

CITATION: *Vincenzina Zangari v J.O.N.* [2005] NTMC 022

PARTIES: VINCENZINA ZANGARI

v

J.O.N.

TITLE OF COURT: Local Court

JURISDICTION: Adult Guardianship Act

FILE NO(s): 20218244

DELIVERED ON: 14 April 2005

DELIVERED AT: Darwin

HEARING DATE(s): 25 February, 18 March 2005

JUDGMENT OF: Jenny Blokland SM

**CATCHWORDS:**

Adult Guardianship – Intellectual Disability – “illness” – whether includes psychiatric or mental illness.

*Adult Guardianship Act*

*Criminal Code s 43A*

*Mental Health and Associated Services Act*

*Carol Pettola v Daranee Buckley*, NTMC, 8 September 2004, Mr Lowndes SM

*Rex Wild QC v Andrew Heffernan*, NTMC, 14 October 2003, Mr Bradley CM

American Psychiatric Association, “Diagnostic and Statistical Manual of Mental Disorders” (DSM IV, 4<sup>th</sup> Edition)

Dr Alen Ettinger; Professor Andres Kannir; ABC “The Health Report”, 28 February 2005; [www.abc.net.au/rn/talk](http://www.abc.net.au/rn/talk)

Professor Bruce McEwen, ABC “The Health Report”, 28 February 2005;

[www.abc.net.au/rn/talk](http://www.abc.net.au/rn/talk)

Hansard, Legislative Assembly, 2R Speech, Adult Guardianship Bill, Minister Dale, at 3420

**REPRESENTATION:**

*Counsel:*

Applicant: Ms Martin

Respondent: Ms Marris

*Solicitors:*

Applicant:

Solicitor for the Northern Territory

Respondent:

Marris Solicitors

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A

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[2005] NTMC 022

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25

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

No. 20218244

BETWEEN:

**VINCENZINA ZANGARI**  
Applicant

AND:

**J.O.N.**  
Respondent

REASONS FOR DECISION

(Delivered 14 April 2005)

Mr BLOKLAND SM:

1. This application raises an issue of whether the word “illness” within the context of the *Adult Guardianship Act* embraces the concept of “mental illness” and in turn whether “intellectual disability” can embrace the concept. In my view “illness” does naturally embrace both the mental and physical but that view requires some substantial justification as it is not a view shared by all of my colleagues whose views I of course respect. It also has consequences for applications under the *Adult Guardianship Act* that I hear, because unless satisfied to the contrary view in the future, or there is a successful review of this decision, I will continue to take the more expansive approach to the term “illness” and will allow an Adult Guardianship order to be made provided other criteria under the *Adult Guardianship Act* has been met. I note some of my colleagues already take this view but those decisions are not published. In the case at hand, one colleague was prepared to make the original order for the appointment of an Adult Guardian in December 2002. On review of the order on 13 December

2004, Mr Gillies SM set the question of continuing the guardianship order down for hearing on the basis that the represented person may not suffer from an “intellectual disability” because the relevant “illness” appeared to be a psychiatric condition. Mr Gillies SM effectively raised the issue of whether the represented persons condition could amount to an intellectual disability.

2. It should be noted that both the applicant and the solicitor for the represented person support the continuation of the order. I am mindful there is no contradictor, hence I will deal with the relevant contrary arguments in the course of these reasons. I had considered stating a case to the Supreme Court. That course was initially supported by both counsel but in correspondence to me since, counsel have suggested a doubt about the Court’s powers to refer this matter to the Supreme Court. In those circumstances, I will proceed to make a ruling on the matter notwithstanding there is a divergence of opinion within the Court about the question.

### **Relevant Provisions of the *Adult Guardianship Act***

3. The preamble to the *Adult Guardianship Act* states that it is “An Act making provision for a scheme of guardianship for certain adults under an intellectual disability, and for related purposes” The relevant interpretation provisions under s 3 are as follows:

“disability” means intellectual disability

“intellectual disability” means a disability in an adult resulting from an illness, injury, congenital disorder or organic deterioration or of unknown origin and by reason of which the person appears to be unable to make reasonable judgements or informed decisions relevant to daily living.

