AUSTRALIA / JUDGMENT

YJO v YJP [2025] NSWCATAP 7

Source: caselaw.nsw.gov.au · Research copy typeset by Esheria. Not court-issued or certified.

Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation: YJO v YJP [2025] NSWCATAP 7

Hearing dates: 26 September 2024

Date of orders: 06 January 2025

Decision date: 06 January 2025

Jurisdiction: Appeal Panel

Before: A Britton, Deputy President

J Moir, Senior Member (Legal)

Dr B McPhee, Senior Member (Professional)

Decision: (1) Leave to appeal is refused.

(2) Appeal is dismissed.

Catchwords: APPEAL — NCAT — decision to renew and vary initial guardianship order — decision to add access function to initial guardianship order — decision to give Public Guardian an access function

GUARDIANSHIP — appointment of guardian —criteria for appointment of guardian — whether Tribunal misstated test for appointment of guardian in s 17(1)(c) of the Guardianship Act 1987 (NSW) — whether Tribunal misapplied s 17(1)(c) of the Guardianship Act — whether error made by Tribunal material

PROCEDURAL FAIRNESS — apprehended bias — principles

LEAVE TO APPEAL — principles governing under s 80(2)(b) of the Civil and Administrative Tribunal Act 2013 (NSW)

WORDS AND PHRASES — meaning of phrase "able to exercise the functions conferred or imposed by the proposed guardianship order" in s 17(1)(c) of the Guardianship Act 1987 (NSW)

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW), ss 38(2), 45(4)(c), 80(2)(b)

Guardianship Act 1987 (NSW), ss 3(6), 4, 4(b)-(d), 14, 14(1), 14(2)(a)(i), 15(3), 16(1)(a), 16(3), 17(1), 17(1)(b)-(c), 25(2)(a), 25B(d), 25C(1)

Cases Cited: Agripower Barraba Pty Ltd v Blomfield (2015) 317 ALR 202; [2015] NSWCA 30

AHB v NSW Trustee and Guardian [2017] NSWCATAP 79

Akins v National Australia Bank (1994) 34 NSWLR 155

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321; [1990] HCA 33

BHP Billiton Ltd v Dunning [2015] NSWCA 55

C v W [2015] NSWSC 1774

CNY17 v Minister for Immigration and Border Protection (2019) 268 CLR 76; [2019] HCA 50

Collins v Urban [2014] NSWCATAP 17

Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 73 ALD 321; [2003] HCA 26; 77 ALJR 1088

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63

Edwards v Commissioner for Fair Trading, Department of Finance, Services and Innovation [2019] NSWCATAP 208

Ferella & Anor v Chief Commissioner of State Revenue [2014] NSWCA 378

Hossain v Minister for Immigration and Border Protection (2018) 254 CLR 123; 2018 HCA 34

Isbester v Knox City Council (2015) 255 CLR 135; [2015] HCA 20

Kostas v HIA Insurance Services Pty Ltd (2010) 241 CLR 390; [2010] HCA 32

Kudrynski v Orange City Council [2024] NSWCA 33

L & B Linings Pty Ltd v WorkCover Authority of New South Wales [2012] NSWCA 15

Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6; (1996) 185 CLR 259

MZAPC v Minister for Immigration and Border Protection (2021) 273 CLR 506; [2021] HCA 17

P v NSW Trustee and Guardian [2015] NSWSC 579

QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2023) 97 ALJR 419; [2023] HCA 15

Schwartz Family Co Pty Ltd v Capitol Carpets Pty Ltd [2017] NSWCA 223

Tudor Capital Australia Pty Limited v Christensen [2017] NSWCA 260

ZII v ZIJ [2018] NSWCATAP 255

ZKF v ZKG [2019] NSWCATAP 64

Texts Cited: NCAT Fact Sheet, What is a separate representative? June 2024

Category: Principal judgment

Parties: YJO (Appellant)

YJP (First Respondent)

NSW Public Guardian (Second Respondent)

Representation: Appellant (Self-Represented)

B Fogarty, (Separate Representative) (Respondent)

File Number(s): 2024/00204746

Publication restriction: The publication of the evidence given in these proceedings to the Tribunal is prohibited. This order is made under section 64(1)(c) of the Civil and Administrative Tribunal Act 2013 (NSW).

The publication or broadcast of the name of the witness is prohibited. This order is made under section 64(1)(a) of the Civil and Administrative Tribunal Act 2013 (NSW).

Note: A Reference to the name of a person includes a reference to any information, picture or other material that identifies the person or is likely to lead to the identification of the person.

Decision under appeal Court or tribunal: Civil and Administrative Tribunal

Jurisdiction: Guardianship Division

Date of Decision: 27 May 2024

Before: S L Handebo, Senior Member (Legal)

File Number(s): 2024/00013043

Decision Under Appeal

REASONS FOR DECISION

1. Forty-five-year-old YJP (the Son) has an acquired brain injury. His mother, YJO (the Mother), appeals from a decision made by the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) in May 2024 to renew an initial guardianship order made three months earlier in respect of the Son. In the renewed order, the Tribunal reappointed the NSW Public Guardian and the Mother as guardians for the Son and gave the Public Guardian the authority "to decide what access [the Son] has to others and the conditions of access". In these reasons, we will refer to that authority as the "access function".

2. The decision to give the Public Guardian an access function and to reinstate the services function given to the Public Guardian under the initial guardianship order is the decision under appeal.

3. The Mother contends that the decision under appeal contains several legal errors. In addition, the Mother seeks leave to appeal and requests that we have regard to "fresh evidence".

4. We explain below our reasons for dismissing the appeal notwithstanding the fact that, as the Mother contends, the Tribunal misstated the provisions in the Guardianship Act 1987 (NSW) which govern the appointment of a guardian.

