

CITATION: *M v GB* [2013] NTMC 032

PARTIES: M
v
GB

TITLE OF COURT: LOCAL COURT

JURISDICTION: ADULT GUARDIANSHIP

FILE NO(s): 20605476

DELIVERED ON: 11 September 2013

DELIVERED AT: Darwin

HEARING DATE(s): 7 August 2013

JUDGMENT OF: Dr John Allan Lowndes

CATCHWORDS:

ADULT GUARDIANSHIP – MAJOR MEDICAL PROCEDURE –
CONSTRUCTION OF THE WORDS “RELATING TO CONTRACEPTION” –
PURPOSIVE APPROACH TO STATUTORY JUTERPRETATION –
BROADEST POSSIBLE MEANING.

Section 21 *Adult Guardianship Act*

Workers’ Compensation Board of Qld v Technical Products Pty Ltd (1988)

165 CLR 642 applied

REPRESENTATION:

Applicant: Ms Politis on behalf of Adult
Guardianship

Respondant: Mr Clunies-Ross on behalf of NAAJA

Judgment category classification: A
Judgment ID number: 032
Number of paragraphs: 48

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

No. 20605476

BETWEEN:

M

AND:

GB

REASONS FOR DECISION

(Delivered 11 September 2013)

Dr John Allan Lowndes CM:

**BACKGROUND TO THE REVIEW OF THE ADULT GUARDIANSHIP
ORDERS**

1. On 20 June 2011 the Public Guardian was appointed by the Local Court as adult guardian for GB (the represented person). The order was conditional having the effects set out in section 18(1) of the *Adult Guardianship Act* and conferred on the adult guardian the following authority and functions:
 1. to make decisions concerning where and with whom the respondent is to live from time to time;
 2. to make decisions concerning the represented person's health care that is in her best interests except as otherwise provided in section 21 of the Act;
 3. to make decisions concerning the represented person's day to day care so as to facilitate her access to support services as required; and
 4. to instruct solicitors and make decisions in regard to legal matters on the represented person's behalf.

2. The Public Trustee was also appointed by the Court as the manager of the finances and estate of the represented person under section 32 of the *Public Trustee Act*. The orders were to be reviewed by the Court within a period of two years.
3. The orders came before the Court for review on 17 June 2013.
4. According to the Court Report prepared by Natasha May, Adult Guardianship Officer of the Office of the Public Guardian, “consent has been provided for GB to receive regular depo provera injections to support her in managing personal care around times of menstruation”. Such consent appears to have been given in purported reliance on that part of the orders empowering the adult guardian to make decisions regarding the represented person’s health care that is in her best interests except as otherwise provided in section 21 of the Act. In other words, the Public Guardian had formed the opinion that it could consent to the represented person receiving the depo provera injections as being in GB’s best interests in terms of her health care, and did not consider it necessary under section 21 of the Act to seek the consent of the Court to the injections of depo provera.
5. The represented person’s legal representative raised concerns about the Public Guardian having consented to the depo provera injections. Indeed, in the written submissions made on behalf of the represented dated 6 August 2013, it was contended that an injection of depo provera is a major medical procedure as defined by section 21(4) (b) (i) of the Act, and as only the Court can consent to a major medical procedure the Public Guardian cannot consent to the administration of depo provera; and it has been acting outside its authority and powers in doing so.

