CITATION:	*Northern Territory of Australia v EH & Anor* [2021] NTSCFC 5
PARTIES:	NORTHERN TERRITORY OF AUSTRALIA v EH and PUBLIC GUARDIAN
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	ON REFERENCE from the Supreme Court exercising Territory jurisdiction
FILE NOs:	2020-02510-SC 2020-02431-SC
DELIVERED:	20 August 2021
HEARING DATE:	1 September 2020
JUDGMENT OF:	Grant CJ, Southwood and Kelly JJ

CATCHWORDS:

MENTAL HEALTH – Guardianship order – Powers of Guardian

Question of law reserved for Full Court – Scope of Public Guardian's authority under guardianship order to make decisions in relation to health care action and related matters – Whether guardian's power extended to consent to medical interventions involving physical restraint to prevent contamination of catheter site, administration of medication and treatment in secure area of geriatric ward – Terms of the legislation contemplate substitute consent to medical procedures which are inconsistent with adult's expressed or demonstrated views and wishes, and restrictive of adult's freedom of action – Provision for substitute consent advances rather than diminishes individual rights or protections – Principle of legality has no application – Appeal allowed and application for review granted.

Guardianship of Adults Act 2016 (NT) s 3, s 4, s 8, s 11, s 13, s 16, s 17, s 21, s 23, s 25, s 32, s 33, s 35

Coco v The Queen (1994) 179 CLR 427, *Daly v Thiering* (2013) 249 CLR 381, *Ex p Le Heup* (1811) 18 Ves 221, *GPG v ACF* [1983] 1 NSWLR 54, *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, *Lee v The Queen* (2014) 253 CLR 455, *McLaughlin v Fosbery & Ors* (1904) 1 CLR 546, *Public Advocate v C, B* (2019) 133 SASR 353, *RAP v AEP* [1982] 2 NSWLR 508, *Re Application for Guardianship Order (BCB)* [2002] 28 SR (WA) 338, *Re DJR and Mental Health Act* [1983] NSWLR 557, *Re Insane Patient* (1952) 69 WN (NSW) 341, *Re JD* [2003] QGAAT 14, *Re W (A Minor) (Medical Treatment: Courts Jurisdiction)* [1992] 4 All ER 627, *RH v CAH* [1984] 1 NSWLR 694, *Secretary, Department of Health and Community Services v JWB and SMB* (*Marion's case)* (1992) 175 CLR 218, *X7 v Australian Crime Commission* (2013) 248 CLR 92, referred to.

T Carney and D Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice*, The Federation Press, 1997

REPRESENTATION:

Counsel:

Plaintiff/Applicant:	T Moses
First Defendant/Respondent:	D McConnel
Second Defendant/Respondent	M Littlejohn

Solicitors:

Plaintiff/Applicant:	Solicitor for the Northern Territory
First Defendant/Respondent:	North Australian Aboriginal Justice Agency
Second Defendant/Respondent	Direct brief

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IN THE FULL COURT OF THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Northern Territory of Australia v EH & Anor [2021] NTSCFC 5
Nos. 2020-02510-SC & 2020-02431-SC

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Plaintiff/Applicant

AND:

EH
First Defendant/Respondent

AND:

PUBLIC GUARDIAN
Second Defendant/Respondent

CORAM: GRANT CJ, SOUTHWOOD & KELLY JJ

REASONS FOR JUDGMENT
(Delivered 20 August 2021)

THE COURT:

[1] On 15 July 2020, a Judge of the Supreme Court consolidated these two proceedings and referred them to the Full Court pursuant to s 21 of the *Supreme Court Act 1979* (NT). The sole issues arising for determination are whether the Public Guardian's authority under a guardianship order made on 18 March 2019 includes the power to consent to:

(a) physical contact with the first defendant, in the form of handholding and gentle pressure of limbs to prevent contamination of the site and infections when the first defendant has his supra-pubic catheter changed;

(b) the administration of medication to the first defendant, namely oral carbamazepine and olanzapine, for agitation and disinhibition; and

(c) continued treatment of the first defendant in a secure area of the geriatric ward of the Palmerston Regional Hospital, where he has been treated since 2018.

[2] That care and treatment is referred to compendiously in these Reasons as the "medical interventions".

Factual background

[3] The facts are largely uncontroversial. At the time of the hearing the first defendant was an 80-year-old man with frontotemporal dementia presenting as disinhibition, aggression, agitation and impulsivity. On 18 March 2019, the Northern Territory Civil and Administrative Tribunal ("the Tribunal") made a guardianship order appointing the Public Guardian as guardian for the first defendant's personal matters and conferring authority on the Public Guardian to make decisions regarding:

(a) where and with whom the first defendant is to reside;

(b) "health care action" within the meaning of the *Guardianship of Adults Act 2016* (NT); and

(c) the first defendant's day-to-day care, including facilitating access to support services.

[4] At the material times, the first defendant was resident in the secure geriatric ward at the Palmerston Regional Hospital. The purpose of that placement was to minimise his agitation in order to reduce reliance on sedation and staff intervention. The first defendant was not able to leave the secure ward without assistance. There is nothing in the evidence to suggest that the first defendant wished to leave the geriatric ward unassisted.

[5] The first defendant had a suprapubic catheter in place as a result of a urinary retention condition. The catheter was required to be changed every four to six weeks. When being changed, the area around the catheter had to be kept sterile to avoid the risk of infection. During the course of that procedure, the first defendant's treating team held his hands and guided his arms away from the site to prevent him from touching and contaminating the site. Those interventions were partly precautionary and partly responsive to voluntary or involuntary movements by the first defendant. The alternative to that intervention was an increased use of sedation, which gave rise to an increased risk of adverse health outcomes.

[6] The first defendant's medication regime included the administration of carbamazepine twice-daily for the behavioural and psychological symptoms of his dementia, and olanzapine as required for acute episodes of agitation, including sometimes when his suprapubic catheter was being changed.

