

AUSTRALIA / JUDGMENT

CGQ [2024] NSWCATGD 10

COURT

NSW Civil and Administrative Tribunal

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NSW Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation: CGQ [2024] NSWCATGD 10

Hearing dates: 21 May 2024

Date of orders: 21 May 2024

Decision date: 21 May 2024

Jurisdiction: Guardianship Division

Before: A Britton, Deputy President

Dr M J Corr, Senior Member (Professional)

S Bullock, General Member (Community)

Decision: The Registrar is to request Ms X to provide Ms Z's contact details.

The review of the guardianship order and financial order made 21 May 2024 is to be listed for directions at a date set by the Registrar to decide how to determine whether Ms Z is a carer for the purpose of s 3D(2) of the Guardianship Act 1987 (NSW), that is, a person who provided or arranged to be provided domestic services and support to CGQ, immediately before he commenced residing in the group home operated by [a service provider] in 2016.

The Registrar is requested to notify CGQ's sisters, Ms X and Ms Z (if her contact details can be obtained), of the above directions hearings.

Guardianship

1. A guardianship order is made for CGQ.
2. The Public Guardian is appointed as the guardian.
3. This is a continuing guardianship order for a period of six months from 21 May 2024.
4. This is a limited guardianship order giving the guardian(s) custody of CGQ to the extent necessary to carry out the functions below.

FUNCTIONS:

5. The guardian has the following functions:

a) Accommodation

To decide where CGQ may reside.

b) Health care

To decide what health care CGQ may receive.

c) Medical/Dental consent

To make substitute decisions about proposed minor or major medical or dental treatment, where CGQ is not capable of giving a valid consent.

d) Services

To make decisions about services to be provided to CGQ.

CONDITION:

6. The condition of this order is:

a) Standard Condition

In exercising this role, the guardian shall take all reasonable steps to bring CGQ to an understanding of the issues and to obtain and consider his views before making significant decisions.

7. Pursuant to s 61 of the Civil and Administrative Tribunal Act 2013 (NSW), the guardianship order made on 21 May 2024 comes into effect on [The date that CGQ turns 18].

Financial Management

1. The estate of CGQ is subject to management under the NSW Trustee and Guardian Act 2009 (NSW).

2. The management of the estate of CGQ is committed to the NSW Trustee and Guardian.

3. This order be reviewed by the Tribunal within six months.

4. Pursuant to s 61 of the Civil and Administrative Tribunal Act, the financial management order made on 21 May 2024 comes into effect on [The date that CGQ turns 18].

Catchwords: GUARDIANSHIP – application for a guardianship order – whether a guardianship order should be made – 17-year-old subject person under the care of the Minister – subject person has an intellectual disability – subject person resides in a group home – need for decisions to be made in relation to accommodation, health care, services, and consent to medical and dental treatment – no private person available to be appointed – Public Guardian appointed – order made – order to take effect when the subject person turns 18 – order to be reviewed in 6 months

FINANCIAL MANAGEMENT – application for a financial management order – whether subject person is incapable of managing their own affairs – subject person is unable to manage his finances – financial management order made – no private person available to be appointed – NSW Trustee and Guardian appointed – order to take effect when the subject person turns 18 – order to be reviewed in 6 months

PROCEDURE – procedural fairness – parties to proceedings – consideration of ss 3D(2) and 3F(5) of the Guardianship Act 1987 (NSW) – whether the subject person's sister is a carer – whether the hearing should be adjourned to make enquiries – real, material and imminent risk of harm to the subject person if the hearing is adjourned – Tribunal decided that the hearing should proceed

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW), ss 61, 63

Guardianship Act 1987 (NSW), ss 3(1)-(2), 3D(2), 3F, 3F(2)(d), 3F(5)(d), 4, 10, 14(1)-(2), 25G; Sch 6, cl 6A

Cases Cited: None cited.

Texts Cited: None cited.

Category: Principal judgment

Parties: 001: Guardianship Application

CGQ (the person)

HZS (applicant)

Minister For Families and Communities (carer)

Public Guardian

002: Financial Management Application

CGQ (the person)

HZS (applicant)

Minister For Families and Communities (carer)

Public Guardian (joined party)

NSW Trustee and Guardian

Representation: W D Holden, Separate Representative for CGQ

File Number(s): NCAT 2024/00162661

Publication restriction: Decisions of the Guardianship Division of the Civil and Administrative Tribunal have been anonymised to remove any information that may identify any person involved in the Tribunal's proceedings: Civil and Administrative Tribunal Act 2013 (NSW), s 65.

