

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *RNE* [2022] QCAT 343

PARTIES: **In applications about matters concerning**

APPLICATION NO/S: GAA3098-22
GAA3099-22

MATTER TYPE: Guardianship and administration matters for adults

DELIVERED ON: 5 October 2022

HEARING DATE: 23 September 2022

HEARD AT: Brisbane

DECISION OF: Member Kanowski

ORDERS:

- 1. The names of RNE’s children are not to be disclosed to any person entitled to access documents on the tribunal’s file.**
- 2. Unless otherwise ordered by the tribunal, the following documents are not to be disclosed to any person entitled to access documents on the tribunal’s file in connection with any proceedings other than GAA13672-21, GAA13673-21, GAA3098-22 and GAA3099-22: the report of Debbie Anderson dated 31 December 2020; the section 130 request to Kurt McDonald dated 28 March 2022; the email from Kurt McDonald to the tribunal dated 11 April 2022; submissions of Rebecca Anderson dated 21 September 2022; and the Reasons for Decision delivered on 5 October 2022.**
- 3. The application for a non-publication order is dismissed.**

CATCHWORDS: HEALTH LAW – GUARDIANSHIP, MANAGEMENT AND ADMINISTRATION OF PROPERTY OF PERSONS WITH IMPAIRED CAPACITY – GUARDIANSHIP AND SIMILAR APPOINTMENTS – JURISDICTION, PROCEDURE AND EVIDENCE – INSPECTION OF DOCUMENTS – where document in guardianship proceeding identifies child in child protection proceedings – whether parties should be denied access to documents

HUMAN RIGHTS – HUMAN RIGHTS LEGISLATION – where document in guardianship proceeding identifies

child in child protection proceeding – whether human rights of child to protection and privacy should be limited

Child Protection Act 1999 (Qld), s 189(1)

Guardianship and Administration Act 2000 (Qld), s 103, s104(1), s 108(1), s 109(1), s114A

Human Rights Act 2019 (Qld), s 13, s 25(a), s 26(2)

APPEARANCES & REPRESENTATION:

Adult: R Anderson of ADA Law

Public Guardian: A Anderson

REASONS FOR DECISION

Introduction

- [1] These proceedings relate to a man who I will refer to, for privacy reasons, only as RNE.
- [2] There are child protection proceedings in the Childrens Court concerning RNE's children. The court referred to the tribunal the questions of whether RNE has capacity to understand those proceedings, and whether a guardian should be appointed to make decisions for him in legal matters. As a result, the tribunal initiated applications for a declaration about RNE's capacity (GAA13672-21), and for the appointment of a guardian (GAA13673-21). Those applications were heard and determined on 23 September 2022.
- [3] Further tribunal-initiated applications, for a confidentiality order (GAA3098-22), and a non-publication order (GAA3099-22), were also heard on 23 September 2022. They relate to the protection of the privacy of the children. Those applications were determined on 5 October 2022. These are the reasons for the decisions made in respect of those two applications.
- [4] Pre-hearing orders, including a pre-hearing confidentiality order, had been made, but these still permitted access to documents by active parties and legal representatives. Those pre-hearing orders were automatically vacated at the start of the hearing.¹

Legislative framework

- [5] There are privacy protections for children in the *Child Protection Act 1999* (Qld) ('*Child Protection Act*'). Section 189(1) of that Act makes it an offence for a person, without the chief executive's written approval, to publish information that identifies, or is likely to lead to the identification of, a child who has been the subject of an investigation of an allegation of harm or risk of harm.
- [6] Although there is nothing in the documents before the tribunal to indicate why RNE's children are the subject of child protection proceedings, it can be assumed

¹ *Guardianship and Administration Act 2000* (Qld), s 110(2).

that they have each been the subject of an investigation under the *Child Protection Act* of a harm allegation. I find accordingly.

- [7] The *Human Rights Act* 2019 (Qld) (*'Human Rights Act'*) recognises that a person has the right not to have their privacy arbitrarily interfered with,² and that every child has the right to protection that is needed because of being a child.³ Such rights can, however, be limited in some circumstances.⁴
- [8] The proceedings before the tribunal relating to RNE are under the *Guardianship and Administration Act* 2000 (Qld) (*'Guardianship and Administration Act'*). They are 'guardianship proceedings'.⁵
- [9] Confidentiality orders and non-publication orders in guardianship proceedings are 'limitation orders' as defined.⁶ Section 104 of the *Guardianship and Administration Act* says:
 - (1) In considering whether to make a limitation order, the tribunal must take as the basis of its consideration—
 - (a) that each active party in the proceeding is entitled to access a document or other information before the tribunal that is credible, relevant and significant to an issue in the proceeding; and
 - (b) that it is desirable that tribunal hearings be held in public and be able to be publicly reported.
- [10] Confidentiality orders and non-publication orders can be made only if they are necessary – and then, only to the extent necessary – to avoid serious harm or injustice to a person.⁷ The making of such orders is discretionary: the tribunal may, not must, make such orders when the pre-conditions are met.⁸
- [11] The operation of another section of the *Guardianship and Administration Act*, section 114A, is also relevant. It prohibits, in most circumstances, the publication of information that identifies the adult to whom a guardianship proceeding relates. There are some exceptions, such as where the tribunal authorises publication.⁹
- [12] It is also important to understand who can access documents that are before the tribunal. Access is governed by section 103 of the *Guardianship and Administration Act*. There is no right of general public access. Instead, rights of access are for active parties and persons the tribunal considers have a sufficient interest in the proceeding. 'Active party' is defined in section 119 of the *Guardianship and Administration Act*. In RNE's case, the active parties are RNE, the Public Guardian and the Public Trustee of Queensland. 'Person the tribunal considers has a sufficient interest in the proceeding' is not defined. Presumably it would include close family members of the