[7] Against that background, in August and September 2019 a geriatrics registrar at the Palmerston Regional Hospital made applications for orders pursuant to s 35 of the *Guardianship of Adults Act 2016* expressly authorising the medical interventions. In November 2019, a third application was made to the Tribunal for an order pursuant to s 33 of the *Guardianship of Adults Act 2016* that the Public Guardian's authority under the guardianship order included the power to consent to the medical interventions. The import of that application was that an order pursuant to s 35 of the *Guardianship of Adults Act 2016* was unnecessary, and it was effectively made in substitution for the first two applications. The issue arising on the third application resolves ultimately to the question whether the medical interventions are "health care" within the meaning of the *Guardianship of Adults Act 2016*. The Tribunal ultimately found that they were not, largely on the basis that "health care" does not include coercive measures.[1]

1 *Re EH* [2020] NTCAT 17, [86]-[125].

[8] The Territory subsequently brought an application for leave to appeal against that decision, and commenced separate proceedings seeking a declaration that the Public Guardian's authority under the guardianship order includes the power to consent to the medical interventions. That application for declaratory relief was brought in the event that the Supreme Court formed the view that the Tribunal did not have power to make an order in the terms sought pursuant to s 33 of the *Guardianship of Adults Act 2016*, with the consequence that the appeal might fail on that jurisdictional ground rather than proceeding to a determination of the substantive issues.[2]

The historical context

[9] The appointment of substitute decision-makers for the protection of the property and personal interests of vulnerable citizens developed as part of the *parens patriae* jurisdiction. The courts of chancery could appoint a guardian (known as a "committee") to look after the property and person of a ward, and developed special principles and concepts, such as the "best interests" test, to be applied in the exercise of powers by guardians. That jurisdiction was given to the superior courts of the

2 The first defendant died after the hearing of the appeal and the application for judicial review, but before delivery of these Reasons. The death of the first defendant notwithstanding, the Full Court has determined these matters because they involve issues concerning the lawfulness of the medical interventions applied during the first defendant's life which are not purely hypothetical.

Australian colonies, and the powers conferred were inherent and plenary in nature unless modified by legislation.[3]

[10] The *Lunacy Act* 1890 (53 Vict ch 5) was enacted to govern mental health law in England and Wales, and many of its features were copied in the Australian colonies.[4] The analogue legislation in Australia generally conferred a lunacy jurisdiction on the relevant Supreme Court, but preserved the operation of the general law concerning the appointment and powers of a guardian (still called a "committee") except to the extent that the general law was altered by the legislation. The legislation provided that when proved to the satisfaction of the Court that a person was of unsound mind and incapable of managing his or her affairs, a "committee of his estate" could be appointed if necessary, and also "a committee of his person" when desirable.

[11] The legislation also authorised justices to issue warrants for the apprehension of an "insane" person, and to direct that person to be received into a hospital for the insane or a licensed house (subject to requirements for medical certification). The legislation was largely silent as to the powers of a committee when appointed. However, the legislation assumed that a committee of the person appointed by the Court had authority at general law to direct the represented person to be

3 *Re DJR and Mental Health Act* [1983] NSWLR 557, 564.

4 See, for example, the *Lunacy Act* (No 45 of 1898) of New South Wales, the operation of which was considered by the High Court in *McLaughlin v Fosbery & Ors* (1904) 1 CLR 546.

received into a hospital for the insane or a licensed house. A committee could also "settle and change at pleasure the lunatic's residence", and "select a licensed house as the place of enforced residence".[5] That included authority on the part of the committee, when appointed, "to cause the removal of the lunatic from one place of residence to another if circumstances justify such action".[6] That power extended to using force to detain a protected person, and to authorise others to do the same.[7]

[12] However, there was a limited need for the involvement of the superior courts from the mid-nineteenth century to the 1960s. This was because people with mental illness, intellectual disability or some other condition bearing on capacity were ordinarily confined and managed within institutions. Under those arrangements, personal decisions about treatment, lifestyle and education were made by the institution, and it was assumed in practice – whatever the strict position at general law might have been – that medical practitioners working in those institutions could authorise and carry out treatment on people lacking capacity without need for consent. In fact, courts sometimes refused to appoint a guardian to provide consent to medical treatment on the basis that "the ultimate responsibility for any treatment where the patient is incapable of giving a true consent must remain with the hospital and the

5 *McLaughlin v Fosbery & Ors* (1904) 1 CLR 546, 563-564.

6 *McLaughlin v Fosbery & Ors* (1904) 1 CLR 546, 564.

7 *Public Advocate v C, B* (2019) 133 SASR 353, 356 [12].

medical authorities who recommend and give the treatment".[8] The courts ordinarily only became involved where an issue concerning property rights arose, and in those circumstances the relevant Public Trustee was routinely appointed to manage the person's property.[9]

[13] The decline in the use of institutions to confine people suffering from conditions which impaired their capacity brought with it a renewed focus on how those people could make legally effective choices, including valid consent to medical treatment. Without a proxy with the power to make legally valid decisions, those who lacked competence might be deprived of access to necessary and therapeutic treatment and services. At the same time, it was recognised that recourse to the inherent jurisdiction of the superior courts presented practical difficulties, because of both limitations in jurisdiction and the expense and complexity of the procedures involved. In that former respect, the inherent jurisdiction extended only to the mentally ill and the profoundly retarded, and excluded dementia and most forms of mental retardation.[10]

[14] As a result, all Australian jurisdictions implemented schemes under which some form of guardianship tribunal, with an associated public

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8 See, for example, *Re Insane Patient* (1952) 69 WN (NSW) 341, 342.

9 T Carney and D Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice*, The Federation Press, 1997, pp 11-12.

10 *RH v CAH* [1984] 1 NSWLR 694, 696; *GPG v ACF* [1983] 1 NSWLR 54; *RAP v AEP* [1982] 2 NSWLR 508, 510.

advocate or public guardian, was given statutory power to appoint substitutes to make legally valid decisions on behalf of those who lacked the competence to do so, most commonly and significantly in relation to the management of property and consent to medical treatment. Under the legislation enacted for that purpose in New South Wales, Tasmania, South Australian and Western Australia, provision was made for representatives or "persons responsible" to provide consent on behalf of a person who needed medical treatment but was unable to provide personal consent.