REASONS FOR DECISION

1. At the time of this hearing, CGQ was about to turn 18 years of age. Since 2016, the Minister for Community Services (the Minister) has had parental responsibility for CGQ. He is currently living in a group home in regional NSW, managed by "designated agency", a service provider.
2. In an application filed on 2 May 2024, the service provider's case manager, HZS, requested the NSW Civil and Administrative Tribunal (NCAT) to make guardianship and financial management orders in respect of CGQ (the Application).
3. Apparently, because of an administrative oversight, before that Application was made, neither the Minister, nor the service provider had made arrangements for the management of CGQ's personal and financial affairs when he turns 18, three days after the hearing of the Application on 21 May 2024.
4. For the reasons that follow, we decided to make a guardianship order in respect of CGQ and to appoint the Public Guardian to make decisions about his accommodation, services, health care, and to consent to medical and dental treatment on his behalf. That order is made for a term of six months. In addition, we decided to make a reviewable financial management order and to commit the management of CGQ's estate to the NSW Trustee and Guardian.

Parties to these proceedings

1. In the applications seeking guardianship and financial management orders, in answer to the question, "Does the person have a carer?", HZS ticked "no".

2. At the hearing, it became apparent that one of CGQ's sisters, Ms Z, may be a carer for CGQ, and, as a consequence, a party to these proceedings.
3. Section 3F of the Guardianship Act 1987 (NSW) lists the people who are parties to proceedings in respect of applications made under that Act. "The person, if any, who has care of the person to whom the application relates", is a party to proceedings in respect of applications made for guardianship orders and financial management orders: Guardianship Act, ss 3F(2)(d) and 3F(5)(d).
4. A person who "has the care of another person" is defined by the Guardianship Act to mean:
3D Circumstances in which a person "has the care of another person"
 - (1) For the purposes of this Act, the circumstances in which a person is to be regarded as having the care of another person include (but are not limited to) the case where the person, otherwise than for remuneration (whether from the other person or any other source), on a regular basis –
 - (a) provides domestic services and support to the other person, or
 - (b) arranges for the other person to be provided with such services and support.
 - (2) A person who resides in an institution (such as a hospital, nursing home, group home, boarding-house or hostel) at which he or she is cared for by some other person is not, merely because of that fact, to be regarded as being in the care of that other person, and remains in the care of the person in whose care he or she was immediately before residing in the institution.
 - (3) In this section, remuneration does not include a carer's pension.
1. Of the documents provided in these proceedings, the report dated 6 June 2023, prepared by occupational therapist, Ms Y, gives the most detailed account of CGQ's history. Ms Y recorded that CGQ lived with his birth family until the age of four. On 21 May 2011, CGQ was removed from his parents and initially placed with his sister with "shared Parental Responsibility with the Minister of Community Services". On 19 August 2016, the Children's Court of NSW made orders giving the Minister parental responsibility for CGQ and placing him in out-of-home care, apparently due to his sister's "changing circumstances" (the 2016 order).
2. Based on enquiries made by HZS at our request, after the Children's Court made the 2016 order, CGQ was placed in out-of-home care with another service provider. Two years later, the service provider took over that role.
3. HZS understands that immediately before the 2016 order was made, CGQ was living with his sister, Ms Z. According to HZS, the service provider has no contact with and does not have contact details for Ms Z. However, the service provider is in regular contact with another of CGQ's sisters, Ms X. HZS said that she informed Ms X, but not Ms Z, about the hearing.

