

CITATION: *Satu Wieland v HS* [2004] NTMC 042

PARTIES: SATU WIELAND

v

H.S

TITLE OF COURT: Local Court

JURISDICTION: Adult Guardianship Act

FILE NO(s): 20302548

DELIVERED ON: 26 May 2004

DELIVERED AT: Darwin

HEARING DATE(s): 24 May 2004

DECISION OF: Jenny Blokland

CATCHWORDS:

ADULT GUARDIANSHIP -- AUTHORITY OF GUARDIAN TO CONSENT TO RESTRAINT -- REPRESENTED PERSON'S WISHES -- HUMAN RIGHTS.

Adult Guardianship Act (NT), ss 4,17,18,20,21.

Re Application for Guardianship Order (BCB) [2002] 28SR (WA) 338;
Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case) (1992) 175 CLR 218;
Soulitopolous v La Trobe University Liberal Club [2002] FCA 1316;
Inquest into the death of Rita Anderson NTMC 004 [2004]

GA Res (3447) 1975 *General Assembly Declaration on the Rights of Disabled persons*;

GA Res (2856) 1971 *General Assembly Declaration on the Rights of Mentally Retarded Persons*.

Martin Flynn, "Human Rights in Australia," Butterworths 2003 at 32

REPRESENTATION:

Ms Dikstein: in her capacity as Chief Executive, Officer
Adult Guardianship

Mr Rowe : For the Department of Justice, for the staff of the Office of the Public
Guardian

Mr Tiffin: instructed by NAALAS for the represented person.

Mr Farquar: instructed by Cridlands for the affected staff of the Department of
Health and Community Services

Judgment category classification: B

Judgment ID number: [2004] NTMC 042

Number of paragraphs: 30

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20302548

BETWEEN:

SATU WEILAND
Applicant

AND:

H.S.
Respondent

REASONS FOR DECISION

(Delivered 26 May 2004)

Ms Jenny Blokland SM:

Introduction

1. This matter raises an issue not usually encountered in the Adult Guardianship jurisdiction, namely, whether the relevant orders should include an order conferring the ability on the Adult Guardian to consent to the use of certain limited restraints on behalf of the represented person when her health or safety are at serious risk. The Court file indicates that orders were first made on 11 August 2003 declaring the represented person a person with an intellectual disability and in need of an adult guardian. The order was conditional within the meaning of s 18 (1) *Adult Guardianship Act* and the Public Guardian was appointed with certain non controversial functions and authorities. The orders were reviewed on 9 February 2004 and in substance were continued. On 19 May 2004 the court made a further order conferring authority on the adult guardian “to consent to the use of restraint either (chemical or physical) if [HS ‘s.] health or safety are at risk and when no alternative or less restrictive measure can be undertaken”. The matter

was adjourned to 24 May 2004 for mention. At that mention it became clear that the various parties sought to make submissions on the legality or appropriateness of that particular order or the breadth of the order.

2. Discussions between Mr Rowe (for the Department of Justice) and Mr Tiffin (for the represented person) led to a suggestion of an alternative way to deal with the issue (by means of reference to a Behavioural Management Plan). Still the fundamental issue remains whether this court has the power to make the order consenting to certain limited and defined restraints in the Behavioural Management Plan.

The Evidence Concerning the medical Condition of the Represented Person.

3. The represented person's disabilities and social circumstances are extreme. She is a 35 year old woman born in Alice Springs who has resided in the Darwin "long grass" for the past five years: (report of the Adult Guardianship Officer). Her children have been raised and cared for by various relatives: (Report of the Adult guardianship Officer) She has sustained organic brain damage and has alcohol induced epilepsy and has insulin dependant diabetes: (Report of Mr David Gawler (surgeon) and report of the Adult Guardianship Officer).
4. The represented person has primarily resided at Royal Darwin Hospital since her admission on 4 November 2003. The Adult Guardianship Officer's report indicates her "continued hospitalisation is not as a result of medical condition but due to there being no other suitable accommodation options available". She has a Patient Care Assistant who is with her 24 hours a day. Her behaviours are difficult to manage as she often displays determination to leave the hospital. She displays aggressive behaviour towards the staff who attempt to stop her from leaving and is often seen at the bus stop with her bags.

5. Mr Gawler's report of 21 May 2004 persuasively sets out the need for constant medical supervision. I will set out the contents of his report as I have placed a great deal of weight on it in coming to my ultimate decision.