² *Human Rights Act*, s 25(a).

³ *Human Rights Act*, s 26(2)

⁴ *Ibid*, s 13.

⁵ See *Guardianship and Administration Act*, Schedule 4, definition of 'guardianship proceeding'.

⁶ *Ibid*, s 100.

⁷ *Ibid*, s 109(1) and s 108(1) respectively

⁸ *Ibid*.

⁹ *Ibid*, s 114A(5).

adult, bearing in mind that the tribunal is obliged to notify certain family members of a hearing. For example, the tribunal must notify ‘any sibling of the adult who is in a close and continuing relationship with the adult’.¹⁰

- [13] I will refer to persons with a sufficient interest in a proceeding but who are not active parties as sufficiently-interested persons. No such persons have been nominated in RNE’s case, but they could yet emerge.
- [14] Before a hearing, active parties have the right to access documents that the tribunal considers relevant to an issue in the proceeding.¹¹ During a hearing, active parties have the right to access documents that the tribunal considers credible, relevant and significant to an issue in the proceeding.¹² For a reasonable time after a hearing, active parties and sufficiently-interested persons have the right to access documents before the tribunal that the tribunal considered credible, relevant and significant to an issue in the proceedings.¹³ These rights of access may, however, be displaced by a confidentiality order.¹⁴

Documents and access

- [15] Some documents on the tribunal’s file name the children or contain information that could lead to their identification.
- [16] The children are named in the Childrens Court form 16 documents, and in Ms Rebecca Anderson’s written submissions dated 21 September 2022.
- [17] The children are not named in the report of Ms Debbie Anderson, neuropsychologist, but the report names RNE and refers to the child protection proceedings involving his children. This report would therefore indirectly identify the children, as children who have been the subject of harm investigations, to people who know RNE’s immediate family.
- [18] Similarly, there are other documents which name RNE and refer to the Childrens Court proceedings without naming the children. These include a tribunal notice to RNE’s solicitor in the Childrens Court proceedings, Mr Kurt McDonald, requesting information, and his email in response, and correspondence between the tribunal and the Office of the Director of Child Protection Litigation.
- [19] On the other hand, a report by Mr Alistair Stronach, psychologist, neither names the children nor refers to the Childrens Court proceedings. The report is, nonetheless, relevant in the proceedings because it addresses RNE’s cognitive functioning and his decision-making capacity.
- [20] The documents discussed above were all credible, relevant and significant to issues in the proceedings heard on 23 September 2022. They are therefore, in the absence of a confidentiality order, fully accessible to active parties and sufficiently-interested persons for a reasonable time after 23 September 2022.

¹⁰ Ibid, s 118(1)(e).

¹¹ *Guardianship and Administration Act*, s 103(1)(a)

¹² Ibid, s 103(1)(b),

¹³ Ibid, s 103(2).

¹⁴ Ibid, s 103(5).

- [21] Further, some of the documents that indirectly identify the children, especially the reports of Ms Debbie Anderson and the communications with Mr Kurt McDonald, may well be relevant in any future guardianship proceedings involving RNE. They therefore may become accessible by persons in connection with future proceedings, if no confidentiality order is made.
- [22] Documents which name the children have been accessed before the hearing by RNE and his representative, Ms Rebecca Anderson, and by the delegate of the Public Guardian. The Public Trustee of Queensland has not accessed any documents.

Submissions

- [23] Ms Rebecca Anderson submitted that the tribunal should make a confidentiality order prohibiting disclosure of all documents on the tribunal's file received prior to the hearing except for decisions and directions of the tribunal. Further, Ms Rebecca Anderson submitted that a non-publication order is unnecessary, as sufficient protection would be afforded by the confidentiality order and section 114A of the *Guardianship and Administration Act*. Ms Alana Anderson supported these submissions.
- [24] I have, however, decided to take a different course in relation to the application for a confidentiality order, for the reasons explained below.

Why has a confidentiality order been made?

