

When does the appointment of a guardian need to be considered in child protection proceedings?

A factsheet for legal professionals

The appointment of a government agency to make decisions for an adult is a fundamental interference in an individual's human right to make their own decisions. This is recognised in the *Guardianship and Administration Act 2000* (GAA), which states that the right of an adult with impaired capacity to make decisions should be restricted and interfered with to the least possible extent. The appointment of a guardian may also infringe an adult's right to equal recognition before the law under the *Human Rights Act 2019* (HRA).

Consistent with these principles, the Public Guardian has established a Pre-Advocacy team which undertakes pre-hearing and in-hearing advocacy and education. Their aim is promoting an adult's human rights to ensure the least restrictive orders are made. This includes advocating where a formal guardianship appointment is not required or where there is another appropriate guardian or decision-making framework that can be relied upon. They also advocate to ensure that the Public Guardian is only appointed as last resort.

Can the Queensland Civil and Administrative Tribunal (the Tribunal) appoint a guardian?

Section 12 of the GAA provides that the Tribunal may appoint a guardian for personal matters (which includes legal matters not relating to finance or property), if:

1. The adult has impaired decision-making capacity for the matter

An adult is presumed to have capacity for a matter. The Tribunal must be satisfied there is sufficient evidence demonstrating that the adult has impaired decision-making capacity in relation to the areas of appointment that are being considered. Under

Schedule 4 of the GAA, capacity means the adult is capable of:

- (a) understanding the nature and effect of decisions about the matter, and
- (b) freely and voluntarily making decisions about the matter, and
- (c) communicating the decisions in some way.

Decision-making capacity is decision and domain specific. For example, evidence suggesting an adult has impaired parenting capacity does not necessarily mean they have impaired capacity to make decisions. A Parental Capacity Assessment Report or Social Assessment Report which addresses an adult's capacity to parent will not necessarily be sufficient to rebut the presumption of decision-making capacity for legal matters.

Evidence must address the above criteria, for example, whether the adult is capable of understanding the nature and effect of the court application, basic information about how the court will make a decision, and the possible outcomes of the court proceedings. Evidence of diagnosed impairments may be relevant but are not necessarily definitive. An adult has a right to make decisions that affect their life. This includes decisions that others don't agree with. Similarly, non-engagement in a legal process is not evidence of impaired decision-making capacity. **And**

2. There is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property

The Tribunal must ascertain what specific decisions, if any, need to be made for an adult. Decisions about a legal matter may include whether to obtain

legal advice or representation in child protection proceedings, and decisions about whether to oppose an application. The fact that an adult is a respondent in ongoing child protection proceedings does not in itself mean a decision needs to be made about legal matters. For example, if the adult does not want to be involved in the proceedings, seek advice or representation, or oppose the application then there may not be a decision to be made.

An appointment of a guardian is inappropriate if the purpose is to seek 'consent' to the making of a child protection order. Neither the *Child Protection Act 1999* nor the Childrens Court require a parent's consent before determining the outcome of the application and can make an order in the absence of the parents. Furthermore, if the adult is in need of appropriate support services, the appointment of a guardian as a decision maker will not address that need. **And**

3. Without an appointment the adult's needs will not be adequately met OR the adult's interests will not be adequately protected

The appointment of a guardian limits an adult's rights to make their own decisions. This must be weighed up against the risks to the adult's needs and interests if an appointment is not made. In the context of ongoing child protection proceedings, the appointment of a guardian may not necessarily assist the adult in circumstances where the appointment is used as a basis to determine a parent does not have the ability to parent and make decisions regarding their child.

Ultimately the risks must be weighed up against each other. For example, if a parent does not wish to participate in the proceedings, risks to the adult's needs and interests may be minimal and the appointment of a guardian is unlikely to provide any additional protections.

The Tribunal may also consider whether there is another person in the adult's life who is able, willing and appropriate to support the adult with decision-

making on an informal basis. This might include, for example, a person in the adult's safety and support network. In that case, the need for an appointment and the risk to the adult's interests not being adequately protected may be reduced.

If the Tribunal decides to make an appointment, who should be appointed as the adult's guardian?

Pursuant to Section 14(2) of the GAA, the Tribunal may appoint the Public Guardian as guardian for a matter only if there is no other appropriate person available for appointment for the matter. The Tribunal must ensure that the Public Guardian is only appointed as a last resort and in the least restrictive way. If a guardian needs to be appointed, it may be appropriate for the Tribunal to consider whether a person within the adult's safety and support network should be appointed.

What about the Childrens Court's obligation to ensure parents understand the proceedings?

Under section 106 of the *Child Protection Act*, the Childrens Court must ensure, as far as practicable, that the parent understands the nature, purpose and legal implications of the proceeding. If a parent has a disability that prevents them from understanding or taking part in the proceeding, the court must not hear the proceeding without a person to facilitate the parent's taking part in the proceeding. This does not necessarily mean a guardian should be appointed. A parent may be assisted to take part in the proceedings through less restrictive means, such as with an informal support person, including from their safety and support network, or an independent person. A parent's lawyer can also assist a parent to understand the nature and purpose of the proceedings and are an important part of a parent's support network. For a guardian to be appointed by the Tribunal, the criteria under the GAA must be established. The appointment of a guardian does not remove the court's responsibility under s106.

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