



HUMAN RIGHTS

DECISIONS BULLETIN

for the period 1 August 2009 - 31 August 2009

This Bulletin contains summaries of all written reasons for decisions published by the Tribunal in the Human Rights stream for the period 1 August 2009 - 31 August 2009. The full text of decisions and reasons can be found on the Tribunal's website at www.sat.justice.wa.gov.au. If you would like the monthly bulletin emailed to you directly, please enter your email address and details at our subscription page.

GENDER REASSIGNMENT ACT 2000 (WA)	1
AB & AH AND GENDER REASSIGNMENT BOARD OF WESTERN AUSTRALIA [2009] WASAT 152	1
GUARDIANSHIP AND ADMINISTRATION ACT 1990 (WA)	2
LWL [2009] WASAT 150	2
RE: JAB [2009] WASAT 151	3
TR [2009] WASAT 157	3
RE: NCK [2009] WASAT 158	4
RH [2009] WASAT 159	4
JF and MF [2009] WASAT 163	5

GENDER REASSIGNMENT ACT 2000 (WA)

**AB & AH AND GENDER REASSIGNMENT BOARD OF WESTERN AUSTRALIA
[2009] WASAT 152
14 AUGUST 2009**

**MS J TOOHEY (SENIOR MEMBER), MR M ALLEN (SENIOR MEMBER),
DR L FARRELL (SENIOR SESSIONAL MEMBER)**

Gender reassignment - Review of decisions of the Gender Reassignment Board refusing recognition certificates - Both applicants born female - Reassignment procedure - Medical and surgical procedures undertaken - Bilateral mastectomies and testosterone treatment - Genitals and other gender characteristics altered - Whether hysterectomy necessary in order to satisfy requirements of the *Gender Reassignment Act 2000 (WA)* - Gender characteristics - Whether applicants have the physical characteristics by virtue of which a person is identified as male - Finding that applicants satisfy provisions of the legislation - Decision under review set aside

The applicants sought review of decisions of the Gender Reassignment Board of Western Australia refusing to issue them with certificates recognising the reassignment of their gender from female to male.

Both applicants had undergone bilateral mastectomies, and testosterone treatment as a result of which each had undergone extensive physical changes consistent with being male. Both were infertile. Both presented as, and appeared to be, males. Neither had undergone any surgical procedure to alter their ovaries, uterus or vagina. Neither had had a penis constructed.

The Gender Reassignment Board of Western Australia found that each applicant satisfied all the requirements of the *Gender Reassignment Act 2000* (WA) for the issue of a recognition certificate except the requirement that they have the gender characteristics, as defined, of a male. In that regard, the Gender Reassignment Board of Western Australia found the fact of having a female reproductive system inconsistent with being male.

On review, the Tribunal accepted the evidence of each applicant that he intended to continue testosterone treatment for the rest of his life. It accepted the medical evidence that each was, and would remain, infertile for as long as he continued testosterone treatment. It accepted that there was no real prospect of pregnancy in the future. It noted that a surgical procedure is not mandated by the *Gender Reassignment Act 2000* (WA).

The Tribunal noted that it is impossible for a person to have all the physical characteristics by virtue of which to be identified as being of the opposite sex and found that, necessarily, having the gender characteristics of a male within the meaning of the *Gender Reassignment Act 2000* (WA) means having sufficient of those characteristics. It accepted that a female reproductive system is a fundamental, although not essential, physical characteristic of being female. However, it was not persuaded that the presence of those organs alone, in circumstances in which there was no longer a capacity to bear children, and no real prospect of that changing in the future, outweighed the other physical characteristics by virtue of which each applicant is now identified as male.

The Tribunal stated that there are important policy reasons for requiring certainty in the area of gender reassignment. However, whether a person has the gender characteristics of the gender to which they seek to be reassigned must be determined according to the circumstances of the individual in light of the terms and purpose of the *Gender Reassignment Act 2000* (WA). In the circumstances of the applicants in these proceedings, it was satisfied that each was entitled to a recognition certificate.

GUARDIANSHIP AND ADMINISTRATION ACT 1990 (WA)

LWL [2009] WASAT 150

7 AUGUST 2009

**MR J MANSVELD (MEMBER), MS J STANTON (SENIOR SESSIONAL MEMBER),
MS V O'TOOLE (SENIOR SESSIONAL MEMBER)**

Guardianship and administration - Administration - Person unable to make reasonable judgments in respect of matters relating to all or any part of his estate - Person in need of an administrator - Suitability of the proposed appointees as administrators - Remuneration of an administrator

In November 2007, an administrator was appointed for the estate of an elderly man who, due to a number of strokes, had lost the ability to make his own decisions.

The appointed administrators were his accountant and his de facto partner.

Prior to the time when the order for administration was due for periodic review, a daughter of the man sought leave to have the order reviewed.

Another daughter and son of the man alleged that the administrators had not acted in the man's best interests and proposed that they be appointed to act jointly.

The Tribunal decided that the current administrators had conducted the administration in the man's best interests and should continue to act in that capacity. The Tribunal amended the order made in November 2007 to confirm the appointment of the joint administrators, to fix remuneration for the accountant administrator, to make financial provision for the man's disabled son and to direct the administrators to provide regular financial statements to the man's children.

