



NSW Civil and Administrative Tribunal  
New South Wales

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Case Name: NZD  
Medium Neutral Citation: [2017] NSWCATGD 21  
Hearing Date(s): 27 November 2017  
Date of Orders: 27 November 2017  
Decision Date: 27 November 2017  
Jurisdiction: Guardianship Division  
Before: K A McMahon, Senior Member (Legal)  
Dr B McPhee, Senior Member (Professional)  
F E Hilson, General Member (Community)

Decision: Interlocutory Application:

The Benevolent Society has standing to apply for a guardianship and financial management order.

On the application by Ms PAF, today's hearing is adjourned to 14 December 2017.

The parties to give to the Tribunal and to all other parties and the separate representative for the person (if any), a copy of any further documents relied upon by 7 December 2017.

001: Guardianship Application

1. The parties to give to the Tribunal and to all other parties and the separate representative for the person (if any), a copy of any further documents relied upon by 7 December 2017.
2. The Benevolent Society is allowed to be legally represented on the issue of whether The Benevolent Society has standing to make the guardianship

application.

3. The request by The Benevolent Society to be otherwise legally represented in the guardianship application is refused.

4. On the application by PAF, today's hearing is adjourned to 14 December 2017.

#### 002: Financial Management Application

1. The parties to give to the Tribunal and to all other parties and the separate representative for the person (if any), a copy of any further documents relied upon by 7 December 2017.

2. The Benevolent Society is allowed to be legally represented on the issue of whether The Benevolent Society has standing to make the financial management application.

3. The request by The Benevolent Society to be otherwise legally represented in the financial management application is refused.

4. On the application by PAF, today's hearing is adjourned 14 December 2017.

#### Catchwords:

INTERLOCUTORY – standing – does The Benevolent Society have standing to apply for a guardianship and financial management order – consideration of s 9(1)(d) of the Guardianship Act 1987 (NSW) – “genuine concern for the welfare of the person” – consideration of s 21 of the Interpretation Act 1987 (NSW) – whether The Benevolent Society is a “person”

#### Legislation Cited:

Corporations Act 2001 (Cth)  
Guardianship Act 1987 (NSW), s 9(1)(d)  
Interpretation Act 1987 (NSW), s 21

#### Cases Cited:

CJH v Department of Family and Community Services [2016] NSWCATAD 162  
EBI [2017] NSWCATGD 6  
KA v Public Guardian & Ors [2004] NSWADTAP 25  
Minister for Disability Services v People With a Disability Inc (CSD) [2010] NSWADTAP 44  
NEJ [2017] NSWCATGD 1  
QVC [2017] NSWCATGD 20

Category:	Principal judgment
Parties:	Mr NZD (the person) The Benevolent Society (applicant) Ms PAF (carer) Public Guardian NSW Trustee and Guardian
Representation:	L Rogers (The Benevolent Society)
File Number(s):	NCAT 2017/00329005
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**

### **What the Tribunal decided**

- 1 We decided that The Benevolent Society (TBS) has standing to apply for a guardianship and financial management order for Mr NZD.
- 2 We decided to adjourn the hearing of the applications for a guardianship and financial management order for Mr NZD to 14 December 2017 and made directions as set out in the Tribunal's order.

### **Background**

- 3 Mr NZD is a 21-year-old man who lives with his mother and carer, Ms PAF in Eastern Sydney. Mr NZD's parents are separated, however he is in regular contact with his father. Mr NZD is reported to have an intellectual disability and autism and to be non-verbal in his communication. He has a package with the National Disability Insurance Scheme (NDIS) including case management and other services provided by TBS.
- 4 On 31 October 2017, the Tribunal received guardianship and financial management applications from Ms QYS, Case Manager with TBS. In her applications, Ms QYS states that multiple service providers have raised concern over Mr NZD's health and well-being and that he is not receiving the medication he requires. Ms QYS states that Mr NZD is being neglected and

financially exploited by Ms PAF and proposes the Public Guardian and the NSW Trustee and Guardian be appointed.

- 5 The matter was listed before the Tribunal for hearing on 13 November 2017, however, was adjourned to 27 November 2017, and a separate representative appointed for Mr NZD. The Tribunal has since been advised by TBS that it seeks to become the substitute applicant in the applications.

### **The hearing**

- 6 At the end of these Reasons for Decision are lists of the parties to the application and the witnesses who attended the hearing. [Appendix removed for publication.]
- 7 Whenever possible the Tribunal seeks to convene in a manner that promotes the participation of the person the subject of the proceedings. On the basis of the evidence of Ms PAF, TBS staff, and the medical reports, we accept Mr NZD is non-verbal. Ms PAF and TBS staff told us that Mr NZD would not be able to understand the issues in the proceedings or express a view. We accepted their evidence on this issue and determined that it was appropriate to proceed with the hearing in the absence of Mr NZD.
- 8 We dealt with TBS's application to be substituted as the applicant as a preliminary issue at the start of the hearing. We granted leave for Ms Rogers, solicitor, to appear for TBS on this issue which was not opposed by Ms PAF.