[15] This allowed medical staff to identify a close friend or relative who could give consent if required (in some cases without need for the appointment of a guardian). This obviated the need for a specific order from a tribunal unless the treatment fell into an excluded category of serious medical treatment, which ordinarily included such matters as sterilisation, termination of pregnancy and donation of bodily tissue. Under all of the Australian schemes, substitute decision-makers were required to comply with principles incorporated into the legislation to regulate the exercise of powers and duties in the guardianship role. Those principles included such matters as consulting with the person subject to the order, taking his or her views into account, and acting in his or her "best interests".

[16] As part of that Australia-wide process of guardianship reforms, the *Adult Guardianship Act* (NT) came into operation in the Northern Territory on 30 June 1989. Under that scheme, applications for the appointment of a guardian were heard and determined by the Local Court, rather than by a lay tribunal as in the other States and Territory. Under the terms of that legislation, the appointment of a guardian under a full order conferred on the guardian the power "to consent to any healthcare that is in the best interests of the represented person".[11] The exercise of that authority was subject to the "best interests" requirement.[12] The further consent of the Local Court was required only in relation to a "major medical procedure", which included procedures generally accepted by the medical profession as being of a "major nature", and medical procedures relating to contraception and the termination of a pregnancy.[13] In determining whether to authorise a major medical procedure, the Local Court was also required to apply the "best interests" test.[14]

[17] During the operation of the predecessor guardianship legislation, in both the coronial jurisdiction and the Local Court the specific question

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11 *Adult Guardianship Act* (NT), s 17.

12 *Adult Guardianship Act* (NT), s 20.

13 *Adult Guardianship Act* (NT), s 21.

14 *Adult Guardianship Act* (NT), s 21(8). The need to procure the consent of a guardian, or an order of the court as the case may be, was expressly waived in cases of emergency. This recognised the primary common law exception to the requirement that medical treatment be preceded by consent where treatment is carried out in an emergency situation on a patient who is incapable of giving consent. In such a situation, the common law, and the concomitant statutory exemption, recognised that a health care professional can perform any medical procedures which are reasonably necessary in the circumstances: see, for example, *Collins v Wilcock* [1984] 1 WLR 1172.

arose as to whether the guardian of a represented person had power to consent to detention and restraint for the purpose of medical treatment in circumstances where there was a full guardianship order in place pursuant to s 17 of the *Adult Guardianship Act*.

[18] In the coronial findings into the death of Rita Anderson on 16 May 2002, the Deputy Coroner drew attention to a lack of clarity as to the extent of the powers under guardianship orders in relation to coercive treatment and placement. In *Satu Wieland v HS*[15], the Local Court concluded that in the circumstances of that case the guardian had power to consent to detention and restraint for the purpose of medical treatment as "part and parcel" of the power to consent to medical treatment. That finding was consistent with the conclusion reached in *Re Application for Guardianship Order (BCB)*[16]. Those findings are in turn consistent with the historical acceptance that authority to provide substitute consent for medical treatment is an attribute of guardianship[17], and that authority extended to ensuring that a person who was legally incapable of giving consent to medical treatment received such medical care as was required.

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15 *Satu Wieland v HS* [2004] NTMC 42.

16 *Re Application for Guardianship Order (BCB)* [2002] 28 SR (WA) 338. This was a decision of the Guardianship and Administration Board of Western Australia, in relation to a 67-year-old resident of a nursing home who required physical and/or chemical restraint on occasions to ensure his physical safety and to permit therapeutic interventions. The Board concluded that under the Western Australian legislation a guardian would have power to consent to the use of restraints, even allowing for the fact that the use of restraint is a complex matter which could only be assessed in the context of a holistic care management regime rather than viewed in isolation.

17 *Re Insane Patient* (1952) 69 WN (NSW) 341, 342; *Ex p Le Heup* (1811) 18 Ves 221.

[19] Accordingly, subject to the requirement to procure the Local Court's consent in relation to major medical procedures, an adult guardian was considered to have power under the predecessor legislation in the Northern Territory to consent to detention and restraint for the purpose of medical treatment in circumstances where there was a full guardianship order made pursuant to s 17, or a conditional guardianship order made pursuant to s 18, which conferred the power to consent to any health care that was in the best interests of the represented person. In a practical sense, the power vested in guardians to consent to health care in the best interests of the represented person would often have been rendered nugatory in the absence of an attendant power to consent to restraint. Given the nature of the disabilities suffered by persons falling within the ambit of the legislation, it was to be expected that represented persons would on occasions be resistant to or non-compliant with treatment in their best interests.

[20] However, given the uncertainties arising from the lack of express provision in the legislation, where the adult guardian had consented to health care but the person was resistant to provision of the care, the minimum restraint necessary in the circumstances was used to enable the most conservative form of care to be provided. In the ordinary course, the matter was then brought back before the Local Court out of an abundance of caution to seek a variation to the adult guardianship order to give express authority to the guardian to consent to the use of

the minimum restraint necessary for the provision of health care in the best interests of the person.

[21] Some advocates questioned whether the *Adult Guardianship Act* permitted any regime of coercive treatment, either with or without an order of the Local Court expressly authorising restraint, but no finding was ever made in those terms. Such a result would have been inconsistent with the fact that the legislation did not contemplate repeated applications in the *parens patriae* jurisdiction of the Supreme Court, and was in fact designed to avoid that necessity. The matter was not determined authoritatively by the Supreme Court during the operation of the *Adult Guardianship Act*.

The relevant operation of the *Guardianship of Adults Act 2016*

[22] The *Guardianship of Adults Act 2016* commenced on 28 July 2016. It repealed the *Adult Guardianship Act* and conferred jurisdiction in adult guardianship matters on the Tribunal. The Public Guardian is, in effect, the guardian of last resort.[18] Under the terms of the *Guardianship of Adults Act 2016*:

(a) The Tribunal may make an order appointing a guardian for an adult if satisfied that:

(i) the adult has impaired decision-making capacity;

18 Section 13(2) of the *Guardianship of Adults Act 2016* provides that the Tribunal may appoint the Public Guardian only if there is no other individual who is eligible for appointment under s 15 of the Act.

