

**THIS IS AN OFFICIAL REPORT OF THE MENTAL HEALTH
REVIEW TRIBUNAL PROCEEDINGS IN RELATION TO MR
STEPHENS AUTHORISED BY THE PRESIDENT OF THE
TRIBUNAL ON 23 DECEMBER 2015**



This is an edited version of the Tribunal's decision. The forensic patient has been allocated a pseudonym for the purposes of this Official Report

MENTAL HEALTH REVIEW TRIBUNAL DECISION

CONCERNING: Mr Stephens MHRT NO: FXXXX

TRIBUNAL MEMBERS:

Maria Bisogni	Lawyer member
Olav Nielssen	Psychiatrist member
Lynn Houlahan	Member

APPLICATION: Section 88 application for revocation of a Financial Management Order

DATE AND PLACE OF HEARING: 7 August 2015
Mental Health Facility

This is an application by Mr Stephens under section 88 of the *NSW Trustee and Guardian Act 2009* for the revocation of a Financial Management Order made by the Tribunal in September 2010.

BACKGROUND

In 2003, Mr Stephens was found not guilty by reason of mental illness on a range of charges, including attempted murder and maliciously inflict actual bodily harm and he was ordered to be detained. He has had brief episodes of conditional release in the community. He is currently detained in a medium secure mental health facility with limited leave.

Further background information concerning Mr Stephens' history, care and treatment as a forensic patient and the circumstances leading up to the orders committing his estate to the NSW Trustee were set out in Annexure A to the Tribunal's reasons.

The Tribunal made an interim financial management order for three months under s 47 of the *NSW (Trustee and Guardian) Act 2009* ('the Act') in 2010. The reasons for decision stated that there was evidence of 'persistent and long term incapacity through gambling and increasing debt' and that Mr Stephens 'wished to present evidence of present capacity.'

A review of the order was listed 3 months later at which time the Tribunal was satisfied that Mr Stephens was 'incapable of attending to his own financial affairs in a way such as would permit him to avoid the making of a Financial Management Order.'

There was evidence at the hearing by the social worker of Mr Stephens having accumulated a number of debts including to a Bank, and the Hospital for non-payment of fees and the State Debt Recovery Office. Debt waivers had been sought in respect of the debts

ISSUES FOR CONSIDERATION

The issue for the Tribunal to determine is whether Mr Stephens should have control of his finances based on his regained capacity or his best interests.

The Tribunal's power to revoke an order under the Act is governed by section 88 of the Act as follows:

88 Revocation of Order by MHRT

(1) The MHRT, on application by a protected person who is (or who was but has ceased to be) a patient, may revoke the order that the estate of the person be subject to management under this Act, if it is satisfied that:

- a) The protected person is capable of managing his or her affairs, or
- b) The revocation is in the best interests of the protected person.

(2) In this section, a patient includes a forensic patient within the meaning of the *Mental Health (Forensic Provisions) Act 1990*.

The Tribunal is required to apply the principles of the Charter set out in s 39.

39 General principles applicable to Charter

It is the duty of everyone exercising [functions](#) under this Chapter with respect to [protected persons](#) or [patients](#) 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.

PRESENT AT THE HEARING:

Mr Stephens attended the hearing and was represented by Ms Brae Sinclair of the Mental Health Advocacy Service. Also in attendance were:

- the treating Psychiatrist;
- the Nursing Unit Manager;
- the Social Worker;
- Mr Stephens', Key Worker; and,
- Mr Stephens', mother.

EVIDENCE

The Tribunal had regard to a number of written reports by the multidisciplinary team. Mr Stephens also presented written material in support of his application. There was a report from the NSW Trustee and Guardian noting ongoing liabilities comprising hospital fees, banking and credit card and that waivers had been requested for. Mr Stephens had savings of \$12,625 and his sole source of income was the disability support pension (DSP). The report noted no legal action was being pursued against Mr Stephens and no recommendation was made to the Tribunal.

The social worker gave oral evidence said that the Trustee and Guardian had advised her that some of Mr Stephens' debts remain while others have been written off. The Bank's personal loan had been sent to bulk debt recovery which essentially meant it had been waived. However, the Bank had refused a request to waive the credit card bill of \$3,507 and it remained unpaid by the Trustee. A request for waiver of the Hospital fees was made some years ago but was unresolved.

The social worker expressed concern about Mr Stephens' ability to manage his finances as evidenced by: ongoing examples of Mr Stephens wishing to spend money beyond his budget; difficulty in accepting a limit on his spending; and the need to balance his financial commitments. There was an instance of Mr Stephens being allocated money towards clothing by the Trustee but he had not used all the funds on clothing which had been the intended purpose. In addition, Mr Stephens had asked the Trustee for \$50 a week to start saving for his conditional release which had been denied.

