvement in the NDIS. She wouldn't have the ability to retrieve from her working memory, or, indeed, her stored memory, of decisions that have been made that would be relevant to augment information currently available about a decision to be made at the current time.
- [19] I'm satisfied that she would not, due to her cognitive impairment, be able to formulate a range of feasible and realistic and sustainable options for decision-making about a range of personal matters, but particularly about the NDIS. I'm satisfied that she could not evaluate the pros and cons between such options and, therefore, would not be able to realistically and safely make a decision based on an assessment of the benefits and the lack of benefits that any options may give rise to. Lastly, I'm satisfied that she would not be able to prospectively look at decisions and appreciate the consequences that would flow from choosing one option over the other. That system of getting hold of information, analysing the information, formulating options, evaluating options and appreciating consequences is a higher level of reasoning, and as such, on the evidence before me, SLRT would not be able to engage in that process. So as I mentioned, I'm satisfied the evidence does rebut or set aside that

presumption of capacity at law, and I conclude that SLRT cannot understand the nature and effect of decisions about complex personal matters such as delivery of services involved and decisions involved in the NDIS system.

- [20] Next under section 12, I have to look and be satisfied about whether a decision has to be made. It is clear from the evidence that a range of decisions are required in the very near future. SLRT has been registered and enrolled in the NDIS. She has undergone the planning session and a plan has been provided. It is obvious that the plan will meet most of the immediate goals and objectives relating to support for SLRT, but it's not also difficult to see that there might be other areas of support that have not been clearly considered in the current plan. I'm satisfied that even if the current plan is adequate, there needs to be the choice and the implementation of a coordinator. There needs to be the purchase or the selection of services that are the subject of the funding, and then the ongoing need to be involved in ensuring that the plan is adequate on an ongoing basis, and, in future years, that any modifications or additions to the plan reflect the realistic goals and needs of SLRT. I'm satisfied those decisions are decisions that SLRT cannot make herself, due to her impaired decision-making capacity.
- [21] Lastly, on the evidence before me, SLRT cannot engage with an advocate, so, therefore, cannot be supported through that means in reaching her own decisions about who should be providing services, what those services are, and how the funding is used in relation to those services. I'm satisfied that in her case, in SLRT's case, there is an absence of informal decision-making support. In this case, there are relatives referred to, particularly, CR, her cousin, but I accept the evidence that CR, due to her own personal circumstances and health condition, would not be able or willing to take on the complex role of a decision-maker, a substituted decision-maker, in relation to the NDIS. I'm also satisfied that the presence of a group of family members, possibly uncles and aunts and other cousins in Charters Towers, would not be able to provide either formal or informal support to SLRT, even though she does visit them, perhaps, on a monthly basis and is funded to do so on an ongoing basis. There is a particular lack of evidence that they have in the past, or they will in the future, actively take a role in intervening in her life and giving her support, or at least making inquiries to ensure that her personal circumstances are appropriate. I accept the evidence from the Public Guardian that they have, in the past, been a guardian for service delivery, and they have been unaware of any real involvement of this type that her family in Charters Towers would give SLRT.
- [22] So I'm satisfied that if the guardian is not appointed, then those complex decisions that are to be made in the near future will not be able to be made. That will, in turn, clearly, in my view, lead to the needs of SLRT not being met, and her benefits from the NDIS would be negated, and I'm satisfied that her interests would not be adequately protected unless there is in

place someone with clear lawful authority on which to make decisions about these matters. The tribunal also notes that there will be a need when a guardian is appointed to implement the funding and the service provision that has already been set out in the current NDIS plan, but it's possible that the guardian may need to take active steps to review the present planning arrangements. The tribunal notes that the NDIS letter refers to a three-month window of opportunity for an internal review to be undertaken; that time has now passed. However, it is clear from the findings made by this tribunal that SLRT, as in November last year, as is now, did not have capacity to fully take part and make her own decisions about the NDIS process. That's why a guardian is being appointed. Therefore, she would not have had the capacity within that three-month period following the document that was issued on the 16<sup>th</sup> of November 2016 to be able to make a reasoned and considered decision with or without support as to whether or not the planning arrangements should be made the subject of an internal review.

- [23] SLRT, as a person with a legal disability, should, in my mind, be provided with the opportunity to commence a review if necessary as from the date when the guardian's appointed, that is, any limitation on the review period, in my view, should commence when SLRT is compensated by the order of this tribunal for her legal disability, that is, from the date of the appointment of the guardian. It would be certainly unfortunate if a person without capacity, who's being involved in a nationwide process to give support to those most vulnerable in this community, is prevented from exercising the full extent of her legal rights because at the time that those rights arose and then expired, she did not have capacity. I would certainly urge the Public Guardian, and I appreciate that is their practice, to take whatever steps as necessary to seek a review if, on review of the circumstances of SLRT, a review internally of the planning outcomes should be undertaken.
- [24] The tribunal, therefore, having been satisfied of the issues under section 12 of the *Guardianship and Administration Act* and satisfied under the other provisions, particularly section 5 of the Act, that a guardian is required, will appoint the Public Guardian to be the guardian for SLRT for service decisions, including decisions about her involvement in the National Disability Insurance Scheme.
- [25] So I will make that order that the appointment is until further order of the tribunal, that is, it doesn't necessarily expire, but under the *Guardianship and Administration Act*, the tribunal is required to review these appointments from time to time, and the review will take place in two years. I will also, in the order, make a declaration that SLRT does not have capacity to make decisions about personal matters, including decisions about the range of services that would be funded for her under the National Disability Insurance Scheme.



I am particularly pleased that we're going down a pathway of excluding all other realistic options and focusing on what needs to be done, so this system appears to be working, and I'm very pleased that everyone is cooperating so well in relation to these vulnerable adults. So I'll bring an end to the hearing. The order will be sent out to the parties, and if there's any queries, please contact the case officer at the tribunal.