4. Immediately before, and during the hearing, we unsuccessfully attempted to contact Ms X to see if she could shed light on CGQ's circumstances before the 2016 orders were made, specifically who, if anyone, otherwise than for remuneration, had been providing CGQ with domestic services and support, or had arranged for such services and support to be provided to CGQ. This is relevant because it appears that CGQ was living in a group home managed by the other service provider after the 2016 order was made. By s 3D(2) of the Guardianship Act, where a person resides in an institution, which is defined to include a group home, that person "remains in the care of the person in whose care he or she was immediately before residing in the institution". It follows that any person(s) who had the care of CGQ immediately before he commenced living in a group home is a party for the purposes of these proceedings.
5. On the limited available information, it is not possible to make a reliable finding about who, if anyone, had the care of CGQ before he moved to live in the group home managed by the other service provider in 2016, or indeed whether this was the first time he had resided in a group home or some other institution. If, as Ms Y's report appears to indicate, CGQ was in the care of Ms Z, then she is a party to these proceedings and ought to have been given notice of, and the opportunity to participate in, the hearing to determine the Application.
6. At the hearing we considered whether to adjourn the hearing so that enquiries could be made to enable us to decide whether Ms Z is a carer for CGQ and therefore a party to these proceedings. HZS urged us not to adopt that course, arguing that CGQ will turn 18 in three days' time, at which point the Minister will no longer have parental responsibility for CGQ, leaving him without anyone authorised to make decisions on his behalf. HZS said that there is an urgent need for several key decisions to be made on behalf of CGQ, importantly where he will live when he turns 18.
7. At the hearing, Ms W, CGQ's National Disability Insurance Scheme (NDIS) coordinator, said that discussions are underway with an accommodation provider in relation to CGQ's accommodation when he turns 18. Apparently, those discussions were delayed because of staffing issues within the service provider. An in-principle agreement had been made for CGQ to transition to accommodation provided by the accommodation provider. In Ms W's opinion, it was critical that those arrangements be finalised without further delay.
8. As we explain below, CGQ lacks the ability to make decisions on his own behalf in respect of his personal and financial affairs.
9. Procedural fairness requires that a person who is a party to proceedings be notified of a hearing in the proceedings. Nonetheless, the Tribunal may dispense with a requirement to serve notice of a hearing under s 10 of the Guardianship Act, if the Tribunal considers compliance with that requirement would be likely to cause a real, material and imminent risk of harm to the person who is the subject of the application to which the hearing relates: Guardianship Act, Sch 6, cl 6A. Despite the potential breach of our obligation to afford all parties procedural fairness, we decided to proceed to hear the Application. We found that

there would be a real, material and imminent risk of harm to CGQ if the hearing of the Application were to be adjourned.

Can a guardianship order be made for CGQ?

1. The discretion to make a guardianship order can only be exercised if we are satisfied that CGQ is a "person in need of a guardian", that is, a "person who because of a disability is totally or partially incapable of managing his or her person": Guardianship Act, ss 3(1),14(1). A person with a disability includes a person who is physically and/or psychologically disabled and by virtue of that fact is restricted in one or more major life activities to such an extent that they require supervision or social habilitation [support to live in the community]: Guardianship Act, s 3(2).

Medical evidence

1. In a report dated 14 January 2021 addressed to CGQ's GP, Dr V, paediatric neurologist, Dr U, recorded that CGQ had been diagnosed with cerebral palsy Gross Motor Function Classification System (GMFCS) III, intellectual disability, non-verbal, scoliosis-severe recurrent aspiration on fluids, epilepsy, behavioural difficulties- aggression. Dr U recorded that CGQ has a background of "cerebral palsy due to prematurity (35/40), a stormy delivery and insult in the neonatal period".
2. In a pro forma "Health Professional Report form" dated 15 May 2024, Dr V declared that CGQ had a severe intellectual disability which affected his capacity to make informed decisions about accommodation, health care and services.

Other evidence

1. In a "child assessment tool" report dated 8 February 2019, a NSW Family and Community Services caseworker said that CGQ has been assessed by a children's hospital as "functioning at an 18 month old level". The caseworker said that CGQ requires full supervision at all times; uses a wheelchair; attends school; walks around the classroom with an unsteady gait; does not read or write; at times cries inconsolably for 10 to 15 minutes.
2. In her report referred to above, Ms Y recorded that CGQ is living with three other residents in supported accommodation provided by the service provider in regional NSW. The residents are provided with 2:4 support throughout the day and 4:1 support at night. CGQ:
 1. requires 1:1 support in all aspects of self-care
 2. with hand holding and verbal prompting, can get in and out of a hi-lo bed
 3. with support, can feed himself
 4. usually enjoys the company of other residents