(ii) the effect of that impairment is that for some or all "personal matters" the adult is unable to exercise decision-making capacity; and

(iii) the adult is in need of a guardian for some or all of those matters.[19]

(b) The term "personal matter" is defined to mean "a matter relating to the adult's personal affairs (including health care) or lifestyle". The definition then provides examples of personal matters, which include "accommodation" and "health care".[20]

(c) The Tribunal must specify in a guardianship order the "personal matters" for which the guardian has authority.[21]

(d) The Tribunal may impose restrictions on the guardian's authority, impose requirements to be complied with by the guardian in relation to the exercise of the guardian's authority, and give directions to the guardian about the exercise of the guardian's authority.[22]

[23] Section 21 of the *Guardianship of Adults Act 2016* provides that a guardian for an adult must make decisions in relation to the personal matters for which the guardian has authority under the guardianship order as and when such decisions are required. For the purpose of

19 *Guardianship of Adults Act 2016*, s 11.

20 *Guardianship of Adults Act 2016*, s 3.

21 *Guardianship of Adults Act 2016*, s 16.

22 *Guardianship of Adults Act 2016*, s 17.

doing so, the guardian is authorised to do anything on behalf of the adult that the adult could lawfully do if the adult had full legal capacity. However, the guardian's authority is subject to the Act and the terms of the guardianship order.

[24] Consistently with the principles which were developed and applied in the *parens patriae* jurisdiction, a person exercising authority under the *Guardianship of Adults Act 2016* in relation to an adult must exercise that authority in accordance with the guardianship principles set out in s 4 of the Act and in the adult's "best interests". In determining what is in the adult's best interests, the decision-maker must take into account all relevant considerations, giving them the weight which is appropriate in the circumstances. In determining what is appropriate, the decision-maker must ensure that the authority is exercised in a way that "is the least restrictive of the adult's reasonable decision and action as is practicable".[23] The relevant considerations are specified to include, amongst other things:[24]

(a) maintenance of the adult's freedom of decision and action to the greatest extent practicable;

(b) the provision to the adult of appropriate care, including health care; and

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23 *Guardianship of Adults Act 2016*, s 21(4)(a).

24 *Guardianship of Adults Act 2016*, s 21(5).

(c) maintenance of the adult's right to be treated with dignity and respect.

[25] The term "health care" is defined broadly to mean health care of any kind, "including: (a) anything that is part of a health service, as defined in section 5 of the Health Practitioner Regulation National Law; and (b) the removal of tissue from a person's body in accordance with Part 2 of the *Transplantation and Anatomy Act 1979*".[25] The definition is broad in scope, and inclusive rather than exhaustive. The reference to a "health service" as defined in s 5 of the Health Practitioner Regulation National Law operates only to specify various categories of healthcare provider[26], and does not inform the question to be determined in this appeal.

[26] Where the matters for which the guardian has authority under the guardianship order include health care actions, the guardian can make consent decisions about those health care actions for the represented adult.[27] The term "health care action", for an adult, is defined to mean "commencing, continuing, withholding or withdrawing health care for the adult".[28] The term "consent decision", about health care action, is

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25 *Guardianship of Adults Act 2016*, s 3.

26 For example, services provided by registered health practitioners, hospital services, mental health services, pharmaceutical services, ambulance services, community health services, pathology services, et cetera.

27 *Guardianship of Adults Act 2016*, s 23(1).

28 *Guardianship of Adults Act 2016*, s 3.

defined to mean “a decision to give or refuse consent for the taking of the health care action”.[29]

[27] The only express restrictions on a guardian’s authority to make consent decisions about health care actions are where the matter is subject to an advance consent decision pursuant to the *Advance Personal Planning Act 2013* (NT), or where the matter involves “restricted health care”.[30] The *Guardianship of Adults Act 2016* stipulates each of the following matters to be “restricted health care”:[31]

(a) sterilisation of an adult, unless it occurs as a consequence of health care action that is taken primarily to treat an illness of or injury to the adult;

(b) termination of a pregnancy of an adult, unless it occurs as a consequence of health care action that is taken primarily to treat an illness of or injury to the adult;

(c) removal from an adult of non-regenerative tissue (as defined in s 4 of the *Transplantation and Anatomy Act 1979*) for transplantation to another person;

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29 *Guardianship of Adults Act 2016*, s 3.

30 *Guardianship of Adults Act 2016*, s 23.

31 *Guardianship of Adults Act 2016*, s 8. The matters stipulated as "restricted health care" are reflective of the position obtaining at general law concerning substitute consent for serious and non-therapeutic procedures: see *Secretary, Department of Health and Community Services v JWB and SMB (Marion’s case)* (1992) 175 CLR 218. The central finding in *Marion's case* was that the authorisation of a superior court was necessary for the non-therapeutic sterilisation of a mentally handicapped minor; and that the parent alone cannot consent. This represents a qualification to the general rule that an incompetent minor's parent or guardian has power to consent to medical treatment of the child.

(d) health care provided for medical research purposes; and

(e) health care prescribed by regulation to be restricted health care.

[28] The *Guardianship of Adults Regulations 2016* prescribe as "restricted health care":

(a) health care of a kind that is not yet accepted as evidence-based, best practice health care by a substantial number of health care providers specialising in the relevant area of health care; and

(b) electroconvulsive therapy.

[29] The scheme of the legislation is to give a person appointed as the guardian for an adult with authority in relation to health care the power and corresponding duty to make decisions in relation to those matters when such decisions are required. For the purpose of doing so, the guardian is authorised to do anything on behalf of the adult that the adult could lawfully do if the adult had full legal capacity. That power and duty is subject to, and guided by, a number of mechanisms under the legislation. Most significantly, decisions may only be made in accordance with the guardianship principles set out in s 4 of the *Guardianship of Adults Act 2016* and in the adult's "best interests"; and consent may not be given to "restricted health care" [32]. A primary

32 *Guardianship of Adults Act 2016*, s 23. It is not immediately apparent whether the position remains that consent to procedures falling within the scope of "restricted health care" would be required from the Supreme Court in the exercise of the *parens patriae* jurisdiction, or whether the Tribunal may give make a consent decision about "restricted health care action" pursuant to s 44 of the *Advanced Personal Planning Act 2013*. It is unnecessary to decide that issue for these purposes.

consideration in a guardian's deliberations is to ensure the provision to the adult of appropriate health care.

