



NSW Civil and Administrative Tribunal  
New South Wales

---

Case Name: LGT

Medium Neutral Citation: [2019] NSWCATGD 9

Hearing Date(s): 10 January 2019

Date of Orders: 10 January 2019

Decision Date: 10 January 2019

Jurisdiction: Guardianship Division

Before: J S Currie, Senior Member (Legal)

Decision: The financial management order made on 21 November 2006 is revoked from 10 January 2019. NSW Trustee and Guardian is to pay over or hand over the estate to LGT.

Catchwords: FINANCIAL MANAGEMENT – application to review or revoke financial management order – whether subject person has regained capacity to manage their affairs – subject person demonstrates awareness of financial position, assets and risks – availability of family and other support – finding of regained capacity – order revoked.

Legislation Cited: Guardianship Act 1987 (NSW), ss 4(a), s 25P(1)–(2)  
NSW Trustee and Guardian Act 2005 (NSW), s 39(a)

Cases Cited: CJ v AKJ [2015] NSWSC 498  
GW v Protective Commissioner & Ors [2003] NSW ADTAP 51  
H v H [2015] NSW SC 837  
McD v McD (1983) 3 NSWLR 81  
P v NSW Trustee and Guardian [2015] NSWSC 579  
Re W and L (Parameters of Estate Management Orders) [2014] NSWSC 1106

Texts Cited: Nil

Category: Principal judgment

Parties: 002: Review or Revoke Financial Management Order

LGT (subject person, applicant)  
NSW Trustee and Guardian (appointed financial manager)  
MFT (spouse)

Representation: Nil

File Number(s): NCAT 2006/00370238

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

## **REASONS FOR DECISION**

### **APPLICATION TO REVIEW OR REVOKE FINANCIAL MANAGEMENT ORDER**

#### **Background**

- 1 LGT, aged 47 years at the time of the hearing, presently lives with her fiancé MFT, with whom she has had a long-term relationship, in rented accommodation in a town on the South Coast of New South Wales.
- 2 On 21 November 2006 the Guardianship Tribunal made a financial management order for LGT, under which the management of her estate was committed to the Protective Commissioner, whose functions are now undertaken by NSW Trustee and the Guardian. At that time the Tribunal accepted medical evidence to the effect that LGT had a moderately severe recurrent depressive illness and dependent personality disorder, first diagnosed in 1999.
- 3 On 19 October 2018 the Tribunal received from LGT an application seeking a review or revocation of her financial management order. The application sought revocation of the order on two grounds; firstly, that LGT had regained the capability to manage her own affairs and secondly, in the alternative, that it would be in her best interests for the order to be revoked.

- 4 The purpose of these proceedings at Sydney was to conduct a hearing of LGT's application. I had to decide whether the financial management order should be revoked on either of the grounds stated by LGT in her application and, if the order were not to be revoked, whether it should be varied.
- 5 I decided that the order should be revoked on the ground that LGT had regained the capability to manage her own affairs. These are my reasons for that decision.

### **Parties and participants**

- 6 The front-sheet to these Reasons identifies the parties to the application and the Appendix identifies the people who participated in the hearing. [Appendix removed for publication.]

### **Issues for determination**

- 7 Under s 25P(1) of the *Guardianship Act 1987* (NSW) ("the Act"), when the Tribunal reviews a reviewable financial management order it must vary, revoke or confirm the order. Under s 25P(2) of the Act, it may revoke the order only if:
  - (1) it is satisfied that the protected person is capable of managing his or her affairs, (this is sometimes referred to as "the regained capability ground"), or
  - (2) it considers that it is in the best interests of the protected person that the order be revoked, even though the Tribunal is not satisfied that the protected person is capable of managing his or her own affairs, (this is sometimes referred to as "the best interests ground").
- 8 Accordingly, the issues which had to be decided by me were:
  - (1) whether the financial management order for LGT should be revoked on either the regained capability ground or the best interests ground; and
  - (2) if the order were not revoked, whether any variation should be made to it.

## **CONSIDERATION**

### **Regained capability ground: legal principles and authorities**

- 9 The Supreme Court of New South Wales has provided guidance in several decisions as to how the Tribunal should assess a person's capability to manage his or her affairs. In earlier cases the Court had based its test predominantly on the ability of the subject person to conduct the ordinary everyday affairs of people. It was said that if by reason of a failure to do this

there would be a real risk that they would be disadvantaged or that their money or assets would be at risk of dissipation, then they would properly be treated as being incapable of managing their affairs. However, that approach has been reviewed and altered in more recent cases in which it has been emphasised that the Tribunal should not be relying just on hypothetical notions such as “the ordinary everyday affairs of people” but rather should focus on the capability of the particular person to deal with his or her actual assets and to do what he or she is proposing to do with them.