Statutory framework

1. Section 14 of the Guardianship Act gives the Tribunal power to make a guardianship order. In exercising that discretion, the Tribunal must take into account the matters listed in s 14(2):

14 Tribunal may make guardianship orders

(1) If, after conducting a hearing into any application made to it for a guardianship order in respect of a person, the Tribunal is satisfied that the person is a person in need of a guardian, it may make a guardianship order in respect of the person.

(2) In considering whether or not to make a guardianship order in respect of a person, the Tribunal shall have regard to:

(a) the views (if any) of:

(i) the person, and

(ii) the person's spouse, if any, if the relationship between the person and the spouse is close and continuing, and

(iii) the person, if any, who has care of the person,

(b) the importance of preserving the person's existing family relationships,

(c) the importance of preserving the person's particular cultural and linguistic environments, and

(d) the practicability of services being provided to the person without the need for the making of such an order.

1. The Tribunal must review a guardianship order at the request of any person entitled to request a review of the order: Guardianship Act, s 25(2)(a). A person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the person under guardianship is entitled to request a review of a guardianship order: Guardianship Act, s 25B(d). On reviewing a guardianship order under s 25(2)(a), the Tribunal may vary the order, suspend

or revoke the order, confirm the order, or renew, or renew and vary the order: Guardianship Act, s 25C(1).

2. Where the Tribunal decides to make a guardianship order, it must appoint a person(s) who is aged 18 years or more as the guardian of the person under guardianship: Guardianship Act, s 16(1)(a).

3. Where, as in the decision under appeal, the Tribunal makes a limited not a plenary guardianship order, the Tribunal may appoint two or more guardians under that order, either jointly (each having the same functions) or separately (each having different functions). However, the Public Guardian is not to be appointed a joint guardian: Guardianship Act, s 16(3).

4. In the Guardianship Act a reference to a function includes a reference to a power, authority and duty, and a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty: Guardianship Act, s 3(6).

5. Before appointing a person to act as the guardian of the person under guardianship, the Tribunal must satisfy itself that the proposed guardian satisfies each of the three matters listed in s 17(1):

17 Guardians

(1) A person shall not be appointed as the guardian of a person under guardianship unless the Tribunal is satisfied that—

(a) the personality of the proposed guardian is generally compatible with that of the person under guardianship,

(b) there is no undue conflict between the interests (particularly, the financial interests) of the proposed guardian and those of the person under guardianship, and

(c) the proposed guardian is both willing and able to exercise the functions conferred or imposed by the proposed guardianship order.

(2) Subsection (1) does not apply to the appointment of the Public Guardian as the guardian of a person under guardianship.

...

1. Section 4 imposes a duty on anyone exercising functions under the Guardianship Act, including the Tribunal and any guardian, to observe the principles in s 4 of that Act (the section 4 principles):

4 General principles

It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:

(a) the welfare and interests of such persons should be given paramount consideration,

(b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,

(c) such persons should be encouraged, as far as possible, to live a normal life in the community,

(d) the views of such persons in relation to the exercise of those functions should be taken into consideration,

(e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,

(f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,

(g) such persons should be protected from neglect, abuse and exploitation,

(h) the community should be encouraged to apply and promote these principles.

Grounds of appeal

1. As a party to the proceedings before the Tribunal, the Mother has a right to appeal the decision under appeal, an "internally appealable decision", on any question of law or, with the leave of the Appeal Panel, on any other ground: Civil and Administrative Tribunal Act 2013 (NSW) (NCAT Act), s 80(2)(b).

2. An appellant must identify with precision the question of law said to be raised by the decision under appeal: Ferella & Anor v Chief Commissioner of State Revenue [2014] NSWCA 378 at [6], [22]; Schwartz Family Co Pty Ltd v Capitol Carpets Pty Ltd [2017] NSWCA 223 at [13]. The Mother failed to do so in the notice of appeal and submissions in support. Nonetheless, adopting the "more generous or benevolent approach" endorsed by the Court of Appeal (Griffiths AJA, Meagher and Kirk JJA agreeing) in Kudrynski v Orange City Council [2024] NSWCA 33 at [50][51], we considered whether, on the material filed by Mother in this appeal, together with her oral submissions, as a matter of substance, there existed a question of law to be considered.

3. Having considered that question, we concluded that the following questions of law can be discerned:

1. Whether, by giving the Public Guardian an access function, the Tribunal misapplied ss 15(3) and 17(1)(c) of the Guardianship Act.

2. Whether there was no evidence to support the purported finding that the Mother and the Son did not have a close relationship.

3. Whether the Tribunal failed to have regard to the Son's views as required by ss 4(d) and 14(2)(a)(i) of the Guardianship Act.

4. In circumstances where it is alleged that some of the parties conferred before the hearing, whether the Tribunal's conduct in admitting their evidence into proceedings, gave rise to reasonable apprehension of bias.

1. The Mother seeks leave to appeal on the ground that several key findings made by the Tribunal are alleged to be against the weight of evidence. In addition, the Mother says that there is fresh evidence, which warrants the leave to appeal being granted.

2. In the amended notice of appeal filed 3 July 2024, the Mother identified that the orders she sought on appeal as being the removal from the Public Guardian of the access and services functions and giving those functions to her. The Mother failed to identify any question of law said to have been raised by the decision to give the Public Guardian a services function or any grounds which might warrant leave to appeal from that decision. Accordingly, in this appeal we have confined our consideration to the decision to give the Public Guardian an access function.