Further, s 3(3) provides:

- (3) A person shall not be considered to be under an intellectual disability by reason only that the person –

- (a) express – stet or refuse, or fails to express a particular political, anarchic, religious, irreligious, legal, illegal, moral, or immoral opinion; or
- (b) engages in or refuses or fails to engage in a particular political, anarchic, religious, irreligious, legal, illegal, moral or immoral activity.

4. The Local Court constituted by a Magistrate has the power after a hearing to make guardianship orders, and a number of ancillary orders: (*ss 11-13*). Under *s 15*, the Court may make an order appointing an adult guardian if it is satisfied that the person is under an intellectual disability and is in need of an adult guardian. The whole philosophy of the *Adult Guardianship Act* is that decisions of various kinds that might be made in relation to a represented person must be made in their best interests to encourage and assist them, if possible to participate in the community and make reasonable judgements on their affairs; *s 20*.

**Discussion of the term “illness” in the context of s 3 *Adult Guardianship Act***

5. Acts of Parliament must be read as a whole; words of a statute must be read in their context and words should be interpreted in accordance with their current meaning. These uncontroversial aids to interpretation lead me to the conclusion that there is no reason to unnecessarily restrict the word “illness” so that it might exclude the operation of the *Adult Guardianship Act* in relation to persons who are intellectually impaired through “mental illness”. Pearce and Geddes “Statutory Interpretation in Australia”, 5<sup>th</sup> Edition at 93 state that the authorities indicate *that courts should be cautious of suspecting words in legislation that have an ordinary, everyday meaning to intensive analysis. Commonsense, experience of the world and local knowledge should guide the “interpretation of such provisions”*. Use of the word “illness” indicated a broad concept and readily embraces what is even colloquially and readily embraces what is even colloquially called “mental

illness”. A Dictionary meaning of “intellectual” (Shorter Oxford English 5<sup>th</sup> Ed) reads as follows:

**A** adjective. **1** Of or pertaining to the intellect or understanding that is describable as such in relation to the intellect. LME. **B**. That appeals to, engages, or requires the exercise of the intellect. M19

**2** (Able to be) apprehended only by the intellect; non-material, spiritual. LME-E18

**3a** Characterized by or possessing understanding or intelligence. *obsolete* exc. As in sense B. L15 **b** Possessing a high degree of understanding or (esp. analytical) intelligence; given to the exercise of the intellect. Also, of, pertaining to, or characteristic of an intellectual or intellectuals, E19.

**B** noun. **1** The intellect, the mind L16-M17. **2** In *pl.* a Intellectual powers, mental faculties; wits, senses, *arch, colloq.* E17. **b** Things pertaining to the intellect. Now *rare* or *obsolete*. M17.

**3** A person of superior (or supposedly superior) intellect, *esp.* one having an analytic mind; an enlightened person. M17.

**Intellectu´ality** noun [late Latin *intellectualtas*] the quality or state of being intellectual; intellectual power or ability; LME. **Intellectually** adverb (LME. **Intellectualness** noun (*rare*) M19.

The dictionary meaning of “disability” reads:

**disability**/disa´biliti/noun. L16 [from DIS-2 + ABILITY.]

**1** Lack of ability (to do something); inability, incapacity. Now rare. L16.

**2** Shortage of money. E17

**3** An instance of lacking ability; now *spec.* a physical or mental condition (usu. Permanent) that limits a person’s activities or senses, esp. the ability to work. E17.

**4** Incapacity recognized or created by the law; legal disqualification. M17

The dictionary meanings accord with my own understanding of those terms. There is nothing in that terminology that would prohibit inclusion of mental illness from the definition.