“[H.S] has been an inpatient at this hospital under my care since 5th November 2003. She was admitted with serious burns and a left subdural haematoma on a background of previous brain injury. She also had a history of alcohol abuse and it is thought she has suffered from domestic violence on numerous occasions. She had a protracted course but eventually the burns healed and her brain injury improved but she remains with an ataxic gait, apraxia as well as poor depth perception and poor insight into her condition. In addition she has epilepsy and during this last weekend has two epileptic fits despite being on appropriate treatment. In addition she has insulin dependant diabetes and this has been difficult to control. Yesterday she had a hypoglycaemic episode.

Many months ago she was discharged to the Christian Outreach Centre Hostel because this institution does not allow drugs or alcohol, however she promptly absconded and returned to the hospital in a drunken state after a fit”.

There is no doubt this patient cannot be discharged to the community. She was living in the long grass previously and it is to the long grass she will return. She has family in Alice Springs but they are unable to care for her. Even if they were able to care for her, her needs would be beyond their capacity to supply. This is because she needs her regular injections of insulin and she needs supervision of her oral medication. Because she continues to have occasional fits and episodes of hyperglycaemia, or hypoglycaemia this patient requires nursing supervision 24 hours per day.

In addition due to her brain damage and alcohol addiction, she is not capable of caring for herself in the community. There is a very high risk she will be used and abused and will be at serious risk of bodily harm or worse. Consequently this patient warrants long term nursing supervision with access to nursing care 24 hours per day, to manage her medical problems. She also needs to be confined for her own protection, bearing in mind her addiction to alcohol and her brain damage, which render her judgment and insight deficient. There is no doubt that discharge from this hospital into the community, would put her life and health in serious danger both from the point of view of her medical problems and from the point of view of her combination of brain damage and alcohol addiction rendering her vulnerable to abuse. Further, I do not believe that a situation with

limited constraint and with part time nursing availability would be satisfactory. Sometimes her fits or hypoglycaemic episodes occur outside normal working hours and require urgent attention with intravenous medication. She does need access to qualified nursing care twenty four hours a day together with confinement for her own protection.”

6. These observations are further supported by Dr James Stephen who has also provided a report.
7. Concerns of the nursing staff have been provided through detailed reports from the Director of Nursing, Surgical, Ms Sharon Sykes. Ms Sykes details the intensive supervision of the represented person, noting that she is able to walk freely in and outside of the hospital building but needs to be followed constantly by the Patient Care Assistant whose role is to maintain safety for her and others around her. The represented person becomes agitated often and attempts to leave the hospital. Coaxing and distractions are used to prevent her taking this course. The situation escalates from time to time into aggressive behaviours and the presence of security officers or police is required. Ms Sykes is concerned at the inappropriateness of the use of physical restraint by nursing staff and carers. She supports the Behaviour Management Plan that has been proposed.
8. Senior Constable Pemberton, the hospital based Constable has provided a statement indicating her involvement with the represented person. She has noted deterioration in her condition. She agrees she is in danger of harm, exploitation and abuse if she leaves the hospital. Her behaviour is noted as impulsive and aggressive. She refers to instances of Security staff and police (including herself) needing to persuade her to return. She is concerned about the “grey-area” of the powers of restraint.
9. The Acting Senior Manager of Aged and Disability Services, Ms Janice Diamond has also provided a report indicating that an alternative model of care has been investigated but that it is expensive and currently there are no

vacancies in supported accommodation. She has assisted in the development of the behavioural management strategy.

10. Both Ms Dysart and Elspethy Crosby, of the Adult Guardianship Office have reported to the court that they see only two choices:

“To seek authority to consent to restraint to ensure [HS] remains in RDH until appropriate supported accommodation is made available or,

to according to her wishes and consent to her release from RDH knowing that this decision is likely to result in serious risk to [HS’s] health and welfare.”

Discussion of the Issues

11. Ms Dikstein, Executive Officer, Adult Guardianship opposes the making of the order arguing the *Adult Guardianship Act* does not permit such an order, even in its more modified form, as presented by Mr Rowe (for Department of Justice) and broadly supported by Mr Tiffin who was initially very concerned at the breadth of the original order. Mr Farquar also supports the proposal advanced by Mr Rowe with some modifications for removal of any doubts. Clearly all parties are motivated by concerns for the represented person and for some clarity to be brought to their obligations and functions. It may seem unusual that Officers of the Adult Guardianship Office prefer the option being urged on the Court but Ms Dikstein disputed that. It must be remembered Ms Dikstein has an advocacy role under the Act.
12. Reference has also been made of the desire to avoid the tragic consequences raised in *Inquest into the Death of Rita Anderson*. NTMC 004 [2004]. That is completely understandable. Deputy Coroner Morris noted that the Adult Guardianship Act may assist but did not need to determine the question of consent to restraint of certain types.
13. I readily accept the *Adult Guardianship Act* primarily involves an approach to ensure the best interests of a represented person are promoted. Further,