Initial guardianship order

1. In January 2024, the Mother made an application to NCAT seeking a guardianship order in respect of the Son. Four weeks earlier, the Son had been admitted to hospital following an unwitnessed fall where he sustained a "traumatic brain injury": N O'Dowd, Senior Member (Legal); Dr W Longley, Senior Member (Professional); P Davidson, General Member (Community), 13 February 2024, unreported (the Initial Reasons) at [4],[12].

2. The Tribunal found that the medical evidence established that the Son had a "significant cognitive disability", required support and supervision with activities of daily living and lacked the ability to make complex decisions: Initial Reasons at [14]-[16].

3. The Tribunal found that the Son was a "person in need of a guardian" for the purpose of s 14(1) of the Guardianship Act: Initial Reasons at [17]. The Tribunal went on to exercise the discretion to make a guardianship order, reasoning that the Son had complex medical and social needs and was unable to make the series of decisions that would need to be made about his accommodation and services when he was ready for discharge from hospital: Initial Reasons at [22]-[24].

4. The Tribunal decided to appoint the Mother and the Public Guardian as the Son's guardians and to give the functions of health care and authority to consent to medical treatment to the Mother, and the functions of accommodation and services to the Public Guardian.

Renewed and varied guardianship order

1. On 6 March 2024, the Mother made an application to NCAT seeking review of the initial guardianship order (the review application). In that application the Mother wrote that she made the application "to prevent the suspected people who assaulted my son ... from visiting him while in hospital as well as when he will be discharged into the community".

2. In the proceedings to determine the review application, the Tribunal ordered, under s 45(4)(c) of the NCAT Act, that the Son be separately represented. Solicitor Ms Hill was appointed as separate representative for the Son.

3. The Tribunal found that there had been no material change in the Son's condition since the initial guardianship order was made and decided to exercise the discretion to renew that order: YJP, NCAT (S Handebo, Senior Member) 27 May 2024, unreported (the Reasons) at [19]. The Tribunal then went on to consider whether, as urged by the Mother, the initial guardianship order should be varied by adding an access function and, if so, who should be given that function.

4. The Tribunal said that moving to Sydney several years ago "permitted [the Son] to finally allow himself to be comfortable living as a gay man, and [the Son] developed a group of friends in Sydney who made him feel welcome and supported": Reasons at [32]. The Tribunal noted that the Son is reported to have had a romantic relationship with Friend 1, one of the members of that group, but that it was difficult "to ascertain the exact nature of this relationship, and whether the relationship continues to be a romantic or a platonic relationship": Reasons at [33]. The Tribunal noted that the hospital social worker and the representative of the Public Guardian, each of whom participated in the review hearing (respectively, "the hospital social worker" and "the PG representative"), together with Ms Hill, "all spoke of [the Son] continuing to hold strong feelings for [Friend 1]": Reasons at [33].

5. The Tribunal recorded that the Mother described the relationship between the Son, Friend 1, and Friend 2 (Friend 1's spouse of two years) as a "love triangle". Friend 1 and, to a lesser extent, Friend 2 had been regular visitors since the Son's admission to hospital in December 2024: Reasons at [35].

6. The Tribunal said that the purpose of the Mother making the review application was to be given an access function with the "intention of prohibiting contact between [the Son], [Friend 1] and [Friend 2]": Reasons at [35].

7. At [37]-[38], the Tribunal said that the Mother was strong in her view that there is a need "for a guardian to be appointed to make appropriate decisions for [the Son] about his access to others to protect [the Son] from harm". The Mother referred to the history of the Son being "exploited financially by others, and ... multiple instances of [the Son] being physically and sexually abused by others". The Tribunal recorded that the Mother said that the Son confided in her that Friend 1 and Friend 2 were responsible for the alleged assault which resulted in him being admitted to hospital and said that "[Friend 1] is a devil pretending to

be an angel".

8. The Tribunal recorded that at the hearing:

"42 [The Mother] expressed a very clear view that she is the only person who could be appointed to make access decisions for [the Son]. As his mother, [the Mother] told us that she knows [the Son] and his history, she knows which friends would be safe and which friends would not be, and that she is the only person who [the Son] would confide in and provide enough information to allow appropriate decisions to be made. [The Mother] was firm in her view that [the Son] would not confide in the Public Guardian, and accordingly, the Public Guardian would not have the information required to make the necessary decisions for [the Son] with respect to access.

43 At Hearing, and in response to questions asked by the Tribunal, [the Mother] was clear that if she were appointed as [the Son]'s guardian with an access function, the decision that she would make would be to prohibit all contact and communication between [the Son] and [Friend 1 and Friend 2]. She told the Tribunal that there have been extended periods in the past (presumably during the time that [the Mother] visited [the Son] in Australia during his hospitalisation) when [the Son] has not had communication with [Friend 1], and that she believes that in time [the Son] would be okay with her decision to prohibit access.

44 [The Mother] told the Tribunal that she did not believe that her appointment would have a detrimental impact on her relationship with [the Son]. She told us that if someone else were appointed with an access function, [the Son] would simply ignore the decisions that were made. She told us that '[the Son] needs convincing ... that's what I am here for'."

1. At [45]-[49], the Tribunal recorded that the hospital social worker said that Friend 1's visits "appeared to have a positive effect" on the Son. At [46] the Tribunal set out an extract of an email sent to the Mother in March 2024, in which the social worker wrote:

"...

I wanted to reassure you... that we have been closely monitoring all of [the Son]'s visitors to ensure he is safe and comfortable with the visitor. We ensure [the Son] is well during the visit and monitor behaviours afterwards. So far, we have only observed positive behaviours during and after [Friend 1's] visits. [The Son] is also engaging better in therapies when [Friend 1] talks to him about the importance of these for his prompt recovery. [The Son] is more motivated, relaxed and even talkative.

..."

