SUPREME COURT OF QUEENSLAND

CITATION:	*Williams v The Guardianship and Administration Tribunal* [2002] QSC 237
PARTIES:	**JOHN JOSEPH WILLIAMS** (first appellant) **and** **JOSEPHINE MAY WILLIAMS** (second appellant) **and** **DAVID JOHN WILLIAMS** (third appellant) **v** **THE GUARDIANSHIP AND ADMINISTRATION TRIBUNAL** (first respondent) **and** **THE ADULT GUARDIAN** (second respondent)
FILE NO/S:	SC No 8237 of 2001
DIVISION:	Trial Division
PROCEEDING:	Appeal from a decision of the Guardianship and Administration Tribunal
ORIGINATING COURT:	Guardianship and Administration Tribunal
DELIVERED ON:	22 August 2002
DELIVERED AT:	Supreme Court at Brisbane
HEARING DATE:	20 August 2002
JUDGE:	de Jersey CJ
ORDER:	**That the appeal be allowed and that the appellants John Joseph Williams, Josephine Mary Williams and David John Williams be appointed guardians of Kathleen Mary Williams under the *Guardianship and Administration Act* 2000**
CATCHWORDS:	GUARDIANS – Guardianship and Administration Tribunal – application for leave to appeal decision of Tribunal – appellants sought guardianship of adult with impaired capacity – whether Tribunal erred in law in its decision not to exercise its discretion to appoint a guardian in favour of the appellants – whether the Tribunal correctly interpreted provisions of the *Guardianship and Administration Act* 2000

Guardianship and Administration Act 2000, s 5, s, 11, s 12, s 164

COUNSEL: C A Cuthbert for the appellants
S Keim for the second respondent

SOLICITORS: Williams Lawyers for the appellants

[1] **de JERSEY CJ**: The first appellant, John Joseph Williams, applied to the Guardianship and Administration Tribunal for the appointment of his wife Josephine, his son David and himself as joint guardians of his daughter Kathleen. Kathleen was born on 25 April 1967, inflicted with micro-cephalic spastic quadriplegia. Under s 12(1) of the *Guardianship and Administration Act* 2000, the Tribunal may appoint a guardian for an adult with impaired capacity for a "personal matter", defined in schedule 2 to the Act to include such matters as where and with whom the person lives, work, education, healthcare, and day to day issues like diet and dress. There is no question but that Kathleen has "impaired capacity" within the meaning of s 12 in respect of personal matters, and the Tribunal accepted that. Section 12(1) goes on to provide that the Tribunal may in such a case appoint a guardian only if satisfied, additionally, as relevant here, that "there is need for a decision in relation to the (personal) matter" ((b)), and that without such an appointment, the adult's needs will not be adequately met or her interests adequately protected ((c)).

[2] Declining to appoint the appellants as Kathleen's guardians, the Tribunal took the view that there was no "pressing need for someone to be given specific legal authority to make a decision" for Kathleen. Given her "obvious vulnerability due to her total dependence on others", what she needed in these circumstances was not a surrogate decision-maker, but "strong and effective advocacy" such as the appellants had provided and could continue to provide. Her parents are her statutory health attorneys, and the Tribunal "expect(ed) Cootharinga and its staff to respect (the parents') authority as…attorneys and to comply with their decisions made under that authority".

[3] Section 164 of the Act accords a right of appeal where the appeal is based on a question of law only. The appellants rely essentially on these two questions of law:

1. whether, on the unchallenged evidence of the appellant John Williams especially, the Tribunal was not in law bound to exercise its discretion only in favour of the appointment of the appellants as guardians; and
2. whether the Tribunal misconstrued the reference in s 12(1)(b) to "a need for a decision in relation to the (personal) matter", by confining the words to a situation where a decision on a particular issue was currently required, or, as it was put by the Tribunal, where there was "pressing need" for such decision.

[4] Kathleen has since the age of about two been cared for within institutions for disabled people, and since 13 February 1986 in accommodation managed by the Cootharinga Society of North Queensland. While generally appreciating the care provided by the Society, the appellants are concerned about its consistency and standard, especially in view of rapid staff turnover. Their concerns came to a point when in June 2001, Kathleen fell out of bed one night and was injured in

circumstances where the staff had not properly secured her; and earlier that year, when staff referred Kathleen to a Dr Davies, without notice to the appellants, for advice as to installation of "PEG" device to prevent the aspiration of food, where the appellants' clear instructions were that a Dr Stainkey was to provide Kathleen's treatment, and the appellants' aversion to the "PEG" device was known.

