



NSW Civil and Administrative Tribunal  
New South Wales

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Case Name: UZX

Medium Neutral Citation: [2020] NSWCATGD 3

Hearing Date(s): 2 and 3 April 2020

Date of Orders: 3 April 2020

Decision Date: 3 April 2020

Jurisdiction: Guardianship Division

Before: C P Fougere, Principal Member  
J L Newman, General Member (Community)

Decision: The guardianship order for UZX made on 2 August 2019 has been reviewed. The order now is as follows:

1. The Public Guardian is appointed as the guardian.
2. This is a continuing guardianship order for a period of 12 months from 2 August 2019.
3. This is a limited guardianship order giving the guardian(s) custody of UZX to the extent necessary to carry out the functions below.

FUNCTIONS:

4. The guardian has the following functions:
  - a) AccommodationTo decide where UZX may reside.
- b) The guardian may authorise others including members of NSW Police and the Ambulance Service of NSW to:

i) take UZX to a place approved by the guardian.

ii) keep them at that place.

iii) return them to that place should they leave it.

c) Services

To make decisions about services to be provided to UZX.

CONDITION:

5. The condition of this order is:

a) Standard Condition

In exercising this role the guardian shall take all reasonable steps to bring UZX to an understanding of the issues and to obtain and consider their views before making significant decisions.

Catchwords:

GUARDIANSHIP – review of guardianship order – requested review of guardianship order – whether guardianship order should be varied – COVID-19 – pandemic – Public Health Act – Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020 – subject person unable to understand the need to self-isolate – subject person often found wandering the streets – subject person presents a potential risk to their own health – where service providers have withdrawn their services due to fear of health risks – practicability of services being provided to the subject person without a guardianship order – section 62 of the Public Health Act – whether a public health order could be made in respect of the subject person – no other avenue by which subject person’s welfare and interests could be promoted in light of self-isolation requirements – guardianship order varied so that guardian may authorise ambulance and police services to implement accommodation decisions.

Legislation Cited:

Guardianship Act 1987 (NSW), ss 3(1)-(2), 4, 4(b), 4(d),

4(f)-(g), 14(2), 14(2)(d), 15(3)  
Public Health Act 2010 (NSW), ss 3(2), 7, 51(1), 62,  
62(1)(b), s 62(1)(b)(i), 62(2)(d), 62(4), 62(6), 65, Sch 1,  
Sch 1A, Pt 4 Div 4  
Public Health Regulation, cls 39, 39(1), 39(1)(b)  
Public Health (COVID-19 Restrictions on Gathering and  
Movement) Order 2020, cls 4-6

Cases Cited: IF v IG [2004] NSWADTAP 3  
NIQ [2014] NSWCATGD 28  
P v NSW Trustee and Guardian [2015] NSWSC 579

Texts Cited: Nil

Category: Principal judgment

Parties: 003: Requested Review of Guardianship Order

UZX (the person)  
VAD (applicant)  
Public Guardian (appointed guardian)

Representation: Separate Representative for UZX: J Quiohilag

File Number(s): NCAT 2019/00182057

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**

### **REQUESTED REVIEW OF GUARDIANSHIP ORDER**

#### **What the Tribunal decided**

1 The Tribunal reviewed the previous guardianship order made on 2 August  
2019 concerning UZX and varied that order by adding the following function:

The guardian may authorise others including members of NSW Police and the  
Ambulance Service of NSW to:

- i) take [UZX] to a place approved by the guardian.
- ii) keep her at that place.
- iii) return her to that place should she leave it.