6. It has been somewhat problematic on whether the words when read in context of the section or the Act as a whole should be limited to exclude consideration of intellectual disabilities that do not have their genesis in “physical” disorders, injuries and the like. I am aware that it is not enough to define each word separately. Context is everything. My attention has been drawn to *Rex Wild QC v Andrew Heffernan* Case No. 20321492, 13, 14 October 2003 at 17. Counsel have advised the Court that in that matter the learned Chief Magistrate held that in assessing intellectual disability, “illness” does not include “psychiatric illness” and that the basis for the intellectual disability needs to be permanent in nature. Although I have obtained the relevant file from the court Registry I have been unable to extract His Worships reasons and unable to analyse that matter further.
7. My colleague Mr Lowndes SM in *Carol Pettola v Daranee Buckley*, No. 20405525, 8 September 2004 held that there is a clear distinction between mentally ill persons and those suffering from an intellectual disability, such that “mental illness” is excluded from the definition of “intellectual disability” under the Act. In his reasons, His Worship noted *inter alia*, that it was significant that each of the conditions that appear after the word “illness” (at 53) “have a physical orientation and in my view, delimit the otherwise wider meaning of the word “illness”. His Worship said “Put simply, they restrict the meaning of illness to physical illness”. His Worship applied the *noscitur a sociis* rule. This rule might be applied to delimit a word of wide possible construction. The problem I have with His Worship’s conclusion is that on my reading at the definition of “intellectual disability”, the gravamen of the definition is that the person “by reason of” (any one of the enumerated conditions), “appears to be unable to make reasonable judgements of informed decisions relevant to daily living”.

There just does not appear to me to be any reason to limit “illness” to so-called “physical” conditions. It is true that it would not be in keeping with the *Adult Guardianship Act* to allow temporary treatable illnesses to form the basis of a Guardianship Order, but that is contained and controlled by either the need of the relevant condition to be “permanent” as suggested by the Chief Magistrate, or significant enough to warrant a guardian. Further, the very notion of “impairment” is broad envisaging psychiatric or mental conditions, such that, if so called “mental illness” were to be excluded, it would need to be specifically excluded. Similarly “injury” in the section is of wide connotation capable of embracing both physical and mental injury. In my view “Organic deterioration” was obviously specifically included as various forms of dementia and other deterioration have not readily found a way of being recognized in statutes as they are arguably neither an “illness” nor an “injury” and if not specifically included may not have been considered as coming within the definition. The same is the case for “congenital disorders”: These specific terms were not meant, in my view to restrict “illness” and “injury”, but rather to ensure those concepts were not excluded because it is unlikely that they would be regarded as an “injury” or “illness”. By illustration and comparison only, I note the new “mental impairment” provisions of the *Criminal Code s 43A* defines “mental impairment” as inclusive of “senility, intellectual disability, mental illness, brain damage and involuntary intoxication”. A number of these conditions, if not specifically recognized in that statute, would not necessarily be recognized in the former “insanity” defence. A number of those terms have been historically problematic.

8. There is a matter of further significance leading me to reject the restrictive meaning namely, the duality underlying “physical” illness or injury on the one hand and “mental” or “psychiatric” illness or injury on the other shows an assumption that obscures the fact that there is not always a clear line between the two. Current literature recognizes that many so called “mental”



conditions have physical pathology as well. In this case itself there is evidence of the injury to the represented person's brain that the mental illness has caused. The recognition of the relationship between the "mental" and "physical" is discussed at length in American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM – IV, 4<sup>th</sup> Edition); concluding as follows (at page xxxx.):

“The terms *mental disorder* and *general medical condition* are used throughout this manual. The term *mental disorder* is explained above. The term *general medical condition* is used merely as a convenient shorthand to refer to conditions and disorders that are listed outside the “Mental and Behavioural Disorders: It should be recognised that these are merely terms of convenience and should not be taken to imply that there is any fundamental distinction between mental disorders and general medical conditions, that mental disorders are unrelated to physical or biological factors or processes, or that general medical conditions are unrelated to behavioural or psychosocial factors or processes”.

9. I note this theme is continued at page 181 of DSM IV concerning the discussion of Mental Disorders Due to a General Medical Condition. Examples of recent discussions of the recognition of the interaction of organic, chemical and psychological conditions concern the relationship between epilepsy and depression: (Dr Allen Ettinger; Professor Andres Kannir; ABC “The Health Report” 21 March 2005; [www.abc.net.au/rn/talk](http://www.abc.net.au/rn/talk)) and the relationship between “stress”, chemical changes in the brain and the co-morbidity with chronic diseases: (Professor Bruce McEwen, ABC, “The Health Report”, 28 February 2005, [www.abc.net.au/rn/talk](http://www.abc.net.au/rn/talk)). Indeed, in relation to *schizophrenia*, (being the significant condition concerning the represented person), the DSM IV notes a number of “physical” changes to the brain of persons with schizophrenia. These include, (DSM IV at 305): enlargement of the lateral ventricles; decreased brain tissue; decreased volume of the temporal lobe; medial temporal structures smaller in volume than persons without schizophrenia. In conclusion, in my view, although it is convenient, useful and practical to describe many conditions as either

“physical/organic” or “mental/psychiatric”, this obscures the relationship between the two and may distort the application of the law.