[5] The Tribunal made a number of important factual findings, including that Kathleen is unable to care for herself, is unable to make most decisions for herself, and can communicate her wishes only through gestures and limited vocalisation. She requires 24 hour assistance and supervision so that all of her daily personal needs may be met: "she has very limited decision-making ability".

[6] The Tribunal nevertheless found that there was, in terms of s 12(1)(b), no "need for a decision in relation to the matter", referring back to the previously mentioned "personal matter" which brought in the wide range of day to day and other issues covered by schedule two. There is plainly need for decisions to be made for Kathleen on such matters on a regular basis: the Tribunal's findings confirm that. But the Tribunal read s 12(1)(b) as limited to the situation where there is a need for a particular decision on a particular, current matter, or as it was expressed, a "pressing" such need. Hence its reliance on the appellant John Williams' agreement that there was "no pressing issue" requiring decision. The provision does not however import any criterion of urgency or immediacy. It simply contemplates a situation where there is a subsisting need for a surrogate decision-maker on personal matters. (There is no reason to read the provision as confined to the singular.) In view of the Tribunal's findings in relation to Kathleen, s 12(1)(b) was in my view plainly satisfied. She needs someone to be making decisions on personal matters for her all the time.

[7] Having reached that point, the Tribunal should then have gone to ss (1) (c), raising the question whether, without an appointment, Kathleen's needs would be adequately met or her interests adequately protected. From a reading of its reasons, one would surmise the Tribunal would at that stage have considered Kathleen's treatment within the present accommodation satisfactory, subject to continuing "advocacy" on her behalf through her parents, and its expression of expectation that Cootharinga and its staff would comply with the parents' decisions as health attorneys.

[8] But noting the Tribunal's acceptance of the parents' frustrations in dealing with the Society, the "great concern" and "quite considerable disquiet" they apparently reasonably felt over the Society's neglect in the particular instances mentioned above, and the father's contention, which the Tribunal did not reject, that the Society regularly challenged the parents' views, it was in my view compelling to accept, as reasonable, the appellants' wish to be appointed guardians in order to ensure that Kathleen's needs and interests were adequately met and protected. The Tribunal's expectation as to the institution's respecting the parents' health decisions, in particular, was rendered doubtful by the 'PEG' matter.

[9] In a case like this, where there are doubts about the adequacy of the institution's treatment of Kathleen – in some respects, why should her support be limited to advocacy on the part of her family? There being no question as to their devoted, competent, responsible approach, and their capacity to advance her interests, why should she be denied the assurance contemplated by the Act, through the

appointment of guardians with the legal capacity to direct, as necessary, her future course? It seems to me that is plainly justified in this case to ensure, in terms of the Act, her "adequate" support in terms of s 12(1)(b).

[10] The Tribunal was influenced by s 5(d), acknowledging that Kathleen's right to make decisions should be restricted as little as possible. The sad reality, however, is that most decisions have to be made for her (cf. *RL* (2002) VCAT 12 para 24). The Tribunal was also bound to apply the "general principles" set out in schedule 1 (s 11(1)), and referred to clauses 2(1) and 7(2) especially. But again, those general principles neither excluded nor militated against the appointment sought here.

[11] The Tribunal read s 5(d) as requiring the Tribunal not to appoint a guardian should there be "a less restrictive option". But appointing guardians here would not in any practical way restrict or interfere with Kathleen's "right…to make decisions": she has the right, but, through impairment, no real capacity to exercise it.

[12] The Tribunal gave undue application to the principle that it respect any capacity in Kathleen to make relevant decisions for herself. It allied that consideration with its factual conclusion that there was no (pressing) need for decision-making to justify the ultimate refusal to appoint. Each plank was misfounded. As to the former, the Tribunal's findings as to her lack of capacity robs it of application. As to the latter, the finding was simply wrong in fact.

[13] In my view, consistently with the legislative intent, this was a prime case for the appointment of guardians: a need for decision-making; doubts about the standard of the institutional care – and to a degree its responsibility; consequent doubt about the adequacy of Kathleen's care; family members of indubitable, careful commitment to Kathleen who are plainly up to the task and seek appointment.

[14] I am satisfied that the Tribunal erred in law in each of the two respects set out in para 3 above, and that absent those errors of approach, the case for the appointment sought was a strong one. The application was motivated by an unquestionably responsible and loving concern to which the court should, in Kathleen's interests, defer.

[15] I order that the appeal be allowed and that the appellants John Joseph Williams, Josephine May Williams and David John Williams be appointed guardians of Kathleen Mary Williams under the *Guardianship and Administration Act* 2000.