## Background

- 2 Ms UZX is a 69-year-old Aboriginal woman who lives in Housing NSW accommodation in Regional NSW. A guardianship order was made on 2 August 2019 appointing the Public Guardian as UZX's guardian for 12 months with decision making authority about her accommodation and services.
- 3 On 27 February 2020 the Emergency Response Plan for Novel Coronavirus (COVID-19) was activated in Australia. On 12 March 2020 the World Health Organisation declared that COVID- 19 can be characterised as a pandemic.
- 4 On 30 March 2020 the NSW Minister for Health made the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* (Restrictions on Gathering and Movement Order) pursuant to s 7 of the *Public Health Act 2010* (NSW). The Restrictions on Gathering and Movement Order prohibits everyone in NSW, other than a person who is homeless, from leaving their place of residence without reasonable excuse (Clause 5). It also prohibits gatherings of more than two people, subject to certain exceptions (Clause 6). The Order will expire at the end of 29 June 2020 unless revoked earlier.
- 5 The grounds given in Clause 4 of the Restrictions on Gathering and Movement Order for concluding that a situation has arisen that is, or is likely to be, a risk to public health posed by COVID-19 are that:
  - public health authorities both internationally and in Australia have been monitoring international outbreaks of COVID-19
  - COVID-19 is a potentially fatal condition and is also highly contagious
  - a number of cases of people with COVID-19 have now been confirmed in NSW, as well as other Australian jurisdictions, including by means of community transmission
- 6 The applicant in this matter is UZX's primary clinician at the Older Persons Mental Health Service and is an employee of NSW Health. The applicant sought a variation of the guardianship order to add an additional authority so that UZX may be placed in emergency respite accommodation, and kept there, during the COVID-19 pandemic. This additional authority would, if granted, give the Public Guardian the authority to authorise others including members of NSW Police and the Ambulance Service of NSW to:
  - (1) take UZX to a place approved by the guardian;

- (2) keep her at that place;
  - (3) return her to that place should she leave it.
- 7 The applicant described UZX as a vulnerable person. She has a history of paranoid schizophrenia which is currently stable as a result of regular treatment with flupenthixol. UZX also has other health risk factors including that she is a heavy smoker and suffers from respiratory related health issues. UZX is said to be at high risk of contracting and potentially spreading COVID-19 as she is said to spend her days walking the streets, can sometimes be found wandering the street in urine soaked clothes begging for money, allows strangers into her home and does not understand the need to self-isolate due to her cognitive impairment. We were told that UZX struggles with self-care, food preparation and cleaning of herself and her unit.
- 8 According to the applicant, UZX is resistant to the idea of respite care and has indicated to care providers in previous discussions that she does not wish to consider respite or permanent placement.
- 9 The applicant also expressed concern that UZX's incapacity to observe social isolation rules places her at risk of coming to the attention of police, perhaps as a result of notification by members of the public. It is highly unlikely that UZX would be able to provide an adequate explanation for her movements to police.
- 10 In-home support services provided by a service provider were withdrawn by the service on 30 March 2020. In an email dated 30 March 2020, the Operations Manager of the service provider wrote that this was because UZX:

“is not practising social isolation and is particularly at risk of catching and spreading COVID-19. As Operations Manager I agree that the risk of spread to our caregivers and other frail, elderly clients is too high and as such we have suspended all services until further notice.”

### **Hearing on 2 April 2020 and directions made concerning the Public Health Act**

- 11 The Tribunal listed the application urgently at 4pm on 2 April 2020 for hearing given what we were told were the risks to UZX.
- 12 UZX did not participate in this hearing. We were told that UZX does not have a telephone, that she had not been able to be informed by the applicant or service providers of the hearing, that it was difficult to locate her as she spent much of her time away from her home walking the streets and that service

providers did not wish to go to her home due to concerns that she may place them at risk of contracting the COVID-19 virus.

