

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *DKM* [2020] QCAT 441

PARTIES: **In an application about a matter concerning DKM**

APPLICATION NO/S: GAA12145-10

MATTER TYPE: Guardianship and administration matters for adults

DELIVERED ON: 21 October 2020

HEARING DATE: 6 October 2020

HEARD AT: Brisbane via videoconference

DECISION OF: Member Casey

DECISION: **The Tribunal orders that pursuant to s 109 of the *Guardianship and Administration Act 2000 (Qld)* the following document is confidential and must not be disclosed:**

(a) The photograph of DKM identified as H015.

CATCHWORDS: HEALTH LAW – GUARDIANSHIP, MANAGEMENT AND ADMINISTRATION OF PROPERTY OF PERSONS WITH IMPAIRED CAPACITY – where the Tribunal initiated a confidentiality order prior to the hearing which was vacated at the hearing – whether a confidentiality order is necessary

Guardianship and Administration Act 2000 (Qld) ('GAA'), s 100, s 103, s 104, s 109, s 110, s 111, s 119
Human Rights Act 2019 (Qld) ('HRA'), s 13, s 25, s 48

APPEARANCES: DKM, the adult
HDR, daughter of DKM
Applicant in relation to application for the appointment of a guardian for the adult
Care manager / clinical nurse
Delegate of the Office of the Public Guardian
Interpreter

REASONS FOR DECISION

Introduction

- [1] DKM is 79 years of age and of Bhutanese heritage. She arrived in Australia in 2010, after having spent 20 years in a refugee camp in Nepal with her family awaiting resettlement to a new country. DKM appointed HDR, one of her daughters, as her Enduring Power of Attorney for personal, health and financial matters on 20 June 2017.
- [2] On 2 September 2020, the Tribunal received an application for the appointment of a guardian for DKM. The applicant proposed the appointment of the Public Guardian as guardian for the adult.
- [3] The Tribunal initiated applications on 24 September 2020 and 28 September 2020 for the appointment of an administrator for the adult and an order about an Enduring Power of Attorney, respectively.
- [4] On 28 September, the Tribunal initiated a further application for a confidentiality order. In response to the application, the Tribunal made a confidentiality order on 29 September 2020 whereby, pursuant to sections 109 and 110 of the GAA, the photograph of DKM identified as H15 was made confidential and must be withheld from all persons. [H15 is the same document subsequently identified as H015].

The Legislation

- [5] A confidentiality order is a type of limitation order.¹
- [6] Section 103 of the GAA provides that each active party or person the Tribunal considers has a sufficient interest in a proceeding must be given reasonable opportunity to access and make submissions about a document or other information before the Tribunal that the Tribunal considers is credible, relevant and significant to an issue in the proceeding.
- [7] Under section 103(5) of the GAA, the Tribunal may displace the right to access a document or other information only by a confidentiality order.
- [8] Section 104 of the GAA provides the basis of the Tribunal's consideration for limitation order in that each active party in the proceeding is entitled to access a document or other information before the tribunal that is credible, directly relevant and significant to an issue in the proceeding.
- [9] Under section 109(1) of the GAA, if the Tribunal is satisfied it is necessary to avoid serious harm or injustice to a person, the Tribunal may, but only to the extent necessary, by a confidentiality order, withhold from an active party or other person a document, or part of a document, before the Tribunal.
- [10] Section 109(2) of the GAA states that, to the extent a document or part of a document contains health information for a person, or to the extent other information is health information for a person, serious harm to the person includes significant health detriment to the person.

¹ GAA, Section 100.

- [11] Section 110(2) of the GAA provides that a confidentiality order made before a hearing is vacated at the start of the hearing.
- [12] Section 111 of the GAA states that each active party, and any entity that would be adversely affected by a proposed limitation order, has standing to be heard in relation to the making of the order.

Should the Tribunal make a Confidentiality Order?

- [13] Upon the confidentiality order of 29 September 2020 being vacated at the commencement of the hearing, active parties in the proceeding were invited to make submissions as to whether a photograph of DKM identified as H15 should be withheld from all persons. The active parties were DKM, DKM's daughter, the applicant in relation to the application for the appointment of a guardian for the adult, the clinical nurse and the delegate of the Office of the Public Guardian.²
- [14] DKM declined to make a submission. The applicant in the application for the appointment of a guardian submitted that she was unaware of the existence of the photograph and therefore had no objection to the document being withheld. Both the clinical nurse and the delegate of the Office of the Public Guardian stated they were not aware of the photograph and declined to make submissions. The daughter of DKM submitted she was unaware of the material sought to be made confidential and that she would wait for the decision of the Tribunal.
- [15] The written evidence before the Tribunal includes submissions in relation to a specific health care consideration of the adult. The submissions were descriptive and substantive. The photograph identified as H15 is in relation to the health care consideration of the adult and is therefore credible, directly relevant and significant to the application for the appointment of a guardian.
- [16] The photograph of DKM identified as H15 is sensitive. The photograph was submitted to the Tribunal by a party other than DKM. The Tribunal was not aware if DKM provided permission for the photograph to be taken in the first instance, nor was the Tribunal aware if the adult provided permission for the photograph to be filed with the Tribunal.
- [17] In the Tribunal's consideration of the application for a confidentiality order, the Tribunal is required to interpret the statutory provisions, to the extent possible that is consistent with their purpose, to be interpreted in a way that is compatible with human rights.³ A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.⁴ Section 25(a) of the HRA states that a person has the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with.
- [18] As the written submissions of active parties in relation to the specific health care consideration of the adult were descriptive and substantive, the Tribunal determines that, on balance, the photograph does not provide additional information that would serve to inform the Tribunal's decisions in relation to the applications pertaining to

² GAA, Section 119.

³ HRA, Section 48.

⁴ HRA, Section 13.

the appointment of a guardian and an order about an Enduring Power of Attorney. As a consequence, in the Tribunal's consideration of the confidentiality order application, section 25(a) of the HRA is enlivened in so far as the adult's right being arbitrarily interfered with.

- [19] In addition to Tribunal files being accessible to active parties and other persons before and during hearings in the interests of procedural fairness,⁵⁶ Tribunal files are accessible to the public insofar as any person may inspect documents filed in the Tribunal registry. Given the sensitive nature of the photograph, it is reasonable to deduce that DKM would suffer significant psychological distress should the photograph be accessed by active parties and other persons, including members of the public.
- [20] Therefore, due to the sensitive nature of the photograph, the confidentiality of the document is necessary to avoid serious harm including significant health detriment to the adult.

Conclusion

- [21] Accordingly, the Tribunal orders that pursuant to section 109 of the GAA the photograph of DKM identified as H015 is confidential and must not be disclosed.
- [22] Having regard to section 13 of the HRA, the Tribunal determines that DKM's right to privacy⁷ has been engaged but not limited by the making of the confidentiality order.

⁵ GAA, Section 103.

⁶ GAA, Section 104.

⁷ HRA, Section 25.