

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *LHM* [2022] QCAT 90

PARTIES: **In an application about matters concerning LHM**

APPLICATION NO/S: GAA15599-22
GAA15601-22

MATTER TYPE: Guardianship and administration matters for adults

DELIVERED ON: 16 March 2022

HEARING DATE: 2 February 2022

HEARD AT: Brisbane

DECISION OF: Member Casey

ORDERS:

- 1. Public Guardian is appointed as guardian for LHM for the following personal matters:**
 - (a) accommodation;**
 - (b) provision of services;**
 - (c) legal matters not relating to LHM’s financial or property matters; and**
 - (d) seeking help for, or making representations for LHM.**
- 2. This appointment remains current until further order of the Tribunal. The appointment is reviewable and is to be reviewed in two (2) years.**
- 3. The Public Trustee of Queensland is appointed as administrator for LHM for all financial matters.**
- 4. The Tribunal dispenses with the requirement for the administrator to provide a financial management plan.**
- 5. The Tribunal directs the administrator to provide accounts to the Tribunal when requested.**
- 6. This appointment of the Public Trustee of Queensland remains current until further order of the Tribunal.**

CATCHWORDS: HEALTH LAW – GUARDIANSHIP, MANAGEMENT AND ADMINISTRATION OF PROPERTY OF PERSONS WITH IMPAIRED CAPACITY – ADMINISTRATION AND FINANCIAL MANAGEMENT – where the Tribunal is satisfied the presumption of capacity is rebutted – need for the

appointment of a guardian and an administrator

Guardianship and Administration Act 2000 (Qld) ('GAA'), s 5, s 11, s 12, s 14, s 15, Schedule 4

Powers of Attorney Act 1998 (Qld) ('POAA'), s 62

Human Rights Act 2019 (Qld) ('HRA'), s 13, s 19, s 24, s 25, s 48

APPEARANCES & REPRESENTATION:

Adult:	LHM – the adult (videoconference with applicant)
Applicant/s:	ARJ – social worker (videoconference)
Public Guardian:	Two delegates of the Office of the Public Guardian (videoconference from separate locations)
Public Trustee:	A representative of the Public Trustee of Queensland (videoconference)
Interested Person/s:	IH – case manager, Multicultural Australia (phone) Dari/English interpreter (videoconference)

REASONS FOR DECISION

- [1] LHM is a 30-year old male Afghan national. Dari is his preferred language and he does not speak English. LHM was evacuated to Australia by aircraft via Dubai on 7 September 2021. His wife and three children remain in Afghanistan. He has been granted a visa (subclass 449) by the Australian Department of Home Affairs and remains under case management from Multicultural Australia through the Specialised and Intensive Services Humanitarian Settlement Program. On 21 September 2021, after having spent 2 weeks in quarantine within a medical ward of a tertiary hospital in Brisbane, LHM was transferred to the hospital's acute mental health unit.
- [2] On 15 December 2021, the Tribunal received an application from ARJ, a social worker from the adult's mental health treating team, seeking the appointments of the Public Guardian and the Public Trustee of Queensland as guardian and administrator, respectively, for the adult.
- [3] In a further application to the Tribunal, dated 23 December 2021, ARJ sought an interim order for the appointments of the Public Guardian as guardian and the Public Trustee of Queensland as administrator for the adult. On the same day, the Tribunal dismissed the application for the appointment of a guardian for LHM under an interim order and appointed the Public Trustee of Queensland as administrator for LHM for all financial matters. The administration appointment remained current for three (3) months or, if the Tribunal were to make a further order in this matter, until the date of the further order, whichever is the sooner.
- [4] The Tribunal received a further application from ARJ on 24 January 2022, seeking to dismiss or strike out the proceeding in relation to the application for the appointment of a guardian for the adult. The applicant submitted that it had come to her attention that the adult was not eligible to 'have a Public Guardian as long as he

is under the Department of Home Affairs, who along with Multicultural Australia, is his formal decision maker at this time’.