### **Does TBS have standing to bring the application?**

- 9 The applications were initially made by Ms QYS, Case Manager, with TBS. Ms Rogers advises that Ms QYS has left her employment with TBS. She advises that TBS as a corporate entity seeks to become the substitute applicant instead of another member of TBS staff which has previously been their practice when making applications to the Tribunal.
- 10 TBS's application to become the substitute applicant was not opposed by Ms PAF. She said that it did not make any difference to her if TBS was the applicant as opposed to an individual member of TBS staff.
- 11 The relevant provision of the *Guardianship Act 1987* (NSW) is s 9(1)(d) which states that a person has standing to bring an application if he/she is:

- (1) the person who is the subject of the application,
- (2) the Public Guardian, or
- (3) any other person who in the opinion of the Tribunal, has a genuine concern for the welfare of the person.

12 Ms Rogers provided us with written submissions and relies on previous decisions of the Tribunal in 2017 which have determined that certain corporate entities providing health services had standing to bring applications under the *Guardianship Act*. These decisions are *NEJ* [2017] NSWCATGD 1 (*NEJ*), *EBI* [2017] NSWCATGD 6 (*EBI*) and *QVC* [2017] NSWCATGD 20 (*QVC*).

### **Is TBS a “person” with standing to make the application?**

13 Section 21 of the *Interpretation Act 1987* (NSW) defines “person” as including “*an individual, a corporation and a body corporate or politic*”.

14 There is nothing in the text or context of the *Guardianship Act* which would indicate that the word “*person*” in s 9(1)(d) is intended to have a meaning other than that provided for in the *Interpretation Act*.

15 Ms Rogers submitted that TBS is a “person” as defined because it is a company limited by guarantee and registered under the *Corporations Act 2001* (Cth). We were provided with an extract from the Australian Business Register confirming TBS is a registered corporation.

16 We accept Ms Roger’s submission on this issue and are satisfied TBS is a corporation and therefore a “*person*” as defined in the *Interpretation Act*.

### **Does TBS have a genuine concern for the welfare of the person who is the subject of the application?**

17 In *NEJ*, the Tribunal accepted that the term “*genuine concern*” should be given its natural and ordinary meaning consistent with the decision in *CJH v Department of Family and Community Services* [2016] NSWCATAD 162.

18 Further the Tribunal has accepted that a corporate body may have a “*genuine concern*” consistent with the decision in *Minister for Disability Services v People With a Disability Inc (CSD)* [2010] NSWADTAP 44. According to this decision a number of factors can be considered to determine whether an organisation has a genuine concern, including the aims of the organisation and the type of activities it undertakes in pursuit of those aims.

- 19 In considering this issue in *NEJ*, *EBI*, and *QVC*, the Tribunal had regard to the aims and objectives of the organisations as set out in their constituent and governing documents.
- 20 Ms Rogers has provided us with an extract from the Australian Charities and Not for Profits Commission (ACNC) confirming TBS's registration as a charity, having initially been established in 1813.
- 21 Ms Rogers has also provided us with a copy of the TBS's constitution. Rule 1.1 of the constitution states that TBS is "*established as a charitable institution and will pursue charitable objectives*".
- 22 Further to Rule 1.2 of the constitution, the "*predominant objects for which TBS is established are to:*
- (a) *raise funds for, and otherwise assist and support, programmes supporting people and communities in Australia who are disadvantaged, in need or vulnerable;*
  - (b) *improve the economic, personal and social circumstances of people and communities in Australia who are disadvantaged, in need or are vulnerable;*
  - (c) *by any appropriate means (including the training of persons) act as, and support and assist others to be, leaders in the provision of relief for people and communities in Australia who are disadvantaged, in need or vulnerable; and*
  - (d) *do such other things as are incidental or ancillary to the attainment of the objects of the society*".
- 23 Rule 2 of the constitution provides that the profits and other income of TBS must be applied solely towards the promotion of the purposes and objectives referred to in Rule 1 and that no dividend, bonus or profit is to be paid to Members of TBS.
- 24 Ms Rogers relies on this evidence as demonstrating the activities and objectives of TBS are consistent with TBS having a genuine interest and concern for the welfare of Mr NZD.
- 25 Ms Rogers submits that this is consistent with the approach taken in *NEJ*. In *NEJ* the Tribunal considered the statutory purpose of South Western Sydney Local Health District (SWSLHD) including to provide relief to sick and injured persons by providing care and treatment and to promote, protect, and maintain

the health of the community as consistent with having a genuine concern for the welfare of the person the subject of the proceedings who was a patient in a hospital within their region.