THE PURPOSE OF A REVIEW AND THE POWERS OF THE COURT UPON COMPLETING A REVIEW

6. A preliminary question that needs to be considered is what, if any, power the Court has to investigate the concern raised on behalf of the represented person, and to give a ruling as to whether the Public Guardian has, in consenting to the represented person receiving the depo provera injections, acted in accordance with the conditional order made in 2011.
7. It is noted that neither party to the proceedings questioned the propriety of the Court in investigating and determining the matter. Of course, that is not determinative of the question. One needs to look further and to examine relevant provisions of the Act.
8. The obvious starting point is section 23 of the Act, which deals with reviews of orders.
9. Section 23(4) requires the Executive Officer to provide the Court at the hearing of a review with such information and reports as it considers necessary to:
 1. determine the effectiveness of the guardianship order in providing care and protection of the represented person;
 2. consider the need for the continuation of the order;
 3. consider any changes in the circumstances of the represented person or of the person's guardian; and
 4. determine any changes which might be considered necessary to the existing order.
10. In determining the effectiveness of an order in terms of it providing care and protection to a represented person, it is abundantly clear that the Court can inquire into the implementation of the order, and the level of compliance with the order, as well as to the extent to which it has been serving the best interests of the represented person. Clearly, if an order has

not been properly implemented, or not fully complied with, then it is difficult to see how the order can be said to have been effective in serving the best interests of the represented person.

11. Furthermore, it is implicitly recognised by section 23 (4)(d) that the Court can remedy any deficiency in the implementation of, or default in complying with, a guardianship order by making necessary changes to the order.
12. Section 23 makes it absolutely clear that, in reviewing a guardianship order, the Court performs a supervisory function in ensuring that orders made by the Court are acted upon in accordance with their terms – and at all times there is compliance with the provisions of section 21 of the Act.
13. Section 23(5) provides that upon completing a review the Court may by order, amend, vary, continue or replace the guardianship order subject to any conditions or restrictions it considers necessary, or revoke the order. Again this subsection implicitly recognises the supervisory function of the Court. Should the Court find some problem with the implementation of an order under review – or the interpretation of the order by those responsible for implementing the order (namely the adult guardian) – the Court is empowered to inform an adult guardian precisely what they can – and what they cannot – consent to in relation to matters involving the health care of a represented person. In exercising this power, the Court may give a ruling as to what constitutes a section 21 “major medical procedure”. Such a ruling could conveniently be included in the final orders made by the Court as an amendment, variation or a condition or restriction.¹
14. I am satisfied that the Court can, in conducting the present review, deal with the concerns raised by the legal representative for the represented person.

¹ See the written submissions made on behalf of the represented person.

THE RELIANCE ON THE DANILA DILBA MEDICAL RECORDS

15. The underlying purpose of the depo provera injections – and presumably the basis upon which the Public Guardian has been consenting to the represented person receiving the injections – is set out in the Danila Dilba medical records and a medical report from the Danila Dilba Health Service dated 4 July 2013 (Exhibit 1)² which states:

As you know (GB) has Downs Syndrome and has regular health checks at Danila Dilba.

(GB's) carers first raised the issue of problems (GB) managing her menstruation with Dr Julian Charles on 6/9/12 and also raised and discussed the issue with Dr Marion Christie on 9/12. On 8/1/13 Dr Roxanne Craig noted a phone discussion with you stating that Life without Barriers carers were requesting medication to stop her menstruating.

From the medical record it seems that (GB) does not notify her carers when she begins menstruating and so she leaks menstrual blood onto her clothes and furniture at her place of residence, her work place and on transport. Even when the carers change her clothes and put in place sanitary pads (GB) is not able to change them. She removes the pads and so leaks menstrual blood and the carers need to clean her and sanitise the furniture continually during the day.

(GB) would have had these issues for many years. It seems she has normal painless menstruation bleeding 5-7 days every month requiring normal sanitary protection. However, due to her intellectual disability she is unable to manage her hygiene issues which also become health risks to other residents and work mates and to carers and staff.

Depo provera is an injectible contraception given intramuscularly every 3 months at DDHS. A common side effect is the cessation of menstruation so it is often used to treat menstrual problems. It is considered safe and is widely used in many settings all over the world. A theoretical risk is that given long term and especially to very young women it may reduce bone mass density and increase fracture risk in old age. There are other rare side effects but the benefits of improving quality of life for patients are considered to outweigh the risks and from the record after discussion with Dr Craig you consented to (GB) receiving dep provera. (GB) is in full time institutional care and is not alone and the carers state she is not at risk of being in a sexual relationship and contraception is not considered

² The medical report is based on the health services medical records.

to be an issue. Depo provera is commonly used in the setting of patients with disability not able to cope with menstruation.