- 13 In deciding whether to vary the guardianship order as requested by the applicant, we had to have regard to, amongst the other matters set out in s 14(2) of the *Guardianship Act 1987* (NSW), the practicability of services being provided to UZX without the need for the making of the amended order: s 14(2)(d).
- 14 At the hearing conducted on 2 April 2020, the evidence given by the applicant and other witnesses suggested there was the possibility that UZX may meet the requirements of s 62(1)(b) of the *Public Health Act* as a result of the COVID-19 pandemic and could therefore be a person for whom a public health order may be made pursuant to s 62 of that Act.
- 15 Section 62(1) of the *Public Health Act* provides that
  - (1) An authorised medical practitioner may make a public health order in respect of a person if satisfied, on reasonable grounds, that—
    - (a) the person has a Category 4 or 5 condition and because of the way the person behaves may, as a consequence of that condition, be a risk to public health, or
    - (b) the person—
      - (i) has been exposed to a contact order condition, and
      - (ii) is at risk of developing the contact order condition, and
      - (iii) because of the way the person behaves, may be a risk to public health.
- 16 COVID-19 is a Category 4 condition: *Public Health Act*, s 51(1), Sch 1.
- 17 COVID-19 is a contact order condition: *Public Health Act*, s 51(1), Sch 1A.
- 18 Section 62 sits within Pt 4 Div 4 of the *Public Health Act*. Relevantly,:
  - a public health order may authorise the person subject to the order to be detained at a specified place for the duration of the order: s 62(4).
  - in considering whether or not to make a public health order, the authorised medical practitioner must take into account the principle that any restriction on the liberty of a person should be imposed only if it is the most effective way to prevent any risk to public health: s 62(6).
  - a public health order made under s 62(1)(b) would, unless said to expire sooner, expire after 14 days (s 62(2)(d) and Sch 1A). This is subject to

extension by NCAT upon application by the authorised medical practitioner before expiration of the order: s 65.

- 19 So that we could determine the application for review on an urgent basis and in accordance with s 14(2)(d) of the *Guardianship Act*, we directed all parties as follows:

By 3pm on 3 April 2020, the applicant, an employee of NSW Health, and the Public Guardian are to give to the Tribunal and each other party and the separate representative written submissions as to the application of Part 4 of Division 4 the *Public Health Act 2010* to these proceedings and, in particular, whether a public health order made under s 62 of the *Public Health Act 2010* is a more appropriate course of action in relation to [UZX].

- 20 Written submissions were provided in accordance with the directions by the Public Guardian and by the Crown Solicitor's Office acting for Health NSW. The content of the submissions is set out below.
- 21 At the hearing on 2 April 2020 we also appointed a separate representative to represent UZX's interests given her extreme vulnerability, the high likelihood that she would be unable to be contacted to participate in the resumed hearing and the potential implications of orders made under the *Guardianship Act* or under the *Public Health Act*.
- 22 Ms Jeremie Quiohilag participated in the hearing on 3 April as UZX's separate representative. Ms Quiohilag had not been able to be in contact with UZX and based her submissions on the written material before the Tribunal and discussions prior to the resumed hearing with the applicant and the Public Guardian's office.

### **What did the Tribunal have to decide?**

- 23 On reviewing a guardianship order at the request of an applicant, the Tribunal may confirm, vary, suspend or revoke an order.
- 24 In this matter, there was no dispute that UZX continues to be a person for whom we could continue to make a guardianship order as she continues to be restricted in important major life activities to such an extent that she requires supervision or social habilitation: *Guardianship Act*, s 3(2). She has a significant "need for services to help [her] function normally in community with others" (*P v NSW Trustee and Guardian* [2015] NSWSC 579, [303]) and is at least partially incapable of managing her person: *Guardianship Act*, s 3(1).