10. Reliance on extrinsic aids such as the Legislative Assembly debates are not of great assistance on this particular point, although I note the then Minister for Health and Community Services, Mr Dale states (see Hansard, 2R Speech 3420):

“Because some of the people exhibit behaviour which appears at times to be consistent with some types of mental illness, they have been treated as mentally ill. Alternatively, they have been imprisoned for offences which they have committed and this has not been an appropriate, effective or humane method of dealing with them. Most of the people this legislation will assist would not be described as mentally ill. They simply lack the intellectual ability to make reasoned decisions for themselves”

In my view this indicates an acknowledgment that some mentally ill people will be potentially included in the Adult Guardianship scheme. Of course, the definition seeks to do much more than that and include persons with congenital and organic deterioration conditions that may not otherwise be considered “an illness” or “a disability”. Primarily the Minister repeats the definition section in the second reading speech but does not in any way suggest an exclusion of mental illness of injury. The Minister appears to be more concerned with ensuring cognitive impairment and the specifically enumerated conditions are not excluded.

11. Observations have also been made about the relationship between the *Adult Guardianship Act* and the *Mental Health and Associated Services Act*. I do not see that the interpretation advanced here of the *Adult Guardianship Act* impinges on the functions of the *Mental Health and Associated Services Act*. I would only expect to see applications under the *Adult Guardianship Act* when the represented person suffers from such a severe and prolonged illness or injury (mental or physical) such that they are unable to make reasonable judgements or informed decisions relevant the daily living.

Essentially, their disability would have to be so significant as to require a guardian as contemplated by the Act.

12. A further matter of interpretation concerns s (3)(3) *Adult Guardianship Act*, that is, prohibiting the use of religious or political beliefs and the like from becoming grounds for considering a person to have an intellectual disability. In my view s 3 (3) has no work to do if mental illness or injury is not included in the first place. A protected person's belief about the matters enumerated in s 3 (3) are hardly going to be relevant to conditions other than those considered to be mental illnesses or injury.

### **Consideration of the Particular Matters in this Case**

#### **To summarise counsel's arguments:**

13. The represented person is a 22 year old man diagnosed with schizophrenia of the disorganised type with severe and chronic symptoms. He presents as moderately to severely impaired in his capacity to communicate, to socialise, to think abstractly, to reason in complex ways, and to be appropriately self-initiating and goal oriented. He shows a variety of intentional and concentration deficits consistent with disorganised Schizophrenia. He also shows diminished insight into the nature of his impairments. He requires close supervision of his medication regime. His cognitive impairments appear to be a direct consequence of his illness. (Psychological Report of Fiona Leibrick 14 November 2002, p 6).
14. Schizophrenia is a disorder commonly characterised by the presence of a general cognitive impairment which persists after clinical symptoms have ameliorated. Both the 2002 and 2004 Psychologist's Reports about the represented person agree that his persisting cognitive deficits are likely to be a direct consequence of his mental illness, (ie Schizophrenia) and his history of substance abuse; (Psychological Report of Egan Barnett 3

December 2004, p 5, Psychological Report of Fiona Leibrick 14 November 2002, p 6),