- [5] On 25 January 2022, the Tribunal directed that the application filed by ARJ on 24 January 2022 was to be decided at the hearing on 2 February 2022, and that ARJ must email to the Tribunal, in advance of the hearing, any documents she relied on to support the proposition that the adult was ‘not eligible to have a Public Guardian as long as he is under the Department of Home Affairs’.

The Legislation

- [6] The Tribunal is required to determine capacity as at the date of hearing in accordance with section 12 of the GAA as the Tribunal must be satisfied that the adult has impaired capacity before it can further consider the applications for the appointment of a Guardian and Administrator for the adult.
- [7] The adult is presumed to have capacity in accordance with General Principle 1 of the GAA.¹
- [8] The GAA defines capacity as follows:²
- Capacity**, for a person for a matter, means the person is capable of -
- (a) understanding the nature and effect of decisions about a matter; and
 - (b) freely and voluntarily making decisions about the matter; and
 - (c) communicating the decisions in some way.
- [9] In the determination of capacity for an adult for a matter, the Tribunal must consider the type of decisions to be made and the support available to the adult from the adult’s existing support network.³
- [10] The Tribunal is to consider the medical evidence and submissions from the parties to determine if the presumption of capacity is to be rebutted for the adult.
- [11] The Tribunal, when considering the appointment of a guardian or administrator, must be satisfied not only in regard to capacity, but also of the other matters set out in section 12 of the GAA.
- [12] The Tribunal is required to act in accordance with sections 14 and 15 of the GAA when appointing guardians and administrators. The appointee must satisfy the requirements of section 14 including that the person is appropriate for appointment in accordance with the appropriateness considerations set out in section 15 of the GAA.
- [13] When applications to the Tribunal are made under the GAA, applicants may only withdraw their applications, or have a proceeding struck out, when granted leave to do so by the Tribunal.⁴

¹ GAA, Section 11B.

² GAA, Schedule 4 (definition of ‘capacity’).

³ GAA, Section 5(c).

⁴ QCATA, Section 46(2).

Should the Tribunal grant leave for the applicant to withdraw their application?

Evidence

- [14] In her oral submissions, the applicant stated that she had not had direct communication with staff from the Department of Home Affairs and that her application to dismiss or strike out the guardianship proceeding was based on a telephone conversation and email correspondence between herself and a delegate of the Office of the Public Guardian. As the delegate was present at the hearing, the Tribunal determined that the delegate would provide oral evidence in relation to this matter, after the threshold issue of the adult's decision making capacity was addressed by the Tribunal.

Conclusion

- [15] Accordingly, the Tribunal did not strike out or dismiss the application for the appointment of a guardian for the adult. The application for the appointment of a guardian was heard together with the application for the appointment of an administrator for the adult.

Does LHM have capacity to make personal and financial decisions?

Evidence

- [16] The Tribunal received written medical evidence in relation to the adult's decision-making capacity. The reports are outlined below.
- [17] A mental health occupational therapy report dated 2 November provides history into the adult's conditions along with assessment results and findings. The adult is an evacuee who boarded an Australian aircraft in Kabul bound for Dubai during the recent unrest in Afghanistan. He was observed to be psychotic at a military refugee camp in Dubai and was transported to a medical military base in Dubai on 27 August 2021 where he remained until he boarded the flight to Australia. Upon arrival in Australia, the adult was placed in COVID quarantine at the tertiary Brisbane hospital until 21 September 2021 where he was assessed by Consultation Liaison Psychiatry as experiencing psychosis with disorganised and sexually disinhibited behaviour. He was then transferred to the high dependency area within the acute mental health unit. LHM was successfully transitioned to receive treatment within the open area of the acute mental health unit, and his psychotic episode was assessed as resolving on 25 October 2021.
- [18] The occupational therapy report further provides that the adult has been diagnosed with schizophrenia in addition to having a cognitive impairment, referencing that the adult attained a score of 7/30 on the Montreal Cognitive Assessment on 28 October 2021. The report indicates that the adult requires support with self-care, personal hygiene, meal preparation, shopping laundry, cleaning, community access, medication management and completing forms in relation to immigration, health and income. Given the above factors, together with the adult's inability to communicate in the English language and his lack of understanding of Australian systems and culture, the recommendations of the occupational therapist include an application to the National Disability Insurance Scheme (NDIS) in relation to a supported independent living arrangement and community access support, along

with an application to the Tribunal for the appointment of a guardian and administrator.