5. from time-to-time exhibits "behaviours of concern", including physical aggression towards staff and residents
 6. is the subject of a behaviour support plan
 7. is in a class of five at a school for children with disabilities
 8. can use a walker and wheelchair with support
 9. can answer yes or no to simple questions using Augmentative and Alternative Communication (AAC), a yes/no switch on an iPad
 10. requires assistance with toileting.
1. In a behaviour support plan dated "March-April 2024", psychologist, Ms S, recorded that there had been a history of CGQ being aggressive towards staff and others, including head butting, hitting, pulling hair and clothes. In recent months that behaviour has become more frequent and has caused injury to staff and others.
 2. Ms S recorded that previous behaviour support plans had recorded that CGQ was prescribed Epilim, an anticonvulsant and psychotropic medication for "behaviour management". She noted that in March 2022, paediatrician, Dr T, wrote that Epilim was prescribed for "calming" and "no generalised seizures had been reported". However, in a medical certificate issued in May 2023, CGQ's GP, Dr V, wrote that Epilim was issued for "Epilepsy and reflux". Ms S stated that while the use of Epilim is "no longer prescribed for a behavioural purpose", nonetheless under the "Out of Home Care framework, it still requires embedding as a Regulated Restrictive Practice".

Consideration

1. We find:
 1. as a consequence of having an intellectual disability, CGQ requires support and supervision to undertake most activities of daily living
 2. because of his disability, CGQ is incapable of managing his person, and
 3. CGQ is a person in need of a guardian.

Should a guardianship order be made?

1. In considering whether to exercise the discretion to make, or not to make, a guardianship order, we must consider the matters listed in s 14(2) of the Guardianship Act, relevantly, the views of CGQ, the importance of preserving CGQ's existing family relationships and the practicability of services being provided to CGQ without the making of a guardianship order. In addition, we are required to have regard to the statement of principles contained in s 4 of that Act (the section 4 principles).

CGQ's views

1. CGQ attended the hearing by video for a few minutes. He did not speak and appeared unable to express a view about whether a guardianship order should or should not be made.

2. In a hearing report dated 14 May 2024, an NCAT officer wrote:

"Due to the nonverbal nature of [CGQ]'s disabilities, his views had not been sought at this time. [HYS] said that although he uses a communication device to provide mainly yes or no responses his capacity to understand the proceedings is very limited."

Views of the Separate Representative

1. Solicitor, Mr Wayne Holden, was appointed as separate representative for CGQ.
2. Mr Holden has not met with CGQ. He visited CGQ's group home but CGQ was at school. Mr Holden has not spoken with any of CGQ's family members.
3. Mr Holden supported the making of a guardianship order, saying that it was apparent from the available medical reports that CGQ lacked capacity to make decisions about his personal affairs.

Spouse or carer

1. CGQ does not have a spouse.
2. As discussed above, it is unclear whether any person "had the care of" CGQ before 2016.

The importance of preserving CGQ's existing family relationships

1. According to HYS, Ms X is in reasonably regular contact with CGQ. HYS said she had discussed the Application with Ms X who supported that application. According to HYS, Ms X said she was unable to take on the role of guardian or manager for CGQ because of personal commitments.
2. HYS said she was unclear about the extent of CGQ's contact with other family members.
3. In the most recent behaviour support plan, Ms S recorded that Ms X is the only one of CGQ's nine siblings with whom he has regular contact. Once a month he visits Ms X at her home in Northwest Sydney where Ms X "informally supervised contact between CGQ and other family members (e.g. father)".
4. The available evidence does not shed light on whether making a guardianship order would, or would not preserve, CGQ's existing family relationships.

Practicalities of services being provided without a guardianship order

1. CGQ currently receives a range of services, including occupational therapy, behavioural support, speech therapy and transport. Decisions about those services are apparently made by the service provider in consultation with the NSW Department of Communities and Justice.
2. When he turns 18, CGQ will continue to require significant services. CGQ lacks the capacity to make and implement decisions about current and any future services he may require. There is apparently no one in his life willing or able to arrange for services to be provided to CGQ. It would be impracticable for services to be provided to CGQ without a guardianship order. This consideration weighs heavily in favour of making a guardianship order.

Findings and conclusions

1. In circumstances where a series of significant decisions need to be made about CGQ's personal affairs when he turns 18; where he is unable to make those decisions; where, to date, decisions about CGQ's personal affairs have been made by the Minister and the service provider; where neither the Minister nor the service provider have indicated that they would be able or willing to make decisions about CGQ's personal affairs when he turns 18; where apparently there is no family member able and willing to make decisions on his behalf, it is demonstrably in CGQ's welfare and interests that the discretion to make a guardianship order is exercised.