- 25 Nor was there any dispute that the Public Guardian continues to be the only available guardian to be appointed for UZX: *Guardianship Act*, s 15(3). The evidence before us was that UZX does not have family or friends involved in her life who could be considered for this role.
- 26 The focus for our consideration was whether the functions in the order made on 2 August 2019 should be varied to add the additional authority requested.
- 27 The Tribunal must consider all of the following matters set out in s 14(2) of the *Guardianship Act* before exercising its discretion to vary a guardianship order:
- (a) the views (if any) of:
    - (i) the person,
    - (ii) the person's spouse,
    - (iii) the person's carer, and
  - (b) the importance of preserving the person's existing family relationships,
  - (c) the importance of preserving the person's particular cultural and linguistic environments, and
  - (d) the practicability of services being provided to the person without the need for the making of such an order.
- 28 These matters have no hierarchy or weighting and each is a mandatory consideration. However, the Tribunal must undertake a balancing exercise for its consideration of the matters in s 14(2) of the *Guardianship Act*. When undertaking this task the Tribunal may be guided by the principles that are set out in s 4 of that Act (see *IF v IG* [2004] NSWADTAP 3).
- 29 The principles contained in s 4 of the *Guardianship Act* are as follows:

#### **4 General principles**

It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:

- (a) the welfare and interests of such persons should be given paramount consideration,
- (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,
- (c) such persons should be encouraged, as far as possible, to live a normal life in the community,
- (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,



- (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,
- (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,
- (g) such persons should be protected from neglect, abuse and exploitation,
- (h) the community should be encouraged to apply and promote these principles.

30 In relation to the additional authority sought by the applicant in the review application, we also note that:

[51] ...the Tribunal is loath to authorise the use of force by a guardian to enforce a substitute decision which is made by the guardian but not supported by the person themselves. Only in circumstances whereby a person's decision making incapacity is such that it results in them making decisions which expose them to neglect, abuse or exploitation (or they are incapable of making important decisions and others make decisions on their behalf which cause neglect, abuse or exploitation) does the Tribunal contemplate the application of coercive authority...

[52] In examining the need for coercive powers of guardianship to provide services to a person, the Tribunal must conduct such examination being mindful of the principles provided in s 4 of the *Guardianship Act*. NIQ [2014] NSWCATGD 28, [51]-[52]; and NQC [2019] NSWCATGD 24, [30]-[31].

31 Given the mandatory consideration under s 14(2)(d) of the *Guardianship Act* as to whether it was practicable for services to be provided without this variation, we had to consider whether the provisions of the *Public Health Act*, in particular s 62, provided an alternative pathway by which UZX's welfare and interests could be met in the context of the public health risk of COVID-19 and its possible consequences.

32 If the making of a public health order pursuant to s 62 of the *Public Health Act* for UZX was a viable alternative pathway, then this would have been relevant to the exercise of our discretion under s 14(2) of the *Guardianship Act* in deciding whether or not to vary the guardianship order in the manner requested.

### **Parties' submissions**

33 NSW Health, represented by the Crown Solicitor, filed written submissions on 3 April 2020. The relevant content is set out in its entirety.

#### **THE PUBLIC HEALTH ACT**

5. The long title of the Act is "An Act with respect to public health". The Act is intended "to provide a sound basis to enable public health authorities to

effectively protect and promote public health in New South Wales”: New South Wales, Legislative Assembly 2010, *Agreement in Principle*, 24 November 2010, p. 28127.

6. The objects the Act are contained in s. 3, as follows:

**“3 Objects**

- (1) The objects of this Act are as follows—
  - (a) to promote, protect and improve public health,
  - (b) to control the risks to public health,
  - (c) to promote the control of infectious diseases,
  - (d) to prevent the spread of infectious diseases,
  - (e) to recognise the role of local government in protecting public health.
  - (f) to monitor diseases and conditions affecting public health.
- (2) The protection of the health and safety of the public is to be the paramount consideration in the exercise of functions under this Act.”

7. The term “public health” is not defined in the Act. However, it is clear that the Act is not concerned with the general health of individuals. Rather, as reflected in s. 3, the Act is concerned with the management and control of diseases and other circumstances which pose a risk to the health of the broader community.