respect for the dignity and human rights of the represented person are paramount. This is not an application for a *full guardianship* order under s 17 that confers on the guardian *all the powers and duties which the guardian would have if he or she were a parent and the represented person his or her infant child*. I was advised that consistent with the principle of *least restrictive means*, such an order has never been made. It is true, as Ms Dikstein submits, there is no express power under the Act to order the guardian to consent to and restraints. It is clear to me, that consent to limited restraints arises by necessary implication. The Act does not require that every function or authority exercised under the Act must be consistent with the represented person's wishes. *Section 4* provides as follows:

“Every function, power, authority, discretion, jurisdiction and duty conferred or imposed by this Act is to be exercised or performed so that –

- (a) those means which are the least restrictive of a represented person's freedom of decision and action as is possible in the circumstances are adopted;
- (b) the best interests of a represented person are promoted; and
- (c) the wishes of a represented person are, wherever possible, given effect to.”

14. It is immediately apparent that (c) is qualified. It is not always possible to give effect to the represented person's wishes. It is not possible to give effect to her wishes to leave without there being a serious risk to her health. A responsible decision based on the welfare and best interests of the represented person is that for now she should remain in hospital. In my view it is clear that the best interests of the represented person are served by her remaining where she is until more suitable care is available. I am influenced by the fact that the need for her presence at the hospital is so inextricably linked to decisions concerning her health care and safety that it would completely defeat the efficacy of the Conditional Order if she were to leave. Under s18 *Adult Guardianship Act*, subject to s 4, the court is permitted to

confer specific powers on the Guardian that a guardian would have under a full order. I make the observation that a parent whose child was faced with these risks associated with leaving hospital would agree to some minimal level of restraint to stop those risks eventuating.

15. In my view, the current proposal referring as it does to a six stage process that is directed primarily at persuasion and diversionary attempts followed by the possibility of minimal force by police to prevent her leaving followed by the possible administration of Diazepam or other specified medication with appropriate notifications and documentation is a sound plan in all of the circumstances. A number of forms of both mechanical and physical restraint are specifically excluded.
16. In my view the purpose of the consent to certain limited restraints in this case and particular only to this case is part and parcel of consenting to medical treatment. Further, under the *Guardianship Act*, the guardian must act in the best interests of the represented person and s 20 (d) of the Act specifically states that the guardian must act as far as possible “in such a way as to protect the represented person from neglect, abuse, or exploitation.” In this situation, there really is no other choice to protect the represented person other than by ensuring she stays at the hospital.
17. Mr Rowe has referred me to *Re Application for Guardianship Order (BCB)* [2002] 28 SR (WA) 338, a decision of the Guardianship and Administration Board of Western Australia concerning an issue of restraint of an elderly person in a nursing home. There are of course many legal and factual distinctions, however it is interesting to note that the Board on that occasion thought it unnecessary to rely on the Common Law doctrine of necessity, particularly given the observations of McHugh J in *Secretary, Department of Health and Community Services v JWB and SMB (Marion’s case)* (1992) 175 CLR218 relating to concerns of a complete transfer of decision making to the medical profession. *Marion’s Case* involved the question of whether the

guardians (parents) could or should obtain an order from the Family court concerning consent for a hysterectomy to be performed on a severely disabled child. The Board considered that it was appropriate for a guardian to be appointed and that the guardian make decisions concerning medical treatment including restraints. As part of the reasoning the Board in *BCB* considered as follows at 349: .

“in relation to the question of restraints, we examine the issue generally in relation to aged care or similar facilities before considering the specific situation of the represented person. In doing so, the Board acknowledges, as did each of the submissions in this case, that the use of restraints is a complex matter which should not be viewed in isolation. A holistic care management regime should be taken into account. It is accepted that the use of restraints is a very invasive procedure but in appropriate circumstances may be necessary.”