1. At [50]-[53], the Tribunal recorded that the PG representative said that the Mother's firm views about the Son having access to other people "do not necessarily accord with [the Son's] wishes or the objective observations of those involved in [the Son's] day to day care". The PG representative said that it was important that there be an independent person making access decisions for the Son.

2. The Tribunal went on to consider Ms Hill's view about whether the Mother should be given an access function. At [57]-[58], the Tribunal summarised the account given by Ms Hill of her meeting with the Son, the week before the hearing:

"57 [Ms Hill] told us that she and [the Son] spoke at length about [the Mother]. In paraphrasing the nature and content of her conversations with [the Son], [Ms Hill] told us that [the Son] has no doubt that [the Mother] loves him and wants to make decisions that she thinks are the right decisions for him. Notwithstanding that, [the Son] told [Ms Hill] that he is not sure that [the Mother] is accepting of his lifestyle as a gay man. He told her that he has been much more comfortable in his life in Australia living as an openly gay man, and that he feels very much supported by his network of friends.

58 In discussing [the Son]'s injuries that resulted in his hospitalisation, [the Son] is reported to have said to [Ms Hill] words to the effect of 'sometimes I think my friends hurt me, but why would they do that? I worry because I can't remember'.

59 [Ms Hill] told us that [the Son] speaks extremely fondly of [Friend 1] and is clear that he wants [Friend 1] to remain a part of his life."

1. The Tribunal found the need for an access function to be "well-established" and noted that there "are significant concerns around [the Son]'s safety and wellbeing that require a guardian to make decisions that will promote both [the Son's] freedoms, and his physical wellbeing": Reasons at [64].

2. The Tribunal found that the Mother was "unable to exercise an access function objectively and without conflict of interest", and in the absence of another individual who had nominated to act as guardian, decided to give an access function to the Public Guardian.

Ground 1: Whether in giving the access function to the Public Guardian the Tribunal misapplied ss 15(3) and 17(1)(c) of the Guardianship Act

1. The Mother does not challenge the Tribunal's decision to vary the initial guardianship order by adding an access function. Rather the Mother challenges the Tribunal's decision to give that function to the Public Guardian.

2. By Ground 1, the Mother contends the Tribunal misapplied ss 17(1)(c) and 15(3) of the Guardianship Act by giving an access function to the Public Guardian. The Tribunal did so by asking the wrong question: who was "best placed" to make access decisions on behalf of the Son. Referring to the submission made by Ms Hill, the Mother submitted that Tribunal failed to heed the instruction in the Guardianship Act that the Public Guardian can only be appointed as a "last resort".

3. The separate representative appointed for the Son in this appeal, barrister, Mr B Fogarty, disagrees with the contention that the Tribunal misapplied ss 15(3) and 17(1) of the Guardianship Act. Mr Fogarty points out that the Tribunal considered whether the Mother was able to exercise the access function and found that she was not. He contends that there was ample evidence to support that finding.

Consideration

1. By the combined operation of ss 15(3) and 17(1) of the Guardianship Act, if satisfied that the Mother (the only person to nominate to act as guardian) met the criteria for appointment as guardian listed in s 17(1) of that Act, the Tribunal was precluded from appointing the Public Guardian as the guardian of the Mother.

2. In ZKF v ZKG [2019] NSWCATAP 64, a differently constituted Appeal Panel considered the meaning of the phrase "able to exercise the functions conferred ... by the proposed guardianship order" in par (c) of s 17(1) of the Guardianship Act. In that appeal, the subject function was an accommodation function. The Appeal Panel said:

"31 The task posed by s 17(1)(c) required the Tribunal to make an evaluative judgement about whether the appellant was 'able' to exercise the accommodation function. This required the Tribunal to consider not only whether the appellant possessed the necessary skill and experience to be able to exercise that function (or put another way, to make decisions about his mother's accommodation on her behalf) but also whether he had the personal attributes, such as judgement and integrity, required to exercise that function. In addition, as correctly acknowledged by the Tribunal, this required the Tribunal to consider whether the appellant was able to make those decisions in a manner consistent with the statutory duty imposed by s 4 of the Guardianship Act: W v G [2003] NSWSC 1170; (2003) 59 NSWLR 220 at [25] (per Windeyer J); IR v AR [2015] NSWSC 1187 at [36] (per Lindsay J)."

1. At [21]-[25], the Tribunal set out ss 15(3) and 17(1) of the Guardianship Act and correctly summarised the principles which govern their operation. However, in the dispositive part of the Reasons, under the heading "Tribunal's Decision", after correctly stating "it is not for the Tribunal to decide what decisions are made under an access function", the Tribunal went on to say at [65] that it is "simply tasked with determining who is best placed to make access decisions on [the Son]'s behalf" (emphasis added). As the Mother points out, that is not a correct statement of the law. The Tribunal's task was to decide whether it was satisfied of the matters in s 17(1) of the Guardianship Act. If so satisfied, the Tribunal was required by s 15(3) of the Guardianship Act to appoint the Mother or, more correctly, given that the Tribunal had decided to reappoint the Mother with the functions conferred under the initial guardianship order, to give the access function to the Mother. Whether the Public Guardian was, or was not, better placed than the Mother to exercise that function was irrelevant to the question posed by s 17(1)(c) of that Act.

2. Despite misstating the law, it is evident from the Reasons that the Tribunal nonetheless proceeded to consider the question posed by 17(1)(c) of the Guardianship Act, concluding at [71] that it was not satisfied that the Mother was able to exercise the access function. The findings on which that conclusion was based are contained in the immediately preceding paragraphs.