- [19] In a report dated 6 December 2021, a medical officer from the adult's treating team states that the adult has been diagnosed with having a psychotic episode and a cognitive impairment of unknown aetiology. The doctor provides that on 28 October 2021, the adult attained a score of 20/30 on the Rowland Universal Dementia Assessment Scale and that the adult does not understand how to use money, nor does he have the capacity to budget or pay bills. He further provides that the adult does not have a good understanding of how his functional abilities affect his capacity to live in the community. In the doctor's opinion, the adult is able to make simple, not complex, personal decisions and is unable to make all financial decisions.
- [20] In its determination of the adult's decision-making capacity, the Tribunal received oral evidence from attendees at the hearing.
- [21] LHM provided minimal evidence to the Tribunal when questioned. He said he was happy attending the hearing and that he wanted to get out of the hospital so he could find employment, possibly as a car mechanic. He said that he had not been contacted by representatives of the Public Trustee of Queensland, however he had received help from IH (the case manager from Multicultural Australia) and that he would like such help to continue. LHM said that his situation was out of his hands and that ultimately the government will decide his future.
- [22] The applicant submitted that the adult's mental state is stable. He is subject to a treatment authority, inpatient category, under *the Mental Health Act 2019* (Qld). The applicant stated that the adult's cognitive skills have remained unchanged since the cognitive assessments were carried out. ARJ confirmed that due to LHM's cognitive and functional deficits, compounded by his cultural and linguistic challenges, he requires extensive support within an accommodation setting and in order to safely access the community.
- [23] In its determination of decision making capacity, the Tribunal must give consideration to the nature of the decisions that are required for LHM and the support available to him. The adult is case managed by Multicultural Australia through the Specialised and Intensive Services Humanitarian Settlement Program. He has no identified informal supports. The adult requires discharge from hospital to appropriate accommodation with essential supports in place. His financial matters must be managed in order to source and manage income and enable expenditure on necessities.

Conclusion

- [24] The Tribunal places much weight on the information contained in the reports of the occupational therapist and doctor from the adult's treating team, as they are based on longitudinal multidisciplinary assessment and clinical observation of the adult during the current hospital admission.
- [25] Upon consideration of the evidence, and having regard to the nature of decisions required for LHM and the support available to him, the Tribunal determines that due to LHM's cognitive deficits and mental health condition, he is unable to make financial and complex personal decisions. The Tribunal, therefore, is not satisfied that LHM understands the nature and effect of his financial and complex personal

decisions. Accordingly, the Tribunal rebuts the presumption of capacity for LHM for these decisions.

Is there a need for the appointment of a guardian for LHM? If so, who is the most appropriate person for appointment?

Evidence

- [26] The evidence in relation to the adult's personal circumstances follows.
- [27] In the absence of a decision maker for the adult for accommodation and service provision matters, the treating team has been unable to effect the adult's safe discharge from the acute mental health inpatient unit into an appropriate accommodation setting with necessary supports. Under the terms of the adult's visa (subclass 449), he is ineligible for support from the National Disability Insurance Scheme. The adult is seeking to obtain a permanent visa. He has no complex physical health concerns that require decisions.
- [28] The Tribunal obtained evidence from the delegates of the Office of the Public Guardian, one of whom had email and phone contact with ARJ that resulted in ARJ submitting the application to strike out the guardianship proceeding. The delegates provided the Tribunal with their views in relation to the guardianship application, which were consistent with the information that one of the delegates provided to the applicant prior to the applicant seeking to strike out the guardianship proceeding. The delegates submitted that the decision-making ability of the Public Guardian is dependent on the adult's access to funding. They stated that the adult is funded by the Department of Home Affairs, evidenced by his visa (subclass 449) status, and that without access to funding provided to the adult by either the Department of Home Affairs or Multicultural Australia, the Public Guardian would be unable to make accommodation and service provision decisions. They further stated that, as far as they were aware, no decisions could be made by the Public Guardian for accommodation and provision of services unless the adult were to obtain a visa (subclass 200) and would be therefore eligible for funding from the National Disability Insurance Scheme. The delegates submitted that, without a subclass 200 visa in place, the adult would be unable to be obtain accommodation and necessary support services unless decisions are made under the Humanitarian Program in relation to refugees from Afghanistan. They stated that their submissions to the Tribunal were based on their understanding of information contained on the website of the Department of Home Affairs. In relation to health care decisions, the delegates provided that the Public Guardian would be able to act as statutory health attorney of last resort⁵ should physical health decisions be necessary.
- [29] The delegates of the Office of the Public Guardian provided further submissions in relation to the adult's legal matters pertaining to his intention to apply for a permanent visa. They submitted that the Public Guardian is extremely limited in such decision making due to a lack of funding. They stated that while the Public Guardian has exercised limited decision making in the past in relation to immigration matters for adults with concurrent criminal charges, the Public Guardian is not funded to pay for visa applications which can cost between \$20,000 and \$40,000. Additionally, they provided that visa applications are of a significant personal nature and include information about the personal character of the