WAS THE CONSENT OF THE COURT REQUIRED FOR THE DEPO PROVERA INJECTIONS

16. The answer to this question really comes down to a matter of statutory interpretation. Everything turns upon the definition of “major medical procedure” as set out in section 21(4) of the Act, and the proper construction of the language employed in that section.
17. Amongst other things, section 21(4) defines a “major medical procedure” as a “medical procedure relating to contraception or the termination of a pregnancy”. What is comprehended by the phrase “medical procedure relating to contraception”?

- **“Medical Procedure”**

18. The first task is to construe the words “medical procedure”.
19. As these two words are not statutorily defined, they are to be accorded their natural and ordinary meaning. Consistent with this approach, there can little doubt that the depo provera injections that have been given to GB qualify as a medical procedure. They do so for the following reasons:
 1. Depo provera injections need to be prescribed by a medical practitioner;³
 2. Depo provera has identified side effects and certain risks⁴ – and presumably needs to be prescribed by a medical practitioner for these reasons
 3. Depo provera is an injectible contraceptive administered intramuscularly;⁵

³ See the letter from Dr Mary Wyatt.

⁴ See the letter from Dr Mary Wyatt and the Danila Dilba medical records.

⁵ See the letter from Dr Mary Wyatt where the doctor describes depo provera as “a brand of progesterone only contraceptive”, which is “a long acting, reversible, hormonal contraceptive which is given as a depo, intramuscular injection every 11-13 weeks”.

and is administered by medical practitioners.⁶

4. An injection is a medical procedure, although it may be considered by some to be a minor medical procedure.⁷

20. The fact that depo provera injections may be regarded in some medical circles as a minor medical procedure is beside the point. The definition of “major medical procedure” does not require the procedure to be “major” in it self. All that is required is that the procedure is a “medical procedure”. Even if the procedure is minor it still qualifies as “major medical procedure” if the procedure relates to “contraception”.

• **“Relating to Contraception”**

21. Having found that depo provera injections qualify as a medical procedure, the next stage in the process of statutory interpretation is to divine the meaning of the phrase “relating to contraception”.

22. A number of early cases, cited in Pearce and Geddes Statutory Interpretation in Australia 7th edition at [12.7], tended to attribute to such phrases as “relates to”, “relating to” or “in relation to” “the widest possible meaning of any expression intended to convey some connection or relation between the two subject matters to which the words refer”.⁸ However, in more recent times there has been a gravitational pull towards taking a more restrictive approach, which emphasises the importance of context in construing such phrases as “relating to” and determining their field of operation.⁹ *Workers’ Compensation Board of Queensland v Technical Products Pty Ltd* (1988) 165 CLR 642 at 653 is typical of this approach:

⁶ See the letter from Dr Mary Wyatt, which, inter alia, states: “Generally intramuscular injections are administered by a trained “medical professional” including doctors, nurses and health workers, hence are considered a “medical procedure”.

⁷ See the letter from Dr Mary Wyatt.

⁸ See *Trustees Executors & Agency Co Ltd v Reilly* [1941] VLR 110 at 111; *Powers v Maher* (1959) 103 CLR 478 at 484-485; *State Government Insurance Office (Queensland) v Crittenden* (1966) 117 CLR 412 at 416; *Frost v Collector of Customs (Qld)* (1985) 9 FCR 174 at 185.

⁹ See Pearce and Geddes *Statutory Interpretation in Australia* 7th edition at [12.7].

The phrase gathers meaning from the context in which it appears and it is that context which will determine the matters to which it extends.