8. Part 4 of the Act is titled “Scheduled medical conditions”. Division 4 of Pt 4 regulates the making of public health orders for Category 4 and 5 conditions and contact order conditions. Category 4 and 5 conditions are those conditions listed under the headings “Category 4” and “Category 5” in Sch. 1 to the Act: s. 51(1). Those categories are as follows:

**“Category 4**

- Avian influenza in humans
- COVID-19 (also known as Novel Coronavirus 2019)
- Middle East respiratory syndrome coronavirus
- Severe Acute Respiratory Syndrome
- Tuberculosis
- Typhoid
- Viral haemorrhagic fevers

**Category 5**

- Human Immunodeficiency Virus (HIV) infection”.

9. Contact order conditions are those conditions listed in Sch. 1A to the Act: s. 51(1). Schedule 1A lists the following conditions:

**“Contact order conditions**

- Avian influenza in humans
- COVID-19 (also known as Novel Coronavirus 2019)

Middle East respiratory syndrome coronavirus

Severe Acute Respiratory Syndrome

Typhoid

Viral haemorrhagic fevers”.

10. Section 62(1) of the Act authorises the making of public health orders. It provides:

“(1) An authorised medical practitioner may make a public health order in respect of a person if satisfied, on reasonable grounds, that—

(a) the person has a Category 4 or 5 condition and because of the way the person behaves may, as a consequence of that condition, be a risk to public health, or

(b) the person—

(i) has been exposed to a contact order condition, and

(ii) is at risk of developing the contact order condition, and

(iii) because of the way the person behaves, may be a risk to public health.”

11. For present purposes, it is sufficient to observe that the power to make an order under s. 62(1)(a) is only engaged if an authorised medical practitioner is satisfied, on reasonable grounds, that a person has a Category 4 or 5 condition. Similarly, the power to make an order under s. 62(1)(b) is only engaged if an authorised medical practitioner is satisfied, on reasonable grounds, that a person has been exposed to a contact order condition: see s. 62(1)(b)(i).

12. In this case, the material before the Tribunal indicates that [UZX] has been diagnosed with schizophrenia, which is currently well controlled, and that she struggles with incontinence, self-care, food preparation and cleaning of herself and her unit. There is nothing in the material before the Tribunal which indicates that [UZX] has been exposed to COVID-19 or that she has contracted COVID-19. These are necessary pre-conditions to the making of an order under s. 62(1) of the Act. Accordingly, the power to make an order under s. 62(1) does not appear to be engaged in this case.

13. Rather, the basis for the guardianship application is that care services have ceased being provided to [UZX] at her home, on the basis that home visits could pose a risk to the health of her carers. That is said to be because [UZX] does not understand the need for self-isolation during the COVID-19 pandemic. Should she contract the disease, a number of risk factors (age, Aboriginal heritage, history of smoking and Asthma) mean that she has a greater chance of becoming acutely unwell. In this way, the present application is brought on the basis of a concern about the health of [UZX], not about the health of the public more broadly.

14. There are a number of aspects of the regime for the making of public health orders which indicate that such an order should be reserved for exceptional circumstances in which a threat is posed to the public health, and would not be appropriate in the present circumstances.

15. First, only an authorised medical practitioner may make a public health order. An authorised medical practitioner is defined in s. 60 to mean the Chief Health Officer or a registered medical practitioner authorised by the Secretary

to exercise the functions of an authorised medical practitioner under Div. 4 of Pt 4 of the Act.

16. Secondly, the permissible terms of a public health order reflect the fact that the underlying concern is to prevent the spread of the relevant condition. For example, an order may require the subject to “notify the Secretary of other persons with whom the person has been in contact within a specified period”, to “notify the Secretary if the person displays any specified signs or symptoms” and to “undergo specified testing for the relevant condition”: s. 62(3). An order may also authorise the subject to be detained at a specified place for the duration of the order: s. 62(4)(a).

17. Thirdly, it appears that a public health order made under s. 62(1) is intended only to operate for such time as the person poses a risk to the broader community. Unless said to expire sooner, an order under s. 62(1)(a) would expire after 28 days and an order under s. 62(1)(b) (made on the basis that the person has been exposed to COVID-19) would expire after 14 days: see s. 62(2)(d) and Sch. 1A. While this is subject to extension by the Tribunal, an application must be made by the authorised medical practitioner before the expiration of the order: see s. 65.