⁵ POAA, Section 62.

applicant. They concluded their submissions by stating that the Refugee and Immigration Legal Service (RAILS) is funded to support people in Queensland through such applications.

- [30] IH, case manager from Multicultural Australia, submitted that Multicultural Australia can offer adults on 449 visas accommodation options of a single motel room or a unit, however the necessary support services that LHM requires could not be provided due to the organisation's funding constraints. IH said that Multicultural Australia has no authority to place LHM in a setting to meet his service needs. He further submitted that the Department of Home Affairs and Multicultural Australia cannot make personal decisions for LHM as they have no decision-making authority for adults with impaired capacity. IH told the Tribunal that Multicultural Australia will be able to work with a guardian for personal matters. In relation to the adult's legal matters, IH stated that LHM is seeking a visa (subclass 200) whereby he would be eligible for NDIS support, including accommodation. He said that the adult has been referred to RAILS, however RAILS has been unable to take instructions from the adult to progress a visa application, as the adult does not have capacity to provide such instructions. IH told the Tribunal that staff from RAILS are contemplating making an application for a litigation guardian for the adult. He added that it may take approximately 9 months for a visa (subclass 200) to be awarded for Afghan refugees.

Conclusion

- [31] The evidence establishes that LHM is a refugee from Afghanistan who has been hospitalised since his arrival in Australia. He has been granted a visa (subclass 449) by the Department of Home Affairs. Dari is his preferred language. He is unable to speak, write, or understand English. LHM receives treatment and care in an acute mental health unit, having been diagnosed with a mental health condition and a cognitive disability. Due to the nature and extent of the adult's dual diagnoses, and in the absence of the appointment of a formal decision maker for an adult, the adult's treating team has been unable to progress discharge planning so that he can obtain appropriate accommodation with essential support services. The adult is seeking to apply for a visa (subclass 200) which, if granted, would provide him with eligibility to participate in the NDIS program and secure stable accommodation with relevant supports. Due to the adult's cognitive deficits, lawyers have not been able to obtain his instructions in this matter. The evidence before the Tribunal is that the Department of Home Affairs and Multicultural Australia are unable to offer the adult accommodation and support appropriate to his needs and do not have decision making powers for persons with impaired capacity. The evidence establishes that the adult's circumstances have remained unchanged since the initial application was received by the Tribunal, including within the more recent period since the applicant sought to strike out the guardianship proceeding following communications with a delegate of the Public Guardian. The adult is in a highly vulnerable situation due to his cognitive impairment, mental health condition and social isolation, against a background of cultural and linguistic barriers.
- [32] Accordingly, pursuant to section 12 of the GAA, the Tribunal is satisfied that there is a need for decisions not only in relation to accommodation, provision of services and legal matters, but also to seek help or make representations for LHM. The Tribunal determines that without the appointment of a guardian for these matters, the adult's needs will not be met, nor his interests protected.