3. At [66], the Tribunal found that the Mother was unable to make objective and dispassionate decisions on behalf of the Son in relation to the issue of access. At [67], the Tribunal found that the Mother's "mind is closed" to any alternatives to banning Friend 1 and others from visiting the Son. The Tribunal found the Mother held "very passionate views" and:

"Her desire to protect [the Son] at all costs, however, appear contrary to [the Son]'s clear and frequently expressed views, and do not reconcile with the objective reports from [the Son]'s treating practitioners that [Friend 1]'s influence has positively assisted in [the Son]'s recovery. [The Mother]'s views as to what decisions would be in [the Son]'s interests are not necessarily supported by the balance of the evidence."

1. The reference to the "objective reports from [the Son]'s treating practitioners" in the above passage is a reference to the evidence given by the hospital social worker, summarised by the Tribunal at [45]-[49]. Those reports stated Friend 1's visits to the Son had been carefully monitored by hospital staff who had not observed any evidence of concern, nor any evidence of the Son being "fearful around visits with [Friend 1]". To the contrary, hospital staff reported that those visits appeared to have had a positive and therapeutic influence on the Son.

2. At [68], the Tribunal went on to record that there was evidence that the Son apprehended that the Mother "does not support the lifestyle he lives as an openly gay man". The Tribunal found that giving the Mother an access function had "the potential to be unduly restrictive on [the Son]'s right to live the life and lifestyle he wants to live, and to cause irreparable damage to his relationship with [the Mother]".

3. Undoubtedly, at [65] the Tribunal misstated the statutory test governing the appointment of an individual as guardian for a person for whom a guardianship ship order has been made. Nonetheless, the Tribunal went on to apply the correct test. That is evident from the Tribunal's consideration of the evidence about whether the Mother was able to exercise the access function in a manner which conformed with the obligation to apply the section 4 principles at [66]-[68], and its ultimate conclusion that she was not. The error made by the Tribunal was not material, in the sense that there is a realistic possibility, as distinct from a probability, that the decision could have been different as a matter of reasonable conjecture but for that error: Hossain v Minister for Immigration and Border Protection (2018) 254 CLR 123; [2018] HCA 34 at [46]; MZAPC v Minister for Immigration and Border Protection (2021) 273 CLR 506; [2021] HCA 17 at [39].

4. Ground 1 is not established.

Ground 2: Whether there was no evidence to support the purported finding that the relationship between the Mother and the Son was not close in nature

1. The Mother contends that the Tribunal found that her relationship with the Son was not close and that there was no evidence to support that finding. The Mother acknowledges that the Tribunal did not make an express finding about the nature of her relationship with the Son but contends that it can be inferred from its decision not to give her the access function.

2. Mr Fogarty disagrees and contends that the inference cannot be drawn from the Reasons that the Tribunal did not accept that her relationship with the Son was close.

No evidence: the principles

1. A tribunal of fact which makes a finding of fact or draws an inference where there is a complete absence of evidence makes an error of law: Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321; [1990] HCA 33 (Bond) at 356 (Mason CJ); Kostas v HIA Insurance Services Pty Ltd (2010) 241 CLR 390; [2010] HCA 32 at [91] (Hayne, Heydon, Crennan and Kiefel JJ).

2. In Bond, Mason CJ noted at 356 that there was "no error of law simply in making a wrong finding of fact" and "want of logic is not synonymous with error of law". Mason CJ continued:

"So long as there is some basis for an inference - in other words, the particular inference is reasonably open - even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place."

1. Referring to the above statement made by Mason CJ, Basten JA in L & B Linings Pty Ltd v WorkCover Authority of New South Wales [2012] NSWCA 15 at [34] added four "points of caution":

"First, this passage indicates that the 'no evidence' ground of judicial review depends not on the reasoning of the decision-maker, but on a comparison between the material available to the decision-maker and the conclusion reached. Secondly, care must be taken with the term 'no evidence', as an administrative decision-maker is usually entitled to take into account material which would not count as 'evidence' in a judicial context. In what is essentially an inquisitorial inquiry, that material is not necessarily limited to the material placed before the decision-maker by the applicant for review. Thirdly, it is important to bear in mind that the decision-maker may be entitled to seek support for a particular inference from the absence of material supportive of a contrary view. Fourthly, where an evaluative judgment is to be formed on the basis of conflicting indicators, it will be difficult if not impossible to establish a 'no evidence' ground of review."

1. A conclusion that there was some evidence capable of supporting a particular finding of fact requires that there be a rational connection between particular evidence and that finding: BHP Billiton Ltd v Dunning [2015] NSWCA 55 at [35]-[43]; Tudor Capital Australia Pty Limited v Christensen [2017] NSWCA 260 at [300].

Consideration

1. The Mother points out, there was ample evidence before the Tribunal to support her claim that she and the Son enjoyed a close relationship. That evidence included:

1. The report prepared by the hospital social worker based on her discussions with, and observations of, the Son, in which she said "it is clear that he loves his mum very much, and that he does not want to hurt her (being aware that [the Mother] is opposed to his continued relationship with [Friend 1])": at [48].

2. Ms Hill's report that the Son told her that he "has no doubt that [the Mother] loves him and wants to make decisions that she thinks are the right decisions for him": at [57].

1. However, it cannot be inferred from the decision not to give the Mother an access function, that the Tribunal found that she and the Son did not have a close relationship. To the contrary, the Reasons indicate that the Tribunal accepted that the two had a close relationship. For example, one of the reasons given by the Tribunal for not giving the Mother an access function was that there was a risk that if she were to make a decision with which the Son disagreed, it might "cause irreparable damage" to their relationship: at [68].