18. Ms Dikstein agreed that I needed to consider that on this occasion the Public Guardian was appointed as Guardian but it was also conceivable that a family or community member might be involved as a guardian in other cases. Although I agree that factor would add complexities to the management of a given case, it does not persuade me that my interpretation is wrong.
19. Both Mr Farquar and Ms Dikstein have mentioned examples when the court has allowed the guardian to consent to the use of restraints to achieve a particular outcome (such as moving a represented person). There is little in terms of available reasons for those decisions and although of great interest to me, I can't rely on them due to there being so little information about them.
20. Ms Dikstein requested that I submit this matter to the Supreme Court as a case stated. Although it would be very useful to have a decision on this point from the Supreme Court, there is also a need for a decision to be made so that the interests and welfare of the represented person doesn't suffer through lack of clarity and those interested in her care and welfare have

some clarity quickly. If any party believes it is in error, this decision can of course be appealed.

21. Ms Dikstein also suggested that I lay down some guidelines or limits generally on how consent to restraint might operate. I don't believe this is the right occasion for attempting to introduce such guidelines. The cases involving this question are fortunately rare. I have noted the various policy guidelines of the Office of the Public Guardian (NSW) given to the Court by Mr Farquhar. I am not in a position to say whether they would be appropriate in this jurisdiction. In essence the approach taken by all parties (although with some different conclusions) in this case is one that I obviously broadly adhere to, namely that to justify any restraint, there must be a risk of serious harm, injury or serious deterioration of the person's condition. That risk must outweigh the negative affects of any restraint, (including the sense of loss of dignity the person may feel.) The restraint must be minimal and carefully defined and there must be institutional and judicial safeguards including an ability to review.

22. It is an important principle of statutory interpretation that when construing statutes and regulations, a court will, so far as possible, prefer an interpretation that is consistent with Australia's treaty obligations: (as discussed in Flynn, "Human Rights in Australia", Butterworths 2003 at 32). It is also important in cases involving issues of liberty and personal integrity that statutory construction should be consistent with generally accepted human rights norms. An interpretation to the contrary would be of serious concern. After some brief research in the time available, it appears to me that International Law, although protecting the rights of persons with disabilities generally through the Covenants and particularly through the 1975 General Assembly Declaration on the Rights of Disabled Persons (3447) does envisage certain restrictions that are permissible when certain criteria have been met. Paragraph four of the Declaration on the Rights of Disabled Persons states:

“Disabled persons have the same civil and political rights as other human beings; paragraph 7 of the Declaration on the Rights of Mentally Retarded Persons applies to any possible limitation or suppression of these rights for mentally disabled persons.”

23. Paragraph 7 of the (earlier) Declaration on the Rights of Mentally Retarded Persons (2856) states:

“Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities..”

24. Although the protected person is not mentally retarded, general human rights law concerning the people with disabilities appears to adopt principles reflected in paragraph (7) of the *Declaration on the Human Rights of Mentally Retarded Persons*. The history of the use of these Declarations in Australian Law are traced (in the federal Jurisdictions) by Justice Merkel in *Soulitopoulos v La Trobe University Liberal Club* [2002] FCA 1316, 25 October 2002. Although that is a Federal *Disability Discrimination Act* case, I take some assurance from His Honour’s discussion on the use of the Declarations and the importance of maintaining their standards in general Australian Law.
25. The safeguards for the represented person are the involvement of the Public Guardian, the political responsibility of the Attorney General, the opportunity for any party to appeal to the Supreme Court and the ability for any party to request a review at any time.
26. I am going to order that this matter be reviewed within two months. Although the requested order will be made on this occasion, depending on

how circumstances evolve, it must be remembered that limited restraint will not be able to be used indefinitely at the hospital. It is the aspiration of all parties that supported accommodation be found and I think any future court dealing with the matter will expect steps to have been taken towards the realization of that aspiration.

27. I intend to make the Conditional order as agreed by the majority of the parties. The paragraph of the order in contention, should, in my view read:

“3 (d) the authority to consent to health care under Section 21 (1) (b) of the *Adult Guardianship Act* includes the authority to consent to:

(i) The use and means of restraint as set out in the “Behaviour Management plan – [HS] Ward 2A” which is attached this order

(ii) The police using minimum force necessary to arrange the prompt return of the represented person, to the Royal Darwin Hospital. Such restraint also includes detaining her for such time as proper arrangements are being made. ”

28. I shall check with counsel one last time on the appropriateness of the wording of this order and on any amendments to the Behaviour Management Plan prior to making final orders.

29. I thank all parties and their representatives for their thoughtful submissions in a difficult matter.

30. In the interests of transparency given this is an unusual decision, I authorise these reasons to be distributed on the court Web site, and any further reasonable publication provided it does not lead to the identification of a person in respect of whom these proceedings have been brought. (s26 (1) *Adult Guardianship Act*).

Dated this 26th day of May 2004.

Jenny Blokland
STIPENDIARY MAGISTRATE