23. This context-dependent approach to statutory interpretation was followed in *Technical Products Pty Ltd v State Government Insurance Office* (1989) 167 CLR 45, where Brennan, Deane and Gaudron JJ described the relevant words as possessing “ a chameleon-like quality in that they commonly reflect the context in which they appear”. This case makes it clear that there must be a nexus in the sense of some discernible and rational link between the two subject matters in question.
24. As Beaumont and Lehane JJ later said in *Joyce v Beach Petroleum NL* (1996) 67 FCR 275 at 285 when discussing a number of the cases dealing with “relates to” :

...it will depend upon context whether it is necessary that the relationship be direct or substantial, or whether an indirect or less than substantial connection will suffice.

25. Subsequently, in *J & G Knowles and Associates Pty Ltd v Commissioner of Taxation* (2000) 96 FCR 402 at 410 the Court had this to say about the relevant connecting phrase:

Whatever question is to be asked, it must be remembered that what must be established is whether there is a sufficient or material, rather than a causal connection or relationship between the benefit and the employment. There is, in any event, a danger in placing too much emphasis on causation.¹⁰

26. In *Australian Competition and Consumer Commission v Maritime Union of Australia* [2001] 114 FCR 472 Hill J said at 487-488:

It may be accepted that there will always be a question of degree involved where the issue is the relationship between two subject matters. The words “in relation to” are wide words which do no more, at least without reference to context, than signify the need for there to be some relationship or connection between two subject matters: see *Smith v Commissioner of Taxation (Cth)* [1987] 164 CLR

¹⁰ This approach was approved of in *Australian Communications Network Pty Ltd v Australian Competition and Consumer Commission* (2005) 146 FCR 413 at 420.

513 at 533... Like the phrase “in respect of ” the phrase “in relation to” will not, at least normally, apply to any connection or relationship no matter how remote : see *Technical Products Pty Ltd v State Government Insurance Office (Qld)* (1989) 167 CLR 45 at 51 per Dawson J. The extent of the relationship required will depend upon the context in which the words are used.

27. Much earlier, in *Tooheys Limited v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602 at 620-1 Taylor J had stressed both the importance of context in divining the meaning of phrases like that under consideration and the need for a “substantial” connection between the two subject matters:

There can be no doubt that the expression “relating to” is extremely wide but it is also vague and indefinite. Clearly enough it predicates the existence of some kind of relationship but it leaves unspecified the plane upon which the relationship is to be sought and identified. That being so all that a court can do is to endeavour to seek some precision in the context in which the expression is used. With this in mind it may be said with some certainty that an examination of the language of the exempting provision shows that it does not admit of its application to an instrument merely because it makes a reference to the existence of a relationship of master and servant between the parties to it, or still less, because it refers to the existence of a master and servant between persons who are not parties to it. It is, I think, not open to argument that “relating to”, in the context in which it appears, is equivalent to “referring to” and the “relationship” must be based upon some more substantial ground. It is, in my opinion, equally clear that the relationship must appear upon an examination of the instrument itself for it is the character of the instrument which is the material question and this cannot be resolved by an examination of extraneous matters in order to determine the purpose of the parties. In other words the condition for the operation of the exempting provision is that the instrument must “relate” and not merely a relationship of some kind can be made to appear by a consideration of the motive or purpose which has brought it into existence.

28. The context- dependent meaning of the phrase “in relation to” was further considered in *Travelex Ltd v Commissioner of Taxation* (2010) 84 ALJR 683 at 688 by French CJ and Hayne J:¹¹

It may readily be accepted that “in relation to” is a phrase that can be used in a variety of contexts, in which the degree of connection that must be shown between the two subject matters joined by the expression may

¹¹ The phrase “in relation to” can be equated to the words “relating to”.

differ. It may also be accepted that “the subject matter of the enquiry, the legislative history and the facts of the case”, are all matters that will bear upon the judgment of what relationship must be shown in order to conclude that there is a supply “in relation to” rights.