2. The task the Tribunal was required by s 17(1)(c) of the Guardianship Act to undertake did not turn on whether the relationship between the Mother and the Son was or was not close. Rather, it turned on whether the Mother was able to make decisions about the Son's access to other people in a manner consistent with the statutory duty imposed by s 4 of the Guardianship Act. Paradoxically, it was the combination of the very closeness of the relationship between mother and son, the Mother's strongly protective attitude towards him regarding his relations with Friends 1 and 2, and her unwillingness to accept those relationships despite the apparent benefit he was receiving from them, which struck the Tribunal as problematic and potentially undermining the relationship between her and her son if she were given the access function.

3. The premise on which this ground rests, that the Tribunal found that the relationship between the Mother and the Son was not close, is not established.

Ground 3: Whether the Tribunal failed to have regard to the Son's views as required by ss 4(d) and 14(2)(a)(i) of the Guardianship Act

1. The Mother contends that the Tribunal failed to have regard to the Son's view as expressed by Ms Hill. The Mother contends that Ms Hill strongly supported her request to be given an access function.

2. Mr Fogarty disagrees and contends that it misrepresents the submissions made by Ms Hill to suggest that she strongly favoured the Mother being given an access function. In support, Mr Fogarty points to the answer given by Ms Hill in response to a question from the Tribunal about who should be given the access function: "I'm on the sideline. I'm sitting on the fence in terms of who should be appointed": Tcpt, 27 May 2024, p 7(34).

Consideration

1. The Mother correctly points out that ss 4(d) and 14(2)(a)(i) of the Guardianship Act, required the Tribunal to have regard to the views of the Son. Those provisions did not require the Tribunal to have regard to the views of Ms Hill. The views of a separate representative appointed under s 45(3)(c) of the NCAT Act for a person the subject of proceedings in the Guardianship Division (the Person) and the views of that person are not one and the same thing. The NCAT Fact Sheet, What is a separate representative? June 2024 explains that the role of the Separate Representative is, if possible, to elicit the views of the Person, and to inform the Tribunal of those views. However, as the Fact Sheet explains, the Separate Representative is not bound by the views of the Person: "In this way they are different from a legal representative because they do not act on the instructions given by the Person".

2. While not required by ss 4(d) and 14(2)(a)(i) of the Guardianship Act, to have regard to the submissions made by Ms Hill, nonetheless, procedural fairness required the Tribunal to consider any "substantial, clearly articulated argument relying upon established facts" made by Ms Hill: Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 73 ALD 321; [2003] HCA 26; 77 ALJR 1088 at [24].

3. At [54]-[57], the Tribunal summarised Ms Hill's submission. At [63], the Tribunal returned to consider that submission noting that Ms Hill had said that there are "clear arguments for and against the appointment of either [the Mother] and the Public Guardian, and she was reluctant to express a firm view in favour of either option". The Tribunal went on to note that in closing submissions, Ms Hill had said "that the legislation requires that the Public Guardian only be appointed as a guardian of last resort, and in a finely balanced matter such as this, the legislative provisions may weigh in favour of the appointment of [the Mother]".

4. It is to misstate Ms Hill's submission to suggest that she strongly supported the access function being given to the Mother. Nonetheless, it is correct that in closing submissions Ms Hill moved from a position which she characterised as "sitting on the fence" towards a lukewarm endorsement of the Mother being given an access function. The decision to appoint the Public Guardian turned on the Tribunal not being satisfied that the Mother was able to exercise the access function. The "principle of last resort" referred to by Ms Hill required the Mother to be given an access function but only if the Tribunal was satisfied that she met the criteria for appointment in s 17(1) of the Guardianship Act.

5. It is evident from the Reasons that the Tribunal had regard to the submissions made by Ms Hill. Procedural fairness did not require the Tribunal to adopt those submissions.

6. Ground 3 is not established.

Ground 4: In circumstances where it is alleged that some of the parties conferred before the hearing, whether the Tribunal's conduct in admitting their evidence into proceedings gave rise to reasonable apprehension of bias

1. We understand the Mother to contend that the Tribunal's conduct in admitting into the proceedings the evidence given by the PG representative and the hospital social worker gave rise to a reasonable apprehension of bias. She claims that the two conferred before the hearing of the review application. In support of that claim, the Mother points to the fact that they had reached the same conclusion about her suitability to hold the access function.

Apprehended bias: the principles

1. The Tribunal was obliged to afford the Mother procedural fairness: NCAT Act, s 38(2). That obligation required the Tribunal to determine the Mother's application for review without bias or the appearance of bias. The principles summarised below refer to courts but apply equally to NCAT.

2. The test for apprehended bias, the "double might test", is whether "a fair-minded lay observer might reasonably apprehend that the [decision-maker] might not bring an impartial mind to the resolution of the question the [decision-maker] is required to decide": Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63 (Ebner) at [6]; CNY17 v Minister for Immigration and Border Protection (2019) 268 CLR 76; [2019] HCA 50 at [56]; Isbester v Knox City Council (2015) 255 CLR 135; [2015] HCA 20 at [20]. The "double might" serves to emphasise that the criterion is concerned with "possibility (real and not remote), not probability": QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2023) 97 ALJR 419; [2023] HCA 15 at [37].

Consideration

1. The premise on which this ground is based is not established for the following reasons.

2. First, there is no evidence that the hospital social worker and the PG representative conferred before the hearing about the review application, less still that the Tribunal was aware that they had done so.

3. Second, contrary to the claim made by the Mother, the submissions made by the two were different. The hospital social worker and the PG representative agreed that if the Tribunal decided to add an access function to the guardianship order, the Public Guardian ought to be given that function. However, the PG representative submitted that the Mother was unable to exercise that function because she held firm views about decisions concerning access "which do not necessarily accord with [the Son]'s wishes or the objective observations of those involved in [the Son]'s day to day care". On the other hand, the hospital social worker reasoned that the Mother was unable to exercise that function because it would destroy her relationship with the Son. A further point of difference is that, in contrast to the PG representative, the hospital social worker did not support an access function being added to the guardianship order.