- [25] Having regard to the protective purpose of section 189(1) of the *Child Protection Act*, and to the rights of privacy and child protection in the *Human Rights Act*, I consider it would be unjust to the children to have their names accessible by persons entitled to access documents that are before the tribunal. Such access would allow section 189(1) of the *Child Protection Act* to be circumvented. Redaction of the names of the children from documents would not detract from the meaning and usefulness of the documents in the guardianship proceedings. Accordingly, the names should be subject to a confidentiality order.
- [26] As I have outlined, there are documents before the tribunal which do not name the children but which name RNE and discuss the Childrens Court proceedings. If these documents are accessible, they indirectly identify the children as children who have been the subject of harm investigations to any person with knowledge of RNE's family. Allowing access would therefore circumvent section 189(1) of the *Child Protection Act* and infringe the rights of the children under the *Human Rights Act* to protection and privacy. However, denying access would significantly impair the ability of active parties and sufficiently-interested persons to understand the proceedings heard on 23 September 2022. RNE's ability to understand and participate meaningfully in the Childrens Court proceedings was central to the questions of capacity and whether a guardian should be appointed. Denial of access to the documents would mean, for example, that an active party could not make an informed assessment of whether they should appeal. It would deprive active parties of procedural fairness. Procedural fairness underpins section 104(1)(a) of the *Guardianship and Administration Act*, which has been quoted above. Denial of access would render access rights under section 103 of the *Guardianship and Administration Act* pointless to a significant degree.

[27] Limitation of human rights is addressed in section 13 of the Human Rights Act:

13 Human rights may be limited

- (1) 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.
 - (2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant—
 - (a) the nature of the human right;
 - (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
 - (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
 - (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
 - (e) the importance of the purpose of the limitation;
 - (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
 - (g) the balance between the matters mentioned in paragraphs (e) and (f).
- [28] The rights of children to protection and privacy are, of course, important rights. On the other hand, the rights of active parties and sufficiently-interested persons to access documents, and to have procedural fairness in guardianship proceedings, are also important. In my view, there is no less restrictive and reasonably available way to afford procedural fairness than by allowing access to the documents (with the names of the children redacted).
- [29] Bearing in mind the protection against publication afforded by section 189(1) of the *Child Protection Act*, and the limited range of people who can access documents before the tribunal under section 103 of the *Guardianship and Administration Act*, the appropriate balance is struck by allowing access to the documents in question in connection with the proceedings heard on 23 September 2022. Accordingly, in relation to access for the purposes of those proceedings, I decline to exercise the discretion in section 109(1) of the *Guardianship and Administration Act* to make a confidentiality order that extends beyond the names of the children.
- [30] As I have mentioned, however, some of the documents may be relevant in any future guardianship proceeding involving RNE. For example, the tribunal might receive a referral from the Childrens Court in connection with a later child protection proceeding. The documents in question would probably be very relevant in a guardianship proceeding arising from such a referral. On the other hand, there might be an unrelated guardianship proceeding in twenty years' time relating to RNE – such as an application for the appointment of an administrator – for which the documents have only background relevance.

- [31] The appropriate balance in respect of any later proceeding is best struck, in my view, by prohibiting disclosure of certain documents unless the tribunal otherwise orders. This will enable the tribunal at the later time to make an assessment of how significant the documents currently before the tribunal are in the later proceeding, and the procedural fairness impacts of withholding the documents in that proceeding.
- [32] There are some documents which mention the current Childrens Court proceedings but which will not be relevant in any later proceedings. These include the Childrens Court Form 16 documents and correspondence between the tribunal and the Office of the Director of Child Protection Litigation. It is not necessary to make a confidentiality order in respect of such documents, because they will not be accessible under section 103 of the *Guardianship and Administration Act* in future proceedings.

Why has a non-publication order not been made?

- [33] Publication of information that identifies, or is likely to identify, the children is automatically prohibited under section 189(1) of the *Child Protection Act*.
- [34] The names of the children have been disclosed in the guardianship proceedings only to RNE, his legal representative, and the Public Guardian. Those parties would be aware of the operation of section 189(1).
- [35] Section 114A of the *Guardianship and Administration Act* also acts as a safeguard. As mentioned earlier, it prevents publication of RNE's identity in connection with the guardianship proceedings in most circumstances. There are possible exceptions, but they are narrow. It can be assumed that RNE's identity in connection with the guardianship proceedings will not be able to be published. This effectively removes the risk, in my view, that a person who accesses documents on the tribunal's file but who is unaware of section 189(1) of the *Child Protection Act* will inadvertently disclose the identity of the children by means of disclosing RNE's identity.
- [36] An order by the tribunal to prevent publication of the children's identities is therefore not required. I will dismiss the application for a non-publication order.

Conclusion

- [37] For the above reasons, I have made confidentiality orders and dismissed the application for a non-publication order.