[30] Unlike some statutes in other Australian jurisdictions dealing with the appointment and powers of guardians[33], the powers of a guardian under common law and in equity are not expressly preserved. In that sense, the *Guardianship of Adults Act 2016* is not facilitative, but rather prescriptive of those matters. It is unnecessary for these purposes to determine whether by operation of s 14 of the *Supreme Court Act 1979* the Supreme Court retains the jurisdiction of Chancery to appoint a guardian in the exercise of its equitable jurisdiction; but the powers of a guardian appointed under the *Guardianship of Adults Act 2016* are circumscribed by the terms of that legislation.

[31] Against that background, the Tribunal's decision that the Public Guardian's authority under the order for appointment did not extend to authorising the medical interventions was predicated on the following matters:

(a) because a guardian is authorised only to make a decision to give or refuse consent for the taking of the health care action for the represented adult, and because coercion "is anathema to consent"[34],

33 See, for example, *Guardianship and Administration Act 1993* (SA), s 31; *Guardianship Act 1987* (NSW), s 21.

34 *Re EH* [2020] NTCAT 17, [93]-[95].

a guardian may not authorise coercion, including the medical interventions in this case;

(b) the principle of legality requires that a power for a guardian to authorise coercion against a represented adult would need to be conferred in the clearest and most unambiguous terms;[35]

(c) s 35 of the *Guardianship of Adults Act 2016* makes express and exclusive provision for circumstances in which a represented adult may be subjected to coercion;[36] and

(d) properly construed, the term "health care" does not include coercive measures.[37]

[32] The proposition that a guardian's authority is limited by some concept of volition is anomalous in this context. The anomaly lies in importing a requirement for volition into a process necessitated by and predicated on an inability to exercise decision-making capacity. In the ordinary course, any intentional touching of another person for the purpose of providing medical treatment is unlawful unless the person has consented to being treated. In circumstances where the patient has not provided consent to medical treatment, the subjection to that medical treatment is involuntary in nature (leaving aside any provision for substitute decision-making). That is so whether or not the patient

35 *Re EH* [2020] NTCAT 17, [103]-[109].

36 *Re EH* [2020] NTCAT 17, [110]-[114].

37 *Re EH* [2020] NTCAT 17, [115]-[125].

actively resists. Accordingly, where the patient is incapable of providing consent, any medical treatment performed on the patient will necessarily be in the absence of the patient's personal volition.

[33] There is no warrant in the language of the statute, or having regard to its subject matter, for the adoption of a construction which would see a person appointed as a guardian with authority to make decisions in relation to a person's health care, without any relevant restriction in the terms of the order, limited to providing consent to health care of a particular kind, namely health care to which the patient it is not in any way resistant. Apart from finding no support in the language or purpose of the statute itself, such a construction would be inconsistent with its terms.

[34] First, in determining what is in the adult's best interests, the guardian must take into account "the adult's views and wishes as far as it is practicable to do so".[38] That express provision recognises both that it will ordinarily not be possible to ascertain any sort of informed view on the part of the represented adult, and that it may in any event be necessary in the adult's best interests to provide consent which is inconsistent with the adult's expressed or demonstrated views and wishes.

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38 *Guardianship of Adults Act 2016*, s 4(2), (3)(a).

[35] Secondly, in determining what is in the adult's best interests, the authority must be exercised in a way that "is the least restrictive of the adult's freedom of decision and action as is practicable".[39] Those express provisions recognise that it may be necessary in the represented adult's best interests to authorise medical interventions which are restrictive of the adult's freedom of action.

[36] Thirdly, the legislation already contains an express limitation on the scope of "health care" which may be the subject of consent decisions by the concept of "restricted health care".[40] Those express provisions recognise the legislature's consideration of the limits of consent decision-making in the personal matter of health care.

[37] Even where there is some active physical resistance by the represented adult, focusing on volition and coercion as narrowing concepts for "health care" is, as the plaintiff submits, inconsistent with a scheme for surrogate decision-making where the adult lacks the capacity to either accede to or refuse treatment. The principles governing decision-making under the legislation require a consideration of whether the treatment is consistent with the represented adult's wishes, but do not require consistency with those wishes. Those same principles have application to all substitute decision-making under the legislation. By way of example, a guardianship order conferring authority over

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39 *Guardianship of Adults Act 2016*, s 4(4)(a), (5)(c).

40 *Guardianship of Adults Act 2016*, ss 8, 32.

financial affairs permits, and in some senses assumes, financial decision-making contrary to the wishes and volition of the represented adult and coercive treatment of his or her property.

[38] To the extent that there is any ambiguity concerning the scope of the term "health care", that portion of the Second Reading Speech extracted in the Tribunal's reasons for decision[41] suggests that the purpose of the *Guardianship of Adults Act 2016* was to broaden the scope of "health care" to allow efficient substitute decision-making and to avoid treatment delays while approvals were sought from some form of guardianship tribunal (as was previously the practice under the former legislation). The Minister identified that the only limit on the scope of the term was for "restricted health care".

[39] The *Guardianship of Adults Act 2016* would appear in this respect to be most closely modelled on the *Guardianship and Administration Act 2000* (Qld). Section 33 of the Queensland legislation provides that unless the Tribunal otherwise orders, "a guardian is authorised to do, in accordance with the terms of the guardian's appointment, anything in relation to a personal matter that the adult could have done if the adult had capacity for the matter when the power was exercised". That provision is effectively replicated in s 21 of the *Guardianship of Adults Act 2016*. A "personal matter" is defined in the Queensland legislation

41 *Re EH* [2020] NTCAT 17, [113].

to include where, and with whom, the adult lives, and his or her health care. There is no material point of distinction between that definition and the definition in the *Guardianship of Adults Act 2016*.