- 26 The Tribunal adopted a similar approach in *EBI* and *QVC* taking into account provisions in the constitutions of St Vincent's and Calvary and in their service agreements with NSW Health with similar objectives.
- 27 We received evidence from TBS staff that Mr NZD has been provided with case management and other services from TBS since November 2016, having initially been referred to them by Ageing, Disability and Home Care (ADHC). This was not in dispute and we were provided with a copy of current service agreements between TBS and Mr NZD.
- 28 TBS seeks to bring the applications due to concern over Mr NZD's health and well-being and that he is not receiving the medication he requires. TBS is concerned that Mr NZD is being neglected and financially exploited by Ms PAF. Ms Rogers submits this is consistent with TBS's objectives and activities and indicates TBS has a genuine concern for Mr NZD's welfare.
- 29 On the basis of the evidence of TBS's charitable status and objectives and activities and their relationship with Mr NZD as a service provider, we are satisfied TBS has a genuine concern for his welfare and has standing to make the applications. In particular, we have regard to TBS's objective to "*improve the economic, personal and social circumstances of people and communities in Australia who are disadvantaged, in need or vulnerable*" as set out in their Constitution.
- 30 We find that TBS has standing and can be the substitute applicant in the guardianship and financial management applications.

### **Decision to refuse leave for TBS to be legally represented in the further hearing of the applications**

- 31 We refused Ms Rogers's application for leave to represent TBS in the further hearing of the applications. We did not accept Ms Rogers's submission that any unfairness to Ms PAF would be overcome by the appointment of a separate representative for Mr NZD as this would "*level out the playing field*". Ms PAF was evidently distressed at the proposal that TBS be legally

represented in the applications which she strongly opposes and expressed concern this would put her at a disadvantage. We took the view that to refuse leave was more consistent with ensuring fairness between the parties.

32 We were not persuaded to grant leave on the basis of Ms Rogers's submission that this was preferable given that TBS as a corporate entity is now the applicant in the proceedings. We do not consider that this in itself is sufficient to warrant leave being granted given the general rule that parties appear unrepresented in proceedings before the Tribunal.

33 In support of the application, Ms Rogers said that in the event that leave was refused an application would likely be made by Mr LBN. Mr LBN attended the hearing and we were advised that he has obtained legal qualifications overseas, however, is not admitted as a legal practitioner in NSW. Mr LBN is employed in the role of consultant with TBS. We took the view that if an application is made by Mr LBN to represent TBS, the Tribunal will deal with this on its own merits. We note, however, there were a number of other TBS staff who participated in the hearing who have greater direct knowledge of the issues giving rise to the application.

#### **Decision to adjourn the guardianship and financial management applications**

34 Ms PAF made an application for an adjournment. She said she had only recently been able to contact Ms TWU, social worker, who previously was involved in Mr NZD's care while he was under ADHC. Ms TWU is now retired and lives in the West Sydney. Ms PAF seeks that Ms TWU be a witness for her attesting to her good care of Mr NZD, however, she was not available to give evidence at the hearing that day. Ms PAF also said that Mr NZD's father was unable to attend the hearing due to work commitments. Ms PAF said she wanted to attend the hearing in person but had been unable to do so because she did not have respite care for Mr NZD and did not feel able to bring him to the hearing.

35 TBS opposed the application for an adjournment expressing concern that Mr NZD was not going to his day program through a disability support service provider nor respite through a respite service provider because of difficulties



with his behaviour and the need for his medication to be reviewed by a psychiatrist.

- 36 Ms PAF told us, however, that since the last Tribunal hearing, Mr NZD had attended appointments with a paediatrician and with a psychiatrist arranged through a medical assessment service. Ms PAF told us Mr NZD's medication was reviewed at these appointments.
- 37 A support coordinator for Mr NZD at TBS was not in a position to dispute that these appointments had taken place although said she had not as yet received a report from the doctors as normally occurs. Whilst expressing concern about there being delay in the applications being heard, the support coordinator said that TBS could assist with providing respite care for Mr NZD to enable Ms PAF to attend in person if the hearing was adjourned.
- 38 Significantly, the Tribunal previously made an order that Mr NZD be separately represented, however we were advised by the Legal Aid Commission that further time was required in order for the application to be processed. We were also faced with the difficulty that there was insufficient time to properly canvas the issues in the application in view of the time spent determining TBS's application to be substituted as the applicant.
- 39 The decision as to whether to adjourn involved balancing the consequences of adjourning or not adjourning for the subject person or other parties or witnesses (*KA v Public Guardian & Ors* [2004] NSWADTAP 25).
- 40 We decided to adjourn the applications to 14 December 2017. We considered that TBS's concerns were outweighed by the need to afford procedural fairness to Ms PAF to allow her to participate in person and present evidence from Ms TWU and Mr NZD's father. Further we considered an adjournment was appropriate to enable the application for a separate representative to be determined given the benefit of Mr NZD's interests be independently represented.
- 41 We made a direction that the parties give to the Tribunal and to all other parties and the separate representative (if any), a copy of any further documents relied upon by 7 December 2017.

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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

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