10 In two cases in 2015, His Honour Justice Lindsay of the Supreme Court set out his preferred approach to this issue. In *CJ v AKJ* [2015] NSWSC 498 and *P v NSW Trustee and Guardian* [2015] NSWSC 579 at [307], His Honour suggested that:

- (1) the real question is whether the person under consideration is reasonably able to manage his or her own affairs in a reasonably competent fashion, without the intervention of a manager who is charged with the duty to protect his or her welfare and interests; and
- (2) the focus should be on whether the person is able to deal with (make and implement decisions about) his or her own affairs (person and property, capital and income) in a reasonable, rational and orderly way, with due regard to his or her present and prospective wants and needs, and those of family and friends, without undue risk of neglect, abuse or exploitation.

11 His Honour went on to say that in considering whether a person is “able” in this sense, the Court or Tribunal may give attention to past and present experience as a predictor of the future course of events, support systems available to the person; and the extent to which the person, placed as he or she is, can be relied upon to make sound judgments about his or her welfare and interests.

12 The relevant time for considering whether a person is incapable of managing his or her affairs is not merely the day of hearing but the reasonably foreseeable future: *McD v McD* (1983) 3 NSWLR 81, 86; *Re W and L (Parameters of Estate Management Orders)* [2014] NSWSC 1106 at [20].

13 Disability in the guardianship sense is not an element of the test for incapability for the purposes of considering a financial management application: *GW v Protective Commissioner & Ors* [2003] NSW ADTAP 51.

- 14 In the two leading cases cited at [10] above, Justice Lindsay confirmed that in deciding whether capability to manage one's affairs had been regained, the Court or Tribunal may give attention, amongst other things, to: support systems available to the person; and the extent to which the person, placed as he or she is, in a benign domestic environment, can be relied upon to make sound judgments about his or her welfare and interests.
- 15 Lindsay J gave particular attention to the availability of family support. In *CJ v AKJ* at [54], His Honour framed the consideration in terms of determining whether the person under consideration is able:

“(w)ithin the community of his family, and with their ongoing support...to take care of himself his property and his finances.”

#### *The protective element*

- 16 Many of the more recent Supreme Court cases have emphasised that consideration of the capability or otherwise of a person to manage their own affairs involves a protective element. In *H v H* [2015] NSW SC 837 at [27]–[29] Justice Lindsay spoke of the jurisdiction being exercised in such matters as being purposive and protective in nature. His Honour noted that the “welfare principle” embodied in s 39(a) of the *NSW Trustee and Guardian Act 2005* (NSW), which is reflected in s 4(a) of the Act (that is, that the welfare and interests of the subject person should be given paramount consideration) is consistent with the pre-eminence of that protective element. In *H v H* at [35], His Honour made it clear that a proper consideration of the protective nature of the jurisdiction requires the Court (or Tribunal) to take into account, if not actively consult, the views of the subject person and those close to him or her.

#### **Application of those principles in the present case**

##### *LGT's case and the evidence supporting it*

- 17 LGT's case was that she had regained the capability to manager her own affairs. She outlined the grounds upon which she sought revocation in her application, in the supporting documentary material and in her discussion with me at the hearing. She participated actively in the hearing and presented her views clearly and in an organised manner.

- 18 She was able to describe in detail her current assets, consisting principally of a bank account with a local credit union, her current sources of income (an allowance from NSW Trustee and Guardian) and, perhaps most importantly, her regular outgoings. She gave me a detailed outline of the way in which she would ensure that her expenses would not exceed her income and she produced:
- (1) a detailed budget, apparently prepared with the assistance of a charitable organisation dated 27 July 2017; and
  - (2) a document headed "Household Shared Expenses Summary" which appeared to list the current outgoings (without ascribing an amount to each) to confirm how she and MFT would share those expenses between them.
- 19 LGT also demonstrated to my satisfaction her understanding of the need to continue to budget and I understood from what she and Ms Z of an advocacy group told me, that her current budget had been prepared with the assistance of a charitable organisation and that further assistance from that organisation may be available.
- 20 LGT outlined her plans to save money and then approach her credit union to arrange a term deposit, under which she could earn a higher rate of interest on her savings. She indicated that she had already made enquiries with the credit union in this regard.