The psychiatrist gave evidence in relation to Mr Stephens' mental state and medication changes, noting that Mr Stephens has a mental illness which is treatment resistant and had only partially responded to medication. There had been some improvement in his mental state since his last Tribunal hearing. The psychiatrist reported:

‘..... he has generally been settled..... polite, respectful and generally compliant with treatment and direction. He presents generally as slightly disinhibited with rapid speech and preoccupation about his needs not being met.’

The psychiatrist stated that Mr Stephens enjoys a reasonable quality of life and enjoys multiple opportunities to go out on outings with staff and other patients. These may include going to the movies,

visiting the local shopping centre, going to the library and occasionally going outside of Metropolitan Sydney. His use of leave privileges is appropriate.

The psychiatrist noted Mr Stephens' strong desire to manage his finances but Mr Stephens was unable to produce 'adequate evidence that his debts have been waived and that he can budget all of his DSP money.' Further, Mr Stephens had not produced a plan as to how he would repay his debts or budget his money. The psychiatrist opined that Mr Stephens did not have the capacity to manage his finances and the psychiatrist did not support the revocation of Mr Stephens' order.

The nursing report prepared by nursing unit manager (NUM) related that Mr Stephens regrets the decision to have a Financial Management Order and resents the management of his finances by an outside agency. Mr Stephens has a \$100 weekly allowance for comforts that he uses on purchasing cigarettes and ward outings. The NUM stated:

'He generally manages, however he often complains of little or no money at the end of the week. For larger purchase such as clothing, birthdays etc. he is given a sum of money from the Trustee and Guardian and the purchases are generally supervised by nursing staff.'

The NUM stated that the treating team's position in respect of Mr Stephens' application was neutral.

Mr Stephens provided a number of documents to the Tribunal. This included an account of the circumstances leading to the making of the order. In summary, Mr Stephens had accumulated debt trying to build his own credit history in order to qualify for a loan to purchase a unit. He was later unable to pay back the loans due to a physical health problem and felt embarrassed and 'a failure' and tried to gamble to hide his mistakes. Within nine months he was broke and approached the treating team. He had the choice of being bankrupt or signing with the then Office of the Protective Commissioner. He agreed to the latter.

Mr Stephens also wrote about the effect of having an order and a budget so low that it affected his' personal image and physical health had deteriorated'. He wrote that he had having his financial affairs subject to the NSW Trustee humiliated and demoralised him. Mr Stephens claimed that he was capable of controlling his financial affairs, that he was in the right frame of mind and that he had clearly demonstrated with account books his day to day budgeting. Mr Stephens produced 3 books to the Tribunal as to how he manages his money. This included a checklist for all his entries during the week; he then transfers information to a second book which is a 12 column bank book which outlines his payments and how money is spent; the third book is his bank statement.

Oral evidence

During the hearing, the psychiatrist and the social worker amended their views concerning the application for revocation and stated that Mr Stephens should be given an opportunity to manage his finances. This

change in view appeared to be in response to the Tribunal advising that the statutory test for revocation had been recently amended to include a 'best interest' component.

The social worker agreed that Mr Stephens' mental state is now better than it was at the time of making the Financial Management Order in 2010. There was general agreement by the treating team that this was so and that Mr Stephens no longer gambled. The social worker said that the debt of hospital fees remained unresolved but she did not think that debt was being pursued by the Hospital. The social worker said that Mr Stephens had spoken about relying on the Hospital to assist with a budget.

The nursing unit manager said that many of Mr Stephens' problems around money related to his mental illness. He agreed that Mr Stephens is now well and needs and opportunity to 'pass or fail.'

Mr Stephens' key worker told the Tribunal that having an order has caused Mr Stephens a lot of anxiety. It is something Mr Stephens dwells on. The key worker was confident that Mr Stephens could manage his money as his mental state had improved. The key worker said that relations between Mr Stephens and the Trustee are such that when Mr Stephens attends to speak with his case manager, Security is called in and he is escorted out.

Mr Stephens told the Tribunal that he had been persuaded to agree with the making of the order as he was advised that his debts would be waived. His relationship with the Trustee was a source of dissatisfaction to Mr Stephens.

The Tribunal asked Mr Stephens how he would manage his finances if they were restored. Mr Stephens said that that he has opened up five accounts with different Banks and intends to place \$1,000 in each account and not draw from them at all as he would lose the accrued interest. He would place the remainder into another account. He wished to make purchases of a computer (\$500), shoes (\$245), athletic shoes (\$145), tracksuit for (\$120), bed linen (\$89) and a wallet for \$130. Mr Stephens said that he could demonstrate that he could manage his money and he could rely on the treating team for support.

Mr Stephens asked the Tribunal to have regard to his budget plan. The plan did not include payment of hospital fees. When asked about this by the Tribunal Mr Stephens said that he would pay them. The Tribunal asked Mr Stephens about the outstanding credit card debt. Mr Stephens said he would not use his savings to pay it off in one payment. His preference would be to pay a small sum in instalments over an extended period of time. Mr Stephens gave the Tribunal an undertaking that he would pay his Hospital fees. The key worker said that he could assist Mr Stephens by ensuring that the rent would be paid directly from