29. However, as stated by Pearce and Geddes, expressions such as “in relation to” and “relating to” are “of broad import: per Toohey and Gaudron JJ in *O’Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 374”:

In the same case, McHugh J said (at 376) the phrase “requires no more than relationship, whether direct or indirect, between two subject matters”. The words are “amongst the broadest which could be used to denote a relationship between one subject matter and another”: per Lehane J in *Nordland Papier AG v Anti-Dumping Authority* (1999) 93 FCR 454 at 461. However, the relationship must be between distinct subjects or subject matters.¹²

30. It follows that phrases, like the one under consideration, have by reason of their broad import “an ambulatory significance capable of a wide range of applications”.¹³ Construction of such phrases “involves determining the limits of that range”.¹⁴ Moreover, the exact meaning of the phrase in a particular case will very much depend “on the precise context in which it appears and a consideration of the purpose or object underlying the relevant legislation”.¹⁵
31. Turning now to the present case, the words “relating to” (as appear in section 21(4) of the *Adult Guardianship Act*) create a relationship or connection between a “medical procedure” and “contraception” – two distinct subject matters. Bearing in mind that the precise meaning of ambulatory phrases like “relating to” depends on the specific context in which they appear and a consideration of the underlying purpose of the relevant legislation, what degree of connection or relationship must be shown between the two subject matters before it becomes mandatory to obtain the consent of the Court to a “major medical procedure”?

¹² See Pearce and Geddes n 9 at [12.7].

¹³ See *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414 at 424; 243 ALR 606 at 633.

¹⁴ See *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414 at 424; 243 ALR 606 at 633.

¹⁵ See *Bulter v Johnston Guild and Sones* (1984) FCA 118

32. The starting point is the context in which the relevant words are used and the purpose or object of section 21 of the Act – and indeed the overarching purpose or object of the Act as a whole.
33. The object of the *Adult Guardianship Act* is to make provision for a scheme of guardianship for certain adults under an intellectual disability, and for related purposes. However, it is plain from the wording of section 4 of the Act that the scheme is intended to accommodate the best interests of the represented person:

Every function, power, authority, 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.

34. The overall tenor of the Act is that the least possible restrictions should be imposed on an individual's freedom of decision and action.
35. This approach is carried over into the provisions of section 21 of the Act. As previously stated, adult guardians are unable to consent to "major medical procedures". As stated in the Second Reading Speech:

Clause 21 is significant in that it deals with a contentious subject. This clause restricts the authority of the guardian in that it does not allow major medical procedures to be carried out on a represented person unless the court's consent has been obtained.

36. Significantly, in hearing an application for consent under section 21, the Court is to ascertain the wishes of the represented person as far as is reasonably possible: section 21(6). If the Court is satisfied that the represented person understands the nature of the proposed major medical procedure and is capable of giving or refusing consent to that procedure,

the Court is to give effect to the represented person's wishes: s21(7). If the Court is satisfied on hearing an application under section 21 that it would be in the best interests of the represented person it may by order consent to the major medical procedure: s 21(8). These various provisions reflect the underlying policy of the legislation which is to ensure that guardianship orders operate in a manner that is least restrictive of the person's freedom of decision and action, particularly in relation to major medical procedures (as defined in the Act). The provisions attempt to ensure that in relation to major medical procedures a represented person retains a measure of freedom of decision and action – and understandably so. Medical procedures of the type specified in section 21(4) (a) and (b) of the Act are significant procedures performed on the human body which either impact upon its physical integrity or normal functioning. One can readily understand why the legislature chose to treat medical procedures relating to contraception or termination of a pregnancy as a major medical procedure. Both procedures not only interfere with the reproductive functions of the human body, but more importantly relate to a person's reproductive rights.