[40] In the matter of *Re JD*, the Guardianship and Administration Tribunal of Queensland stated:

> This definition of personal matters is very wide as the section provides that it includes any matter relating to the adult's care or welfare except special personal matters and special health care. … Special health care includes sterilisation, termination of pregnancy, removal of tissue for donation, participation in special medical research or experimental health care and electroconvulsive therapy and psychosurgery. These are the matters which are specifically excluded, otherwise if it relates to the adult's care or welfare the guardian can consent. The definition of personal matters also specifically includes health care but does not limit it to this type of care. … Accordingly a guardian who is appointed to make decisions in relation to all personal matters can essentially make all the decisions in relation to a very broad range of matters and should not be read in a restricted or limited way.
>
> Furthermore, the definition of personal matters also specifically lists as a personal matter "legal matters not relating to finance or property". Consent to being retained or contained in a particular place is in the Tribunal's view a legal matter, which a guardian can consent to if the adult is unable to give a valid consent. Any restriction or containment will not amount to "false imprisonment" if consent is given to the containment or restriction. This is acknowledged by Peter MacFarlane in his book Queensland Health Law Handbook (2001) where he states at p 100 "In some instances the restraint will be lawful. This will be the case where the patient consents…". Clearly then if the patient could have consented to make the restraint lawful then a guardian on the basis of section 33 and the definition of personal matters can also provide this consent.[42]

42 *Re JD* [2003] QGAAT 14, [27]-[28] per President Lyons (now Justice Lyons of the Queensland Supreme Court).

[41] It must be assumed that in adopting the model in place in Queensland the legislature was aware of how those provisions were applied in that jurisdiction.

[42] In Tasmania and Victoria, the legislation provides that appointment as a full guardian confers the powers and duties which the guardian would have if he or she was a parent and the represented person his or her child, and includes the authority to decide on a place of residence and healthcare.[43] That structure is quite different to the Territory scheme, but draws attention to the fact that the adoption of a construction which limited a guardian's authority to health care or medical treatment to which the adult is not resistant would be inconsistent with the general law concerning the matters in respect of which a legal guardian may provide consent. For example, in the case of a minor who lacks the requisite capacity, consent to medical treatment will ordinarily be provided by the child's parents or legal guardian. The authority to provide consent to medical treatment in those circumstances includes where the treatment has been expressly refused by the child, and extends to medical treatment to which the child is resistant.[44] However, as under the statutory schemes, the consent of the parents or guardian will be insufficient in relation to certain types of procedures. While

43 See, for example, *Guardianship and Administration Act 1995* (Tas), s 25.

44 See, for example, *Re W (A Minor) (Medical Treatment: Courts Jurisdiction)* [1992] 4 All ER 627, in which the English Court of Appeal dealt with a case involving a 16-year-old girl who was seriously ill with *anorexia nervosa* but refused treatment. The Court of Appeal left undisturbed a finding by the court below that the parents had power to authorise the child's transfer to a specialist unit in order to be force-fed.

recourse is made to the common law principally to shed light on the context in which the provisions were enacted, the position at common law may be influential in the process of interpreting the provisions of a statute concerning basic principles such as the powers of a guardian.[45]

[43] The Tribunal's reliance on the "principle of legality" falls to be considered in this context. That is because the principle, to the extent that it can have any operation in these circumstances, is a legal assumption that the legislature would not have intended to abrogate the fundamental common law right of patient autonomy. The purpose of both the assumption and the common law principle is to provide protection to the individual. For this reason, the assumption will be diminished in effect if the rights given exceed those under the common law and/or where the legislative provision affords enhanced protection to the individual.[46] That is particularly so where a clear legislative object may be discerned. As Gageler and Keane JJ observed in *Lee v New South Wales Crime Commission*:

> The principle ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative

45 See, for example, the observations made in relation to the interpretation of criminal codes by reference to the common law position: *Vallance v R* (1961) 108 CLR 56, [75]-[76]; *The Queen v Barlow* (1997) 188 CLR 1, 32.

46 *Daly v Thiering* (2013) 249 CLR 381, [32]-[33].

> objects by means within the constitutional competence of the enacting legislature.[47]

[44] Although many of the authorities speak of the principle of legality being rebutted by "clear and unambiguous language", and this has been taken by some to require express abrogation, there is no doubt that the application of the principle may be rebutted by necessary implication.[48] The phrase "clear and unambiguous language" encompasses both express words and words of necessary implication. In this case, the assumption either has no application or is clearly rebutted.

[45] First, having regard to the history and principles of guardianship at general law described above, it would seem unlikely that there was ever a fundamental common law (or equitable) right of patient autonomy in relation to persons lacking the capacity to make binding decisions concerning medical treatment or the facilities in which the treatment was to be administered, at least where a legal guardian had been appointed.

[46] Secondly, the appointment of guardians in the *parens patriae* jurisdiction, and subsequent legislative interventions in the field, were to ensure that people suffering from conditions which impaired their

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47 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 310 [313].

48 See, for example, *Coco v The Queen* (1994) 179 CLR 427, 438 (Mason CJ, Brennan, Gaudron and McHugh JJ), 446 (Deane and Dawson JJ); *X7 v Australian Crime Commission* (2013) 248 CLR 92, 109 [24] (French CJ and Crennan J): 'clear words or necessary implication', 603 [119], 604 [125] (Hayne and Bell JJ): 'by express words or necessary intendment'; *Lee v The Queen* (2014) 253 CLR 455, 466 [31] (French CJ, Crennan, Kiefel, Bell and Keane JJ): 'clear words or those of necessary intendment'.

capacity could have legally effective decisions made for them by proxy, including valid consent to medical treatment, lest they be deprived of or delayed from access to necessary and therapeutic treatment and services. Such appointments, and legislation providing for such appointments, are to advance the represented adult's right to the enjoyment of the highest attainable standard of physical and mental health, rather than in diminution of the individual's rights or protections.