**RE: JAB [2009] WASAT 151
11 AUGUST 2009
MS F CHILD (MEMBER)**

Guardianship and administration - Application for leave to apply for review of administration order - Applicant the administrator but seeking leave as the partner and advocate of the represented person - Whether the application for leave discloses a change in circumstances or any other reason for review of the order - No reasons disclosed requiring a review - Periodic order falling due for review - Application for leave dismissed

The Tribunal dismissed an application made in June 2009 for leave to apply for review of an administration order which appointed an administrator of the estate of a woman with a diagnosis of dementia. The application for leave was made by the partner of the woman. The partner had consented to her appointment as the administrator when the order had been made by the Tribunal in May 2008. The order had been set for periodic review in August 2009.

The partner's request for leave primarily addressed dissatisfaction with the original decision of the Tribunal to appoint an administrator of the estate and the evidence on which this decision had been based and did not disclose any change in circumstances or any other reason for the grant of leave.

Having considered the reasons advanced by the applicant the Tribunal determined that the request did not support the grant of leave and that the application should be refused.

**TR [2009] WASAT 157
17 AUGUST 2009**

**MS D DEAN (MEMBER), MS C HILL (SENIOR SESSIONAL MEMBER),
MS J STANTON (SENIOR SESSIONAL MEMBER)**

Review of guardianship order - No need for order - Medical decisions can be made under s 119 - Guardianship order revoked

TR is a young woman with a mild intellectual disability who lives in her own accommodation with 24 hour care funded by Disability Services Commission. She visits and stays with her parents on weekends and public holidays. On 15 July 2009, the Tribunal reviewed an order made on 5 May 2000, appointing the parents as TR's limited guardians to make decisions in relation to her accommodation, work choices, her contact with others and her medical and dental treatment.

The Tribunal heard evidence that TR was no longer in need of a guardian to make decisions in relation to her accommodation that all agreed was now stable. Evidence was also provided that her contact with others and her work activities were being managed in her best interests by her carers and parents working together. There were no current medical decisions to make and in any event, the parents were authorised under s 119 of the *Guardianship and Administration Act 1990* (WA) to make medical and dental treatment decisions on TR's behalf.

Based on the evidence before it, the Tribunal found there was no longer any need for an order as all TR's needs were being met informally.

**RE: NCK [2009] WASAT 158
18 AUGUST 2009
MS F CHILD (MEMBER)**

Guardianship and Administration - Access to medical reports and other documents - Represented person deceased - Application allowed in part

These reasons relate to a determination by the Tribunal of an application for access to documents held on the file of the Tribunal.

The application by the son of NCK, sought release of medical evidence and other documents submitted for hearing of applications for the appointment of a guardian and an administrator of the estate of NCK heard by the Guardianship and Administration Board in 2004.

The application for access to the documents followed the death of NCK in 2009 and was for the stated purpose of probate proceedings of her will, which were before a court in another jurisdiction.

The application was allowed in part but access to the medical reports was refused because the purpose for which their release was sought is outside the purposes of the *Guardianship and Administration Act 1990 (WA)*, and contrary to the public interest in maintaining the integrity of the Tribunal's processes in dealing with applications made under that Act. The one document which was released was a document that did not identify NCK.

**RH [2009] WASAT 159
20 AUGUST 2009
MS D DEAN (MEMBER)**

Section 86 review of guardianship order - Need for an order - Best interests of the person - Previous guardian not suitable - Public Advocate appointed limited guardian

RH is an elderly man with dementia. His friend, KR, was appointed his limited guardian in February 2009 to make decisions on his behalf in relation to the use of chemical and physical restraints and medical treatment. On an application by KR for an early review of the order, the Tribunal revoked the order appointing KR and appointed the Public Advocate limited guardian to make decisions in relation to restraint, medical treatment and also accommodation for RH.

In making this decision, the Tribunal had before it evidence that KR had at times delayed making decisions in relation to medical treatment sometimes causing RH unnecessary discomfort and suffering. Additionally, KR did not accept the seriousness of RH's cognitive decline, did not agree with the assessment of RH's care needs and refused to agree to him moving into nursing home care. Based on this evidence, the Tribunal found that KR did not always act in the best interests of RH and therefore was unsuitable to be appointed guardian.

JF and MF [2009] WASAT 163

25 AUGUST 2009

**MS D DEAN (MEMBER), MS V O'TOOLE (SENIOR SESSIONAL MEMBER),
MS J STANTON (SENIOR SESSIONAL MEMBER)**

**Application for administration - Capacity to make reasonable judgments -
Presumption of capacity not displaced - Application dismissed**

MF is a young woman with an acquired brain injury. In 2005, she entered into a contract of sale for a property she owned at the time. An application was made to the Tribunal by her mother for the appointment of an administrator to act on MF's behalf in relation to matters relating to the sale of the property. The Tribunal appointed MF's brother limited administrator to deal with issues relating to the sale of the property. Three years later, in March 2009, the legal proceedings in relation to the sale of the property had been completed and so the Tribunal revoked the administration order.

On 26 May 2009, a family friend applied to the Tribunal for the appointment of a limited administrator 'to assist [MF] in her legal matters' being an application to the Supreme Court in relation to the property sale. Evidence was provided to the Tribunal that, although MF is slower than some in processing information she was capable of understanding even complex legal matters and was capable of instructing her legal representative. The Tribunal was satisfied on the basis of this evidence that there was no need for the appointment of an administrator and dismissed the application.