#### *Family and other support*

- 21 LGT's fiancé, MFT, confirmed that he and LGT had agreed as to the sharing of expenses as set out in the Shared Expenses Summary. He confirmed that he and LGT were in a long-term relationship and were engaged to be married. He asserted that he would provide her with support, including if necessary financial support if she exceeded her regular budget, but that there had been no need for this to date.
- 22 Another valuable source of support for LGT has been that provided by the advocacy group. That organisation has provided self-advocacy support to LGT since June 2017 and I understood that their ongoing support for LGT could be arranged.

- 23 Ms Z, an advocate from the advocacy group, provided a letter of support for LGT's application, in which she confirmed that LGT had taken the initiative and followed through with all tasks and steps suggested to her to ensure that she can independently control her finances. Ms Z also provided a copy of her individual advocacy case file notes covering the period July 2017 to mid-October 2018. These notes appeared to confirm that LGT had made substantial advances in her capacity to manage her financial affairs in that period.
- 24 Ms Z was of the view that LGT had been most diligent in attempting to manage her own affairs. Perhaps most significantly, Ms Z confirmed that LGT had herself initiated a number of suggestions as to how she might accumulate her savings and invest them. Ms Z also indicated that there were no current sources of potential exploitation of LGT and that LGT understands the prevalence of "scams" particularly those promoted on social media. Ms Z confirmed that in the 18 months on which she has dealt with LGT they had met frequently and that there had been no indication by LGT of a wish to make any unwise or unreasonable investments or purchases.

*The absence of medical or related expert evidence*

- 25 The application was not accompanied by any medical or clinical reports relating to LGT's capability and none were subsequently produced to me. The application was accompanied by a "Health Summary Sheet" printed on 31 July 2018 which summarised LGT's medical history and her then current medications but contained nothing specifically relevant to the issue of incapability to manage her affairs.
- 26 However, it is certainly not the case that a person's capability or incapability to manage his or her own affairs can only be established by means of medical or clinical evidence. Significant observations about the acceptance of medical evidence were made by Justice Lindsay of the NSW Supreme Court in *H v H* [2015] NSWSC 837 at [36](d) and [37], where he noted that although a decision about whether a person is or is not capable of managing his or her affairs may be powerfully informed by an expression of medical opinion which

is based upon articulated observations of fact and accompanied by an exposition of technical medical terms:

“...a determination about capacity for self-management made upon an exercise of protective jurisdiction is not, in essence, the province of medical expertise but of independent judgment by the Court applying established criteria to particular facts... The Court may take comfort from an opinion, but it must look primarily to facts, especially in close-run cases in which opinions may fairly differ. If in doubt there is no substitute for a direct personal engagement with the person whose capacity for self-management is under consideration and those closely satiated with him or her in daily living.”

*Observations by NSW Trustee and Guardian*

27 As is usual in these matters NSW Trustee and Guardian, represented at the hearing by Ms Margis Azizi, a Client Services Officer, expressed no view as to LGT’s application for revocation of the order. Ms Azizi indicated however that a possible source of concern was that LGT may have contracted to obtain telecommunications services at what appeared to be an expensive level. However, Ms Z explained that more appropriate arrangements had now been made with telecommunications providers.

*Assessment of the evidence*

28 I accepted the uncontroverted evidence of LGT, Ms Z and MFT as reliable and persuasive.

29 LGT’s own evidence was well organised and presented. I considered her to be a witness of truth and her evidence reflected a mature and sensible assessment of her current needs and plans.

**Conclusion as to regained capability ground**

30 In reaching my conclusions on this important issue, on the basis of Lindsay J’s comments in the leading cases, particularly those cited at [14]–[15]] above, I took into account the family support which would be available to LGT through MFT and the professional support which had been provided and which, as I understood it, could continue to be available to LGT through the advocacy group.

31 On the basis of my conclusions as to the evidence I was satisfied that at present and for the reasonably foreseeable future LGT was reasonably able to manage her own affairs in a reasonably competent fashion, without the



intervention of a manager charged with the duty to protect her welfare and interests. I was satisfied that, placed as she is and taking into account the ongoing support available to her from her fiancé, MFT, and the advocacy group, she is, currently and for the foreseeable future, able to deal with her affairs in a reasonable, rational and orderly way, with due regard to her wants and needs without undue risk of neglect, abuse or exploitation.

- 32 I was also satisfied that revocation of the order was consistent with LGT's welfare and interests.
- 33 It followed that LGT has regained the capability to manage her own affairs and that the financial management order should be revoked. I ordered accordingly.
- 34 For completeness, I add that even if I had concluded that LGT had not regained the capability to manage her own affairs, on the basis of the evidence before me I would have found that it was in her best interests for the financial management order to be revoked.

\*\*\*\*\*

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.