18. Fourthly, s. 62(6)(a) provides that, in deciding whether to make a public health order, the authorised medical practitioner must take into account “the principle that any restriction on the liberty of a person should be imposed only if it is the most effective way to prevent any risk to public health”.

19. Finally, breach of a public health order is an offence carrying with it a penalty of 100 penalty units or imprisonment for six months or both: s. 70(1). In addition to the procedures for arresting a person contravening a public health order in s. 71, a police officer may arrest a person if the officer suspects on reasonable grounds that a person is contravening a public health order relating to the COVID-19 pandemic: s. 71A.

## **CONCLUSION**

20. The power under s. 62(1) is not available because there is no evidence to suggest that [UZX] has contracted COVID-19 or that she has been exposed to COVID-19.

21. In any event, the features of the statutory scheme outlined above indicate that a public health order would only be made in extreme circumstances where the person poses a risk to public health. It is not the appropriate order where the concern is protection of the health and wellbeing of a particular individual. The variation to the guardianship order is sought on the basis that [UZX] is vulnerable and there is a particular risk posed to her health as a result of the COVID-19 pandemic and the consequent cessation of at-home care. She has particular care needs that are appropriately the subject of a guardianship order, and not a public health order.

34 Written submissions were filed by the Public Guardian on the same date. The relevant content is set out in its entirety.

## **2. Recommendation**

The Public Guardian believes [UZX] remains in need of a guardian. The Public Guardian recommends the Order be renewed with the functions of services,

accommodation, and the addition of the authorise others function for a period of 12 months reviewable.

### 3. Reason for recommendation

#### Accommodation and authorise others

The current COVID-19 pandemic and associated risks related to [UZX]'s failure to comply with Public Health Directives has led to a decision by [the service provider] to withdraw support to [UZX].

[UZX] has been assessed as being at high risk of contracting COVID-19 due to a range of factors related to both her health and her behaviours. These include the fact that she is 69 years of age, a heavy smoker, suffers from respiratory related health issues, and continues to wander the streets in contravention of current COVID-19 related health directives.

The issue to be decided in regard to the application before the Tribunal for the addition of a coercive accommodation function to the current guardianship order is whether concerns related to [UZX]'s failure to comply with social distancing regulations are best addressed in relation to the Guardianship Act or whether, alternatively, it is a matter that would more appropriately be addressed under Section 62 of the Public Health Act.

Section 62 of the *Public Health Act 2010* states:

- (1) An *authorised medical practitioner* may make a *public health order* in respect of a person if satisfied, on reasonable grounds, that--
- (a) the person has a Category 4 or 5 condition and because of the way the person behaves may, as a consequence of that condition, be a risk to public health, or
  - (b) the person—
    - (i) has been exposed to a *contact order condition*, and
    - (ii) is at risk of developing the *contact order condition*, and
    - (iii) because of the way the person behaves, may be a risk to public health.

[UZX]'s circumstance does not, *prima facie*, meet the criteria to be considered under the Public Health Act due to the fact that she has not been diagnosed as having a Category 4 condition (which includes COVID-19) nor is there any direct evidence that she has been exposed to a 'contact order' condition other than what might be inferred in her non-compliance with public health directives in relation to social isolation.

The question arises as to whether this non-compliance constitutes 'exposure' under the Act. This is a matter for the Tribunal to determine. It should be noted however that although a concern for [UZX]'s health is the primary focus of the applicant's submission, the context for this application is the public health risk concern of support workers that they could be exposed to the virus due to [UZX]'s failure to comply with social distancing regulations.