4. Third, even if it were established that the hospital social worker and the PG representative had discussed the Mother's suitability to be given an access before the hearing, contrary to the Mother's belief, that does not constitute improper conduct. It is not improper for parties to proceedings to an application for review of a guardianship order to discuss that application before the hearing. Indeed, the Tribunal requires parties submitting written material to the Tribunal to give a copy of that material to the other parties before the hearing. It is one thing for the parties to exchange material and discuss submissions before proceedings, it is entirely another for the parties to collude for the purpose of tailoring the evidence they intend to give in proceedings. There is no evidence of the latter.

5. In any event, even had there been some basis for concluding that the two parties had aligned themselves, that had nothing to do with the Tribunal. It stood alone and independent. There is no evidentiary basis whatever to suggest that a reasonable and fair-minded person, with knowledge of the issues and the general gist of the evidence, might reasonably apprehend that the Tribunal might not bring an impartial mind to the resolution of the questions it had to decide.

6. The premise on which this ground is based is not established.

Leave to appeal

1. The Mother contends that that the following grounds warrant the exercise of the discretion to grant leave to appeal:

1. The existence of fresh evidence;

2. Findings made by the Tribunal said to be against the weight of evidence, namely:

1. that the Mother was unable to exercise the access function;

2. that the Mother had a conflict of interest with the Son; and

1. The purported failure of the Tribunal to give paramount consideration to the welfare and interests of the Son by giving the Public Guardian an access function.

1. Mr Fogarty opposes leave to appeal being granted.

Principles governing grant of leave to appeal

1. In Collins v Urban [2014] NSWCATAP 17 (Collins) at [84], an Appeal Panel of NCAT stated that there must be a "sound basis" for granting leave to appeal under s 80(2)(b) of the NCAT Act. The Appeal Panel said that an appellant must demonstrate something more than that the primary decision maker was arguably wrong in the conclusion arrived at or that there was a bona fide challenge to an issue of fact. Ordinarily, it will only be appropriate to grant leave to appeal in matters that involve:

"(a) issues of principle;

(b) questions of public importance or matters of administration or policy which might have general application; or

(c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;

(d) a factual error that was unreasonably arrived at and clearly mistaken; or

(e) the Tribunal having gone about the fact-finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed"

(Citations omitted)

1. The factors listed in Collins relevant to the exercise of the discretion to grant or to withhold leave to appeal from a decision are "not an exhaustive list": AHB v NSW Trustee and Guardian [2017] NSWCATAP 79 at [58]; Edwards v Commissioner for Fair Trading, Department of Finance, Services and Innovation [2019] NSWCATAP 208 at [34]. Where, as here, the decision under appeal was made by the Guardianship Division of NCAT, a relevant consideration in the exercise of the discretion to grant leave is the protective character of the jurisdiction exercised by the Division: C v W [2015] NSWSC 1774 at [44]-[46]; P v NSW Trustee and Guardian [2015] NSWSC 579 at [56]; ZII v ZIJ [2018] NSWCATAP 255 at [60].

Fresh evidence

1. In an affidavit sworn 2 August 2024 the Mother said:

"If I am granted the access function in respect of guardianship of [the Son] I consent to supervised access and I will pay for a private nurse or carer if need be to facilitate such access."

1. The Mother contends that that affidavit constitutes fresh evidence and warrants the grant of leave to appeal. She said that since the hearing of the review application in May 2024, she has reflected on her position and decided that if given an access function she would permit Friend 1 to visit the Son subject to the same conditions that had been imposed by the hospital, that is, that the visits be supervised.

2. Mr Fogarty opposes leave being given to appeal on the basis of the purported fresh evidence. He points out that the claim made by the Mother in the affidavit dated 2 August 2024 that she would permit supervised access to the Son conflicts with what she said in an email sent to Friend 1 a week before she prepared that affidavit:

"Hi [Friend 1]. Further to my telephone conversation with you in regards to [the Son] not wanting you to visit him at the hospital, am now requesting you to Never ever visit him either at the hospital or at his place of residence or anywhere else at any time/ day as your visits are antagonising him and making him get irritated and uncomfortable and frustrated which in return are making his health worse. For the sake of [the Son's] health wellbeing and welfare, I

wish you do understand and comply with this request and please keep away from him. Thanking you for your understanding, consideration and cooperation in this respect and request.

[New email]

Hi [Friend 1] I asked you to NEVER Ever come to visit my son in hospital or anywhere else but you seem NOT to have respected my request at around...

...

I have accepted my son as a gay person and so that's not a problem to me BUt you are . Get lost !!

Evil and psychopath describes you who can come to the hospital and tell a lie !!

Am glad you have come to know that am not a woman to be taken advantage of or taken as a fool by a person who pretends to be an angel while they are a devil. No MORE get or find someone else kid to exploit ! You are a 60 plus old man so stop taking advantage of young boys. I have always been in my son's life despite your interference. What does an old man want when you have been told to stick your ass somewhere else !! Get lost please otherwise!!

Please stop sending me any more messages as my message is clear ... leave my son alone and stop visiting him in hospital or anywhere else in that case. Bye old man!!

..."

1. In addition, Mr Fogarty contends that the proposal that Friend 1's visits be monitored is contrary to the section 4 principles, specifically that the guardian must restrict the Son's freedom of action and decision-making as little as possible (s 4(b)); encourage the Son as far as possible, to live a normal life in the community (s 4(c)); and, in relation to the exercise of the access function, take the Son's views into consideration (s 4(d)).