Term of the guardianship order

1. Because of the uncertainty about Ms Z's status as a party to these proceedings, we decided to make an order for only six months. Given the number and complexity of decisions that will need to be made once the Minister no longer has parental responsibility for CGQ, we decided it was neither feasible nor in CGQ's interests to make an order for a term of less than six months.

What functions should the guardian be given?

1. We decided to give the guardian the functions of accommodation, services, health care, and consent to medical and dental treatment.
2. There is an urgent need for a decision to be made about where CGQ will live and the services he will receive once he turns 18. In the absence of a "person responsible", it is necessary that a guardian be given authority to consent to treatment on behalf of CGQ, together with authority to make decisions about the health care he receives.
3. The most recent behaviour support plan indicates that CGQ is not currently subjected to the use of restrictive practices.

Who should be appointed as CGQ's guardian?

1. No one nominated to act as guardian for CGQ, therefore, we must appoint the Public Guardian.

Financial Management application

1. Section 25G of the Guardianship Act provides that the power to make a financial management order in respect of CGQ can only be exercised if we have considered his capability to manage his own affairs and are satisfied of three matters:
 1. that CGQ is not capable of managing his affairs,
 2. that there is a need for a person to manage those affairs on behalf of CGQ, and
 3. that it is in CGQ's best interests that the order be made.
1. In considering whether to exercise the discretion to make, or not to make, a financial management order, we must have regard to the section 4 principles.

Is CGQ capable of managing his affairs?

1. The question of whether CGQ is not capable of managing his finances requires consideration of the nature of his estate. We understand from HZS that when he turned 16 years of age, a bank account was established in CGQ's name. That account hold funds which enable toys and other items to be purchased on his behalf. We were not provided with any information about the amount held, or who is authorised to operate, that account.
2. Apparently, CGQ receives a part-disability support pension and has no debts or liabilities.
3. Despite their simple nature, because of the extent of his cognitive impairment, CGQ is unable to manage his finances.

Is there a need for a person to manage CGQ's affairs?

1. In circumstances where CGQ is unable to manage his financial affairs; is without the support of family or friends to assist with the management of his financial affairs; in the immediate future, requires decisions to be made about his financial affairs, such as negotiating and arranging payment for his future accommodation, there is a clear need for a person to manage CGQ's finances.

Is it in CGQ's best interests that a financial management order be made?

1. In circumstances where CGQ is unable to manage his finances and there is a need for a person to manage his affairs, it is in his best interests that a financial management order be made. It is not in his interests that his financial affairs be left in limbo and that decisions are unable to be made and implemented because CGQ is unable to manage his financial affairs.

Who should be appointed to manage the estate?

1. No individual has nominated to act as manager of CGQ's estate. Therefore, his estate must be committed to the management of the NSW Trustee and Guardian.

Reviewable order

1. For the reasons given for making a six-month guardianship order, we decided to make the financial management order reviewable within six months.

Date of effect of decision

1. We decided to exercise the discretion conferred by s 61 of the Civil and Administrative Tribunal Act 2013 (NSW) to order that our decision to make a guardianship order and a financial management will not come into effect until [Date removed for publication.], that is the day CGQ turns 18. We made that decision because, by the 2016 order, the Minister has parental responsibility for CGQ and authority to make decisions about his personal and financial affairs until he turns 18.
2. We note that the version of the order provided to the parties on 21 May 2024 states that the Tribunal "recommends" that the guardianship and financial management orders order come into effect on [The date that CGQ turns 18].
3. That order contains an "obvious error". We made an order, not a recommendation, under s 61 of the Civil and Administrative Tribunal Act. Under s 63 of the Civil and Administrative Tribunal Act, we direct the Registrar to correct that order.

Parties to proceedings

1. For the reasons discussed above about Ms Z's status as carer, we made the following orders:

"The review of the guardianship order and financial order made 21 May 2024, is to be listed for directions at a date decided by the Registrar, to decide how to determine whether, [Ms Z] is a carer for the purpose of s 3D(2) of the Guardianship Act, that is, a person who provided or arranged to be provided domestic services and support to [CGQ] immediately before he commenced residing in the group home operated by [the other service provider] in 2016.

The Registrar is requested to notify [CGQ]'s sisters, [Ms X] and [Ms Z] (if her contact details can be obtained), of the above directions hearings."

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

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Decision last updated: 02 October 2024

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