Should the Public Guardian be appointed with an accommodation function, the onus of decision making, in accordance with the guardianship principles, would be on the promotion of the welfare and interests of [UZX] rather than the risk to public health. Any decision made by the Public Guardian would therefore need to take into account the health risks to [UZX] associated with her unchecked access to the community. A concern for the health of [UZX]

was the primary focus of the applicants request for the additional guardianship function. The applicant has recommended that this concern be addressed through a decision involving [UZX]'s potential forced removal from her current independent living arrangement into an aged care facility. Any decision made by the Public Guardian would need to consider the merits of this proposal with a focus on [UZX]'s welfare and interests, in part balanced by the need to promote her will and preferences and her capacity to live a normal life in the community. It should be noted that [UZX] has expressed a strong view that she does not wish to be placed in an aged care facility.

As the Public Guardian is already appointed as [UZX]'s guardian we are of the view that, on balance, there may be utility in the addition of a coercive accommodation function to the current order should the Tribunal assess [UZX]'s current circumstance as, first and foremost, constituting a significant risk to herself (rather than the public). We are of the view that our prior guardianship of [UZX] is a significant factor in making this recommendation. We wish to emphasise that future cases of this kind need to be assessed on a case-by-case basis and that cases involving circumstances where there is a concern for health implications to the wider public should continue to be viewed within the purview of the Public Health Act.

35 Mr Sean Hosking, Regional Manager, Southern Office of the Public Guardian, also made oral submissions in response to the written submissions made by NSW Health. We understood these to be as follows:

- The Public Guardian does not agree with NSW Health's position (at [14] and [21]) of the written submissions) that an order under the *Public Health Act* should be reserved for "exceptional circumstances"
- The Restrictions and Gathering and Movement Order provisions requiring social isolation were enacted for a reason and by their very content deem that there is a risk of exposure in the community to COVID-19
- The Order makes clear that people who do not comply with the provisions and wander around the community constitute a risk to the community
- In UZX's case, the prospect of needing residential care has been on the horizon before this application. Given the pre-existing relationship between the Public Guardian and UZX, on balance looking at the individual merits of the case the Public Guardian recommends that the order is varied as requested
- However there will be other matters in which the Public Guardian may take a different view and in which the *Public Health Act* "should be in play"
- The making, or variation, of a guardianship order should not be seen as a less significant infringement on someone's rights compared to the making of a public health order under s 62 of the *Public Health Act*. A guardianship order is a more comprehensive infringement in certain ways than a public health order given the time limited nature of a public health order (28 days if the order is made under s 62(1)(a) and 14 days if made under s 62(1)(b) (subject to extension) of that Act). The terms of a guardianship order are usually longer. A public health order is also limited to one aspect of the person's behaviour

unlike a guardianship order which can address a number of aspects of a person's life

36 The separate representative made oral submissions summarised as follows:

- On balance, the variation sought is warranted in the circumstances
- The separate representative agreed with the Public Guardian's submission that there is no need to establish that exceptional circumstances exist before an order under s 62 of the Public Health Act may be made
- Clause 39(1) of the Public Health Regulation sets out the matters that must be taken into account when an authorised medical officer is deciding whether or not to make a public health order in respect of a person. These are, relevantly:
  - (a) whether reasonable attempts have been made to provide the person with information about the effects of the Category 4 or 5 condition the person has and the risks to public health of that condition,
  - (b) the options other than a public health order that are available to deal with the risk to public health posed by the person,
  - (c) if the proposed public health order will require the person to undergo treatment—the availability and effectiveness of the proposed treatment and the likely side effects of the proposed treatment on the person,
  - (d) if the proposed public health order will require the person to be detained—the likely social, economic, physical and psychological effects of the detention on the person, and...
- The provisions in s 62 of the Public Health Act and cl 39 of the Public Health Regulation make clear that that the making of a public health order is not restricted to exceptional cases. The authorised medical officer is however required to consider “the options other than a public health order that are available to deal with the risk to public health posed by the person”: Public Health Regulation, cl 39(1)(b).