- [33] The only option before the Tribunal is to appoint the Public Guardian for these matters.
- [34] In their evidence to the Tribunal, the delegates of the Office of the Public Guardian based their communications to the applicant and their submissions to the Tribunal on their perusal of the website of the Department of Home Affairs. The Tribunal was not persuaded by their submissions, offered with no legislative basis, that without funding there can be no decision making, and therefore no utility in the appointment of the Public Guardian.
- [35] Section 14(2) of the GAA provides for the Tribunal to appoint the Public Guardian as guardian for adults in Queensland with impaired decision making only if there is no other appropriate person available for appointment for the matter. The Tribunal determines there is no other appropriate person available for appointment for LHM. Furthermore, the Public Guardian is considered by the Tribunal to be an appropriate appointee, having regard to the provisions of section 15 of the GAA.
- [36] Accordingly, the Tribunal appoints the Public Guardian as guardian for LHM for the following matters: accommodation; provision of services; legal matters not relating LHM's financial or property matters; and seeking help or making representations for LHM.

Is there a need for the appointment of an administrator for LHM? If so, who is the most appropriate person for appointment?

Evidence

- [37] The representative of the Public Trustee of Queensland told the Tribunal that the adult does not receive income, however should the adult's biodata be confirmed and authenticated by the Department of Home Affairs, the adult will be eligible to access income support via a Centrelink special benefits payment of \$644 per fortnight, with payments backdated to the date of the adult's arrival in Australia. The representative submitted that the adult may receive approximately \$4000 upon confirmation of his biodata.
- [38] Under the interim order, trust officers have liaised with the applicant and Multicultural Australia to request the status of a special benefits claim. They have also sent authority documents to the Department of Home Affairs and Centrelink, applied for a tax file number exemption for the adult and requested the adult's last tax return. The representative stated that a budget will be devised upon income confirmation, should the Public Trustee of Queensland be appointed.
- [39] IH advised the Tribunal that Multicultural Australia staff are in direct dialogue with Department of Home Affairs personnel to progress the confirmation of the adult's biodata and that, upon confirmation, the Department of Home Affairs will issue an identity card for the adult, containing his name and date of birth. He will also become eligible to receive Medicare services. IH anticipated the confirmation process may take a further three weeks.

Conclusion

- [40] The evidence establishes that there is a pending decision in relation to an application for a special benefits payment. If successful, the adult's income and assets will require protection and management. Expenditure will be in accordance with a budget.

- [41] Pursuant to section 12 of the GAA, there is a need for the appointment of an administrator for the adult for all financial matters, as his financial needs will not be met nor his financial interests protected without the appointment of an administrator.
- [42] The only option for appointment is the Public Trustee of Queensland. The Tribunal is of the view that the Public Trustee of Queensland, as an independent, skilful and experienced administrator, would be able to consult with all stakeholders, including the guardian, and make financial decisions that best meet the adult's needs, in accordance with the General Principles.⁶ The Public Trustee of Queensland is considered the appropriate appointee, having regard to the provisions of section 15 of the GAA.

Application of the Human Rights Act 2019 (Qld)

- [43] The Tribunal gave consideration to the relevant human rights as set out in the HRA. As required by section 48 of the HRA, the Tribunal must interpret statutory provisions to the extent possible that is consistent with their purpose in a way that is compatible with human rights. LHM's rights to privacy,⁷ freedom of movement⁸ and property⁹ are engaged and limited by decision of the Tribunal to appoint a guardian and administrator for the adult. On balance, the decision of the Tribunal provides for the adult to have opportunity to be discharged into the community with appropriate supports, to advance his goal of attaining a permanent visa and to have his income and assets to be utilised in his best interests. Taking into account the above findings in relation to the criteria set out in the GAA, the Tribunal is satisfied that the benefits of the decision of the Tribunal outweigh any limitations imposed on the adult's human rights and that the decision of the Tribunal is the least restrictive option given the adult's vulnerability. Accordingly, the Tribunal determines that the limits imposed by the decision of the Tribunal are reasonable and demonstrably justified in accordance with section 13 of the HRA.

⁶ GAA, Section 11B.

⁷ HRA, Section 25.

⁸ HRA, Section 19.

⁹ HRA, Section 24.