[47] Thirdly, the terms of the legislation contemplate the substitute consent to medical procedures which are inconsistent with the adult's expressed or demonstrated views and wishes, and restrictive of the adult's freedom of action. Those provisions displace such common law rights as might otherwise subsist, by necessary implication at the very least. The application of the assumption that a statute does not incidentally affect common law rights is inapt to a field in which there is a long history of legislative interventions to ensure that persons are provided with safe and effective health care. As Basten JA said in *Harrison v Melhem* (in relation to a scheme for motor vehicle accident compensation which was said to affect common law rights):

> "[B]oth the existence of an effective remedy and controls over the extent of compensation have long since moved beyond the scope of the general law unaffected by statute, and had become the specific attention of widespread statutory interventions.
>
> … [W]here consideration of the legislation, in a given statutory context, favours a construction involving greater rather than lesser

> constraint, there is no reason not to give effect to the construction so indicated.[49]

[48] The *Guardianship of Adults Act 2016* ensures that the best interests of the adult are advanced by incorporating an exhaustive set of principles and express exclusions by which the power to consent to medical treatment is governed. While it would no doubt have been possible for the legislature to have made bald provision that a guardian's authority to make consent decisions about health care action allows consent to "restrictive practices" or "coercive measures" (to adopt the Tribunal's terminology), a provision in those terms would run the risk of displacing, or at least de-emphasising, the carefully calibrated decision-making process prescribed by the legislation.

[49] That is, the decision-maker's authority must be exercised in the adult's best interests; in determining the adult's best interests the decision-maker must obtain the adult's current views and wishes as far as practicable and give appropriate weight to the relevant considerations; and in determining what is appropriate the authority must be exercised in a way that is the least restrictive of the adult's freedom of decision and action as is practicable in the circumstances. As already stated, that process necessarily connotes the consent to procedures which are restrictive of freedom of decision and action if that is in the adult's best interests. As the plaintiff submits, physical manipulations which are a

49 *Harrison v Melhem* (2008) 72 NSWLR 380, 409 [220]-[221]; cited with approval by the High Court in *Daly v Thiering* (2013) 249 CLR 381, [32]-[33].

necessary incident of the safe performance of a medical procedure may include modest physical restraint during the performance of that procedure, even in the absence of specific consent. For those reasons, the proposition that "health care" cannot and does not include physical restraint of short duration in the form of gentle pressure of limbs to prevent contamination of the site and infections should be rejected.

[50] That conclusion is in no way precluded by, or inconsistent with, the fact that under the *Mental Health And Related Services Act 1998* (NT), treatment must not be administered to a person admitted as an involuntary patient unless it has been authorised by the Tribunal[50]; and that mechanical restraint of a patient may only be applied subject to strict conditions and expressly in the absence of the patient's consent[51]. The requirement for the Tribunal's authorisation under that legislation is directed to very different circumstances in which the patient has been involuntarily admitted on the basis of some mental illness or mental disturbance, that condition may not impair the patient's decision-making capacity, and there is no appointment of a substitute decision-maker in place to advocate for the patient and make decisions in his or her best interests. The conditions on mechanical restraint are imposed because it involves the application of devices (including belts, harnesses, medicals and straps) on a patient's body to restrict the

50 *Mental Health and Related Services Act 1998*, s 55(1).

51 *Mental Health and Related Services Act 1998*, s 61.

patient's movement for extended periods, again in relation to patients with conditions which do not necessarily impair their decision-making capacity or the capacity to consent to medical treatment.

[51] We turn then to consider the operation of s 35 of the *Guardianship of Adults Act 2016*. Subsection 35(1) provides:

> The Tribunal may make an order that a guardian, or another specified person, is authorised to take specified measures to ensure the represented adult complies with the guardian's decisions in the exercise of the guardian's authority.

[52] The proposition that this section establishes or confirms that a guardian's authority does not include consent to modest physical restraint during the process of changing a catheter must have as its premise that the guardian's authority is limited in that way. Otherwise, s 35 of the *Guardianship of Adults Act 2016* does no such thing. A provision in general terms empowering the Tribunal to authorise a guardian or some other person to take specified measures to ensure a represented adult complies with the guardian's decisions does not lead necessarily to the conclusion, in the context of medical treatment at least, that consent to therapeutic measures which the adult in any way resists falls outside the scope of the guardian's authority.

[53] The position would be different under a legislative regime which provided for the appointment of a guardian (whether clothed with general law or exclusively statutory powers) by a guardianship tribunal,

but then expressly reserved to the tribunal exclusive power to direct where and with whom the represented person was to reside; to authorise the detention of the person at the place where he or she is to reside pursuant to that direction; and to authorise those involved in the care of the represented person to use such force as may be reasonably necessary for the purpose of ensuring the proper medical or dental treatment of the person.[52] It would have been a simple matter for the legislature to make provision in those terms, following on the position adopted in South Australia, but it chose not to do so.

[54] Moreover, the terms of the provision do not readily lend themselves to the actual performance of medical procedures. This is illustrated in the Explanatory Statement for the Bill, which relevantly states:

> This clause allows the Tribunal to make an order where the guardian or another specified person is authorised to take specific measures or actions to ensure a represented adult complies with a guardian's decision. For example, this will allow for a represented adult to be removed from a setting where they may be subject to abuse, exploitation or neglect but from which they refuse to be removed. Orders of this nature may only be made by the Tribunal and must be reassessed within 42 days of the order being made.
>
> An order under this clause may only be made if the Tribunal is satisfied that authorising the specified measures to be taken is the only appropriate way to protect the represented adult from harm, neglect, abuse or exploitation.[53]

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52 See, for example, *Guardianship and Administration Act 1993* (SA), s 32, the effect of which was considered by the Full Court of the Supreme Court of South Australia in *Public Advocate v C, B* (2019) 133 SASR 353. The observations made by the Full Court at [30] endorsing the application of the principle of legality by the judge at first instance were directed to the question whether the Tribunal was vested with exclusive power to authorise detention and the application of force.