37. It is against this backdrop that the phrase “medical procedure relating to contraception” (in section 21(4)(b)) is to be construed.
38. In my opinion, this phrase is to be given its broadest possible meaning. The requirement that the consent of the Court be obtained in accordance with section 21 is activated whenever there is a direct or indirect connection or relationship between a medical procedure and either contraception or termination of a pregnancy. Clearly a causal relationship between a medical procedure and either of these two outcomes would fall within the Act's definition of “major medical procedure”.
39. Given that the facts of a particular case bear upon the judgment as to whether the relevant degree of connection or relationship is demonstrated,¹⁶

¹⁶ See *Travellex Ltd v Commissioner of Taxation* (2010) 84 ALJR 683.

the evidence, in the present case, establishes that depo provera is an injectable contraceptive administered intramuscularly. Although depo provera injections are a non –permanent contraceptive measure, they nonetheless interfere with the reproductive functions of the human body and impact upon a person’s reproductive rights.

40. The depo provera injections previously received by the represented person (which have been found to be a medical procedure) relate to contraception because there is a clear causal relationship between the injections and contraception: a woman receiving such injections cannot conceive.
41. The Public Guardian sought to argue that the depo provera injections should not be regarded as a “medical procedure relating to contraception” because the injections were administered for the purpose of managing the represented person’s menstruation – and not for the purposes of contraception. With due respect this argument cannot be sustained.
42. The words “relating to”, as appear in section 21(4)(b) of the Act, are intended to ignore the objective of the medical procedure in question. All that matters is that the medical procedure have a contraceptive effect. That the procedure may be performed to achieve a different outcome is immaterial, if the end result is that the procedure performed on the represented person renders that person unable to conceive. The end result is important because it interferes with the reproductive functions of the human body and impacts upon a person’s reproductive rights.
43. It is further contended by the Public Guardian that as the represented person is in full time institutional care and is not alone, and she is not at risk of being in a sexual relationship, contraception is not an issue. This argument is misconceived, and must be rejected. Due to the causal connection between the depo provera injections and contraception the injections, as stated above, interfere with the reproductive functions of the human body and impact upon a person’s reproductive rights. Accordingly,

the injections (being the relevant medical procedure) relate to contraception.

44. I have been mindful that there is danger in placing too much emphasis on causation in construing phrases such as “relating to”. However, in the present case, the causal connection between depo provera injections and contraception is so direct and obvious that there is a substantial or material connection or relationship between the depo provera injections received by the represented person and contraception such that the relevant medical procedure could properly be said to be related to contraception; and therefore necessitate an application to the Court pursuant to section 21 of the Act.
45. However, applying the purposive approach to statutory interpretation, I am also satisfied that the medical procedure of administering depo provera injections “relates to contraception” – and therefore qualifies as a “major medical procedure”. The least possible restrictions should be placed on a represented person’s freedom of decision and action in relation to matters of significance such as an individual’s reproductive rights and functions. Section 21 of the Act seeks to achieve that objective. The consent given by the Public Guardian to the depo provera injections had the unfortunate effect of imposing too high a restriction on the represented person’s freedom of decision and action in relation to a medical procedure that affected her reproductive rights and functions.
46. It is indeed regrettable that the consent of the Court was not obtained before the represented person was given the depo provera injections. It is very disappointing that the Public Guardian, apparently acting on medical advice and possibly other advice chose to place an interpretation on the definition of “major medical procedure” which would not require an application to be made to the Court under section 21 of the Act.

47. An application should have been made seeking the consent of the Court to the represented person receiving the depo provera injections. In making that application the Public Guardian would have been able to put to the Court the reasons for administering the injections and to provide the Court with the supporting medical evidence. The Public Guardian would have been given the opportunity to explain that the purpose of the injections was to manage the represented person's menstruation, and that the injections were not intended to act as a contraceptive. Having been provided with that information, the Court would have attempted to ascertain the wishes of the represented person as far as reasonably possible, and where appropriate to give effect to the represented person's wishes. Finally, if the Court were satisfied that it would be in the best interests of the represented person it could have made an order consenting to the medical procedure.
48. I propose to complete the review of the orders made by this Court on 20 June 2011 and to make any amendment or variation to those orders as may be necessary to give effect to the ruling contained in these reasons for decision.

Dated 11 September 2013

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Dr John Allan Lowndes

Chief Magistrate

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