15. The represented persons current deficits limit his ability to learn new information, engage in abstract thinking, or maintain the cognitive regulation necessary for informed decision making. His poor concentration and attention compromises his capacity to adequately register information, negating the possibility of being able to make reasonable and informed decisions. He has extremely limited ability to plan, problem solve or initiate self-care needs and is predominantly dependent on his carers for survival. He has no insight into his medical condition. Therefore, he can not make reasonable decisions in this regard. It is evident from the nature of these deficits that he is incapable of making decisions regarding his welfare and finances. Nor is he able to appropriately plan or organise his daily life. (Psychological Report of Egan Barnett 3 December 2004, p 6).
16. The represented person's mother is Vincenzina Zangari and the applicant in this matter has lived mainly at his mother's home in the last two years except for a period of 1-2 months when he lived with his sister in Western Australia. He trialed living at another mental health accommodation house but only lasted one night and returned the next day to his mother's house. (Adult Guardianship officer Report to Court, 9 December 2004 p. 2).
17. His mother is his financial manager. He receives a Centrelink Disability Support Pension of \$494.10 fortnightly. He pays \$170.00 in rent, \$100.00 for food and \$60.00 for power on a fortnightly basis. It is estimated that his clothing and entertainment amounts to \$165.00 per fortnight. He has no property, shares, bonds, managed funds, or personal property valued over \$10,000. (Adult Guardianship officer Report to Court, 9 December 2004 p 2 and "Income & Expenditure for the represented person").
18. On 16 December 2002, Mr Luppino SM was satisfied that the represented person was a person under an intellectual disability and is in need of an

adult guardian. His condition has not changed. It was on review this year that Mr Gillies SM set the matter for hearing. (Psychological Report of Egan Barnett 3 December 2004, Pp5 & 6, Psychological Report of Fiona Leibrick 14 November 2002, p 6).

19. The represented person was the subject of a Psychiatric Report by Dr Randhir Singh dated 8 July 2002 (see first application for guardianship orders) and more recently, by Dr Ranjith Jayawardana, dated 12 January 2005. (This report was filled on 19 January 2005). Dr Jayawardana confirms that his condition has not changed and there has been little improvement. He also is of the view that the inabilities are part of the effects of an illness, namely Schizophrenia, “causing intellectual disability”. (Psychiatric Report by Dr Ranjith Jayawardana dated 12 January 2005 p 2).
20. It is the expert opinion of Dr Ranjith Jayawardana that “it is now recognised that Schizophrenia causes intellectual disability due to its injurious effects on cognitive functioning of the brain”. (Psychiatric Report by Dr Ranjith Jayawardana dated 12 January 2005 p 2).
21. The represented person is a person with an intellectual disability and in need of an adult guardian. (Psychiatric Report by Dr Ranjith Jayawardana dated 12 January 2005 p. 1 & 2) (Psychological Report of Egan Barnett 3 December 2004, p 6) (Carers Report of Yvonne Sutherland 7 December 2004, p 1) (Adult Guardianship Office Report to Court, 9 December 2004 Pp 2 & 3).
22. The represented person is still suffering from an intellectual disability, and is still in need of an adult guardian.

**I make the following Orders:**

23. Pursuant to section 23(5) of the Act, the following orders are sought:

The order made on 16 December 2002, appointing the Public Guardian and Vincenzina Zangari as the represented persons joint guardians is continued and varied to remove the Public Guardian;

(1) This order is conditional having the effects set out in section 18(1) of the *Adult Guardianship Act* and confers on the Adult Guardian the following authority and functions:

- (a) to make decisions concerning where and with whom the represented person is to live from time to time;
- (b) to make decisions concerning the represented person's health care and to consent to any health care that is in his best interests, except that is otherwise provided for in section 21 of the *Adult Guardianship Act*;
- (c) to make decisions concerning the represented person's day to day care so as to facilitate his access to support services as required;

2. Pursuant to section 16(1) of the *Adult Guardianship Act*, Vincenzina Zangari is appointed as the manager of the finances and estate of the represented person;

3. These orders to be reviewed within two years.

24. In the interests of transparency I permit reporting, publication or broadcast of this judgement provided any report, publication or broadcast complies with 26(2) *Adult Guardianship Act*.

25. It has come to my attention that the Chief Magistrate Mr Hugh Bradley has written a letter to the Minister for Justice and Attorney General on 23 July 2003 that the *Adult Guardianship Act* be amended to clearly include psychiatric illness as a form of intellectual disability.

I would also request that this matter be clarified in Legislation given the divergence of opinion in the Court and the unlikelihood that this matter will be settled by the Supreme Court in the near future given the unlikelihood of appeals in this type of matter.

Dated this 14<sup>th</sup> day of April 2005.

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**J Blokland**  
STIPENDIARY MAGISTRATE