53 Explanatory Statement, Guardianship of Adults Bill 2016 (NT), 10.

[55] However, this is not to say that s 35 of the *Guardianship of Adults Act 2016* has no application to consent decisions in relation to health care. For example, there may be circumstances in which a guardian has consented to some essential medical treatment of the represented adult, but the adult refuses to leave home and attend hospital for the purpose of receiving that treatment, or (if already in hospital) refuses to leave the ward to go to an operating theatre for the purpose of receiving the treatment. As the plaintiff concedes, the power of the guardian to make consent decisions in relation to health care action would not extend to the forcible conveyance of the represented adult (at least not in the absence of an express provision empowering the guardian to take such measures and actions as are reasonably necessary to ensure that the represented person complies with any decision of a guardian). In those circumstances, application would properly be made to authorise agents of the hospital and/or guardian to forcibly take the adult to the facility or to the operating theatre as the case may be.

[56] To take another example, there may be circumstances in which the measures necessary to overcome resistance to medical treatment by the adult would go beyond the modest physical restraint involved in the medical interventions under consideration in this case. There may be some doubt that those measures are a necessary incident of the safe performance of a medical procedure which are authorised by the

general consent to that procedure.[54] Those circumstances might warrant an application to the Tribunal for authorisation to apply that restraint.[55] An application of that type would be consistent with the common practice of guardians operating under the general law to obtain judicial sanction before exercising any uncommon restraint on or interference with the liberty of the represented person, even where the scope of their authority comprehended that restraint or interference. Whether such an application is necessitated or warranted is an assessment of fact and degree, and a complex one which would involve a careful consideration of the "best interests" criteria set out in the legislation and which would be informed by whether the health professionals involved considered that some further authorisation was required.

[57] Even allowing the potential application of the provision to health care, it does not support the proposition that the medical interventions fall outside the guardian's authority. It may be noted further that on the facts of this case, s 35 of the *Guardianship of Adults Act 2016* had no application to those aspects of the medical interventions which involved the administration of medication and continued treatment in a secure area of the secure geriatric ward. There was no suggestion of

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54 In those circumstances, the medical practitioners would be protected by the operation of s 25 of the *Guardianship of Adults Act 2016*, which operates such that a consent given by a guardian in the exercise of the guardian's authority has effect as if the consent had been given by the represented adult in the adult

55 An authorisation by the Tribunal would have effect under s 35(5) of the *Guardianship of Adults Act 2016* that the guardian or other person is not liable to any action for false imprisonment or assault, or any other action, liability, claim or demand arising out of taking a measure under the order.

any resistance or failure in compliance with the guardian's decisions in relation to those matters, and they otherwise quite clearly fell within the Public Guardian's authority to make decisions concerning residence and accommodation, health care action and day-to-day care.

Disposition

[58] For these reasons, the Tribunal's reasoning and conclusions were in error. In the ordinary course, leave to appeal would be granted in this case. There was sufficient doubt about the question of law determined by the Tribunal to justify the grant of leave; and that question of law is of considerable specific and general importance in the context of consent decisions under the *Guardianship of Adults Act 2016*. However, the application for leave to appeal, and any consequential appeal, are concerned only with the orders made rather than the reasons for those orders.

[59] The orders ultimately made by the Tribunal were that the application for an order pursuant to s 33 of the *Guardianship of Adults Act 2016* that the Public Guardian's authority under the guardianship order included the power to consent to the medical interventions be dismissed; and that the medical interventions were authorised by the Tribunal pursuant to s 35 of the *Guardianship of Adults Act 2016*. The form of those orders gives rise to a consideration whether, even accepting that the Tribunal was wrong in the conclusion of law

ultimately drawn, it was open to it to make orders in the terms sought by the Public Guardian and the Territory pursuant to s 33 of the *Guardianship of Adults Act 2016*.

[60] That section allows the Tribunal to "make orders as to the exercise by a guardian of the guardian's authority". The Public Guardian and the Territory were effectively seeking orders declaratory of the scope of the Public Guardian's authority under the order for appointment which had previously been made by the Tribunal. Given the operation of the legislation, it was unnecessary for the Public Guardian to seek clarifying orders or for the Tribunal to make orders in those terms. However, it was lawful to do so. The terms of s 33 of the *Guardianship of Adults Act 2016* were broad enough to allow orders in those terms. The application involved a right which was the subject of controversy. The Public Guardian had a proper interest in obtaining clarification, and the question was one which fell squarely within the Tribunal's jurisdiction at first instance. In those circumstances, the Tribunal's dismissal of the Public Guardian's application was predicated on error and is amenable to correction on appeal.

[61] Although it was similarly open to the Tribunal to make the orders it did pursuant to s 35 of the *Guardianship of Adults Act 2016*, to do so was also predicated on error. Given the existence of those orders, and the publication of these Reasons, it is strictly unnecessary to grant

declaratory relief that the Public Guardian's authority under the guardianship order includes the power to consent to the medical interventions. However, the plaintiff is entitled to a declaration in those terms to vindicate its position that the Public Guardian's authority derives from the terms of the order appointing it as guardian rather than from the orders subsequently made by the Tribunal pursuant to s 35 of the *Guardianship of Adults Act 2016*.

[62] Accordingly, the following orders are made:

In proceeding No 2020-02431-SC

1. Leave to appeal is granted.
2. The orders made by the Northern Territory Civil and Administrative Tribunal on 25 June 2020 in File No 21647381 are set aside.

In proceeding No 2020-02510-SC

1. Declare that the Public Guardian's authority under the guardianship order made on 18 March 2019 includes the power to consent to:
   (a) physical contact, in the form of handholding, gentle pressure of limbs to prevent contamination of the site and infections when the first defendant has his supra-pubic catheter changed;

(b) the administration of medication, namely oral carbamazepine and olanzapine, for agitation and disinhibition; and

(c) continued treatment in a secure area of the geriatric ward of the Palmerston Regional Hospital where the first defendant has been treated since 2018.

[63] We will hear the parties in relation to the costs of both proceedings if need be.

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