

Introduction

In *HYY (Guardianship)* [2022] VCAT 97, President Quigley and Deputy President Nihill gave advice on whether the *Guardianship and Administration Act 2019* (Vic) ('GAA') authorises a guardian to make decisions about using physical restraint if it is required to provide medical treatment to a represented person. In sum, they said:

- A guardian's power to make decisions about medical treatment does not extend to authorising physical restraint to administer medical treatment.
- The use of physical restraints is not a personal matter for which VCAT may appoint a guardian under the GAA.
- Physical restraint is not a "thing necessary to be done to give effect to the power of the guardian" to consent to medical treatment under s 38(1)(b) of the GAA.
- If physical restraint is required for the purposes of providing medical treatment, a guardian should apply to VCAT for an order under s 45 of the GAA for the represented person to comply with the guardian's decision.

This advice only applies to physical restraint and not to chemical restraint, although the advice notes that parallel issues may arise in administering chemical restraint for the purpose of providing medical treatment.¹

Facts

HYY is a 73-year-old woman with a longstanding history of depression with paranoid themes and suicidal ideation. She also has various medical conditions for which she requires ongoing daily medication to reduce the risk of stroke or thrombosis.

HYY was admitted to hospital after overdosing on melatonin and experiencing six weeks of increasing behavioural disturbance. Doctors at the hospital sought direction from the Office of the Public Advocate ('OPA') on what authority they could administer medication after HYY had been refusing it. On a few occasions, the OPA consented to medical treatment and physical restraint of HYY under s 63 of the *Medical Treatment Planning and Decisions Act 2016* (Vic) ('MTPDA'). The hospital then made an application for guardianship to VCAT.

VCAT made a guardianship order appointing the OPA as HYY's guardian with decision-making authority for accommodation, medical treatment and access to services. The orders did not include any explicit authority to make decisions about restraint. The OPA sought advice from VCAT on the scope of a guardian's power to consent to physical restraint of a represented person to provide medical treatment.

Advice

Application of the Charter

In giving its advice, VCAT emphasised the importance of interpreting the GAA and the MTPDA in a way that is compatible with human rights set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter').²

¹ *HYY (Guardianship)* [2022] VCAT 97, [152].

² *Ibid* [28].

It recognised that a number of human rights would be engaged by the decision to impose physical restraint upon a person.³

VCAT also examined the *Mental Health Act 2014* (Vic) (“MHA”) and *Disability Act 2006* (Vic) (“DA”), which contain detailed provisions on restrictive interventions and make a clear distinction between medical treatment and the use of restrictive interventions to administer the treatment.⁴ There is no reference to the concept of restraint in the GAA or MTPDA, but VCAT considered that any physical restraint must not infringe on a represented person’s right to equal protection of the law without discrimination. This means that any process to determine if physical restraint is required must have sufficient oversight to ensure that the restraint is necessary, reasonable and is the least restrictive option. It must also meet the needs and support the safety and dignity of the represented person.⁵

Meaning of ‘physical restraint’

VCAT understood the meaning of restraint to be “that which is outside the usual course of conduct required to effect medical treatment”.⁶ It recognised that there may be a spectrum of degrees of restriction that health care providers may use when a person is resistant to treatment.⁷ In VCAT’s view, the following actions do not constitute physical restraint and may fall within a guardian’s powers to make medical treatment decisions:

- mild physical restraint, such as firmly holding a hand or arm steady;⁸
- compassionate human contact, such as benign encouragement and assistance;⁹ and
- gentle, non-forcible physical support, such as hand-holding, holding or steadying a limb, encouraging the person into a wheelchair for transport, walking alongside and gently steering the person, providing assistance to get onto a bed, and other potential actions and strategies.¹⁰

VCAT distinguished those practices from forcible restraint used for the purpose of controlling resistive behaviour. That restraint is distinct from medical treatment and, upon VCAT’s rights-based interpretation of the MTPDA, does not fall within the meaning of “medical treatment” in the MTPDA.¹¹

Principles in the GAA

In finding that restraint is not a “personal matter” for which a guardian may be appointed under the GAA, VCAT distinguished cases in other Australian jurisdictions that focus on the best interests of a represented person. VCAT emphasised that the new Victorian GAA, which came into effect in March 2020, has moved away from the best interests approach to a rights-based approach.¹²

The object of the Victorian GAA is to protect and promote the human rights and dignity of persons with a disability. This is brought into effect by the key principles of the GAA, which includes promoting the personal and

³ Ibid [55]-[62].

⁴ Ibid [137].

⁵ Ibid [140].

⁶ Ibid [47].

⁷ Ibid [145].

⁸ Ibid [47].

⁹ Ibid [146].

¹⁰ Ibid [148].

¹¹ Ibid [149].

¹² Ibid [174].

social wellbeing of the represented person by giving effect to their will and preferences. VCAT acknowledged that there may be situations where a guardian needs to make decisions against the will and preferences of a represented person. However, it noted that a person also may often be encouraged or persuaded to comply with a guardian's decision rather than being physically forced to comply.¹³ VCAT also considered that reading the definition of "personal matter" to not include imposing physical restraint was most compatible with the Charter.¹⁴

Section 45 orders

Having ruled out a guardian's power to authorise physical restraint, VCAT considered that the only lawful mechanism to authorise physical restraint in providing medical treatment is by an order under section 45 of the GAA.¹⁵ Section 45(1) provides:

VCAT may make an order at any time while a guardianship order is in force that gives the guardian or another specified person power to take specified measures or actions to ensure that the represented person complies with the guardian's decisions in the exercise of the powers and duties conferred by the guardianship order.

VCAT made this finding for the following reasons:

- The Statement of Compatibility for the GAA indicates that section 45 is intended to confer power to enforce compliance, including by physical measures, and provides an additional level of oversight when the orders are required.
- Section 45 orders are rarely made and are limited to high-risk situations where a person may be in danger.
- There is an obligation on VCAT to rigorously ensure that every less restrictive alternative is thoroughly considered before making a section 45 order.
- Any section 45 order requires strong justification and oversight. Details, including the person authorised to take measures and the measures themselves, must be specified in the order.
- The order must be reassessed every 42 days or in a shorter timeframe so that no restrictive arrangement stays in place longer than necessary.¹⁶

Commentary

HYY is significant because it is the first time VCAT has considered the issue of physical restraint under the new GAA. In deciding that guardians cannot authorise physical restraint to administer medical treatment, VCAT emphasised that the objective of the GAA is to promote the human rights of represented persons and distinguished that approach from the "best interests" approach applied by other jurisdictions.

The advice highlights that guardians, medical treatment decision makers and treatment providers must explore a spectrum of practices, such as gentle, non-forcible physical support or encouragement before applying to VCAT for authorisation to use physical restraint. Authorisation for physical restraint may only be made by a section 45 order

¹³ Ibid [178].

¹⁴ Ibid [175].

¹⁵ Ibid [197].

¹⁶ Ibid [188]-[196].

under the GAA, which is a last resort after every less restrictive measure is considered and is subject to strong oversight and short timeframes.

VCAT acknowledged that there may be administrative burden for guardians and VCAT in seeking a section 45 order, however it considered this oversight was necessary to protect represented persons' human rights. It also noted that further legislative reform may be required to insert appropriate processes for restrictive interventions in the GAA and MTPDA.¹⁷

¹⁷ Ibid [197].