### **Tribunal's reasoning**

37 We concluded that the application for review was concerned primarily with UZX's safety and welfare as a result of COVID-19 and her inability, due to her cognitive difficulties, to understand the need to self-isolate and implement that course of action in line with the Restrictions on Gathering and Movement Order made pursuant to s 7 of the *Public Health Act*.

38 We also concluded on the evidence available to us that the risk to UZX's health, should she contract the virus, is heightened due to her underlying health issues. UZX's health and safety has been placed in further jeopardy following the cessation of personal care services by the service provider due to concerns that UZX is not self-isolating and therefore is placing staff at risk of contracting the virus. The evidence is that without a considerable degree of

personal care support on a daily basis, UZX's general health, hygiene and well-being will deteriorate further.

- 39 Whilst we note the evidence that the service provider withdrew services to UZX also out of concern for the possible transmission of the disease to other vulnerable clients of that organisation if care staff continued to provide services to UZX, this did not in our view alter the focus of the application being primarily and predominantly being UZX's welfare and interests.
- 40 We also accepted that UZX's incapacity to observe the requirements of the Gathering and Movement Order places her at risk of coming to the attention of police and the penalties that might apply.
- 41 The objects of the *Public Health Act* make clear its focus on managing risk to the community and that the "protection of the health and safety of the public is to be the paramount consideration in the exercise of functions under this Act": s 3(2).
- 42 We were satisfied that the current issues concerning UZX do not appear to have public health concerns as their focus that might lead to an order being made under s 62(1)(b) of the *Public Health Act*.
- 43 Having noted this, and not a matter we needed to determine on this occasion, it does not appear that "exceptional" or "extreme" circumstances in which a threat is posed to the public health need to exist before a public health order is made under s 62(1)(b) of the *Public Health Act*. There is no requirement in the legislation or regulations that such circumstances exist. We also note the submission made on behalf of the applicant that without evidence that UZX has in fact been exposed to COVID-19, the power to make an order under s 62(1)(b) of that Act is not engaged. The making of the Gathering and Movement Order that acknowledges the potentially fatal and highly contagious nature of the disease and that community transmission has occurred leaves open, in our view, an argument for another day that there may be reasonable grounds to satisfy an authorised medical practitioner that exposure to COVID-19 has occurred: *Public Health Act*, s 62(1)(b)(i).



44 In this matter the Public Guardian supported the variation of the existing guardianship order as requested by the applicant.

45 In doing so, the Public Guardian emphasised that its pre-existing role as the appointed guardian for UZX was a significant factor in making this recommendation and commented that:

future cases of this kind need to be assessed on a case by case basis and that cases involving circumstances where there is a concern for health implications to the wider public should continue to be viewed within the purview of the *Public Health Act*.

46 We accepted that there did not appear to be any other avenue by which UZX's welfare and interests could be promoted in light of her inability to understand the need to self-isolate as a result of her cognitive impairment. There is no other practicable way for services to be provided to UZX without the requested authority being included in the order: *Guardianship Act*, s 14(2)(d).

47 We were satisfied that UZX's decision-making impairment is such that it results in her making decisions and engaging in activity which exposes her to self-neglect: *NIQ [2014] NSWCATGD 28*, [51]. We gave greater weight to the need for UZX to be protected from neglect (s 4(g) of the *Guardianship Act*) than the principles that require the Tribunal to: restrict as little as possible UZX's freedom of action and freedom of decision (s 4(b) of the *Guardianship Act*); take account of UZX's views as consistently expressed to others (s 4 (d) of the *Guardianship Act*); and to encourage, as far as possible, UZX to be self-reliant in her personal affairs (s 4(f) of the *Guardianship Act*).

48 As a result, we varied the order as requested. It was a matter of consensus between the parties that the term of the varied order should remain as it was when the guardianship order was first made on 2 August 2019, that is, for a period of 12 months from that date. We determined this was the correct approach.

49 If anyone with a genuine concern for UZX's welfare subsequently forms the view that the additional authority is no longer required, or that the guardianship order should be reviewed more generally, then an application for review may be made to the Tribunal.

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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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