2. The Mother claims that she sent the email to Friend 1, referred to above, sometime before 23 July 2024. The reason that email carried that date was because that was when she forwarded it to her then legal representative.

Consideration

1. Generally, fresh evidence must satisfy three conditions: it could not have been obtained with reasonable diligence in the original proceedings; there is a high degree of probability that, if admitted, there would have been a different result in those proceedings; and the evidence must be credible: Akins v National Australia Bank (1994) 34 NSWLR 155 at 160, Clarke JA (Sheller JA agreeing); Agripower Barraba Pty Ltd v Blomfield (2015) 317 ALR 202; [2015] NSWCA 30 at [68] (Sackville AJA).

2. The existence of fresh evidence may warrant the exercise of the discretion conferred by s 80(2)(b) of the NCAT Act to grant leave to appeal. In appropriate circumstances, evidence that was not before the Tribunal at first instance but that does not meet the conditions to constitute fresh evidence might warrant the exercise of that discretion.

3. For current purposes we will assume but not decide that, as she claimed, the Mother sent the email to Friend 1 set out at [79] above before 23 July 2024, and that her claim that she would permit Friend 1 to visit the Son under supervision is genuine.

4. The concerns which led the Tribunal to conclude that it was not satisfied that the Mother was able to exercise the access function in a manner which conforms with the section 4 principles included the Mother's fixed and intractable view about the desirability of Friend 1 visiting and maintaining association with the Son: Reasons at [66]. It is unlikely that concern would be addressed solely by the Mother's concession that she would agree to visits by Friend 1 if supervised. That concession does not address the central concern identified by the Tribunal that, as a result of her fixed views, the Mother was unwilling or unable to give proper consideration to the views expressed by others, including the Son and those involved in his care. Further, that concession would not address the finding by the Tribunal that if the Mother were to be given an access function it would have the potential to damage her relationship with the Son.

5. Finally, we note, as correctly stated by the Tribunal, its role was not to decide whether an access decision should be made on behalf of the Son, and, if so, the type of decision. Rather, the Tribunal was required to evaluate whether the Mother was able to make those decisions in a manner which conforms with the section 4 principles. It may be that the decision which best gives effect to those principles is to prohibit Friend 1 and others from visiting the Son under any circumstances. Alternatively, it may that no restrictions should be placed on Friend 1 and others visiting the Son.

6. We are not persuaded that if the Mother's recent affidavit had been before the Tribunal, there is a high degree of probability that there would have been a different result in the proceedings. Nor are we persuaded that the evidence of the Mother's changed view warrants the exercise of the discretion to grant leave to appeal.

Against the weight of evidence

Unable to exercise access function

1. The Mother contends that the finding that she was unable to exercise the access function was against the weight of evidence. The submission constitutes an expression of disagreement with that finding. The finding was one open on the available material, which the Tribunal discussed at [66]-[68].

Unable to exercise access function ... without conflict of interest

1. At [71], after considering the evidence about the Mother's ability to exercise the access function, the Tribunal and said:

"The Tribunal is satisfied that [the Mother] is unable to exercise an access function objectively and without conflict of interest. In these circumstances, and absent an alternative private person who may be appointed, the Tribunal decided to appoint the Public Guardian as [the Son]'s guardian for the purpose of making decisions about [the Son]'s access to others."

(Emphasis added)

1. As the Mother correctly points out there was no evidence that there was a conflict between the Mother's interests, financial or otherwise, and those of the Son.

2. The Reasons read as a whole and not approached with an "eye keenly attuned to the perception of error" (Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6; (1996) 185 CLR 259 at 272) indicate that in the passage above the Tribunal was not referring to the expression "conflict of interest" in the commonly understood sense, as used for example in s 17(1)(b) of the Guardianship Act (a person shall not be appointed as ... guardian ... unless the Tribunal is satisfied that ... there is no undue conflict between the interests (particularly, the financial interests) of the proposed guardian and those of the person under guardianship...". Rather, the Tribunal was using that expression in the sense used by the PG representative in his submissions to the Tribunal. Referring to those submissions, the Tribunal recorded at [52]:

"[The PG representative] told us that he believes that there would be a conflict of interest in appointing [the Mother] into this role. She has firm views about the decisions that should be made around [the Son]'s access to others, which do not necessarily accord with [the Son]'s wishes or the objective observations of those involved in [the Son]'s day to day care."

(Emphasis added)

1. It is apparent from the above paragraph that the PG representative was using the term "conflict of interest" to mean a conflict between the views of the Mother and those of the Son and those charged with his care. While this is an inapt use of that term, it is apparent that that is the sense in which it was used by the Tribunal at [71]. We are bolstered in that view by the absence of any mention in the Reasons of the financial or other interests of the Mother or the Son. The Tribunal's inapt use of the term "conflict of interest" does not warrant the grant of leave.

The purported failure of the Tribunal to give paramount consideration to the welfare and interests of the Son by appointing the Public Guardian.

1. This ground is misconceived because it fails to acknowledge that to give the Mother an access function, the Tribunal was first required to be satisfied that she met the threshold requirement of being able to exercise that function.

Conclusion

1. The Mother has failed to identify any point of principle, question of public importance, an unorthodox approach to the fact finding, a finding that was unreasonably arrived at, or a clear injustice.
2. Leave to appeal is refused.

Orders

1. Leave to appeal is refused.
2. Appeal is dismissed.

****

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

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 06 January 2025

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://www.caselaw.nsw.gov.au/decision/194294a79e0466d37c1b5719

CASE PAGE https://chat.esheria.ai/case-law/australia/yjo-v-yjp-2025-nswcatap-7-2025

Prepared on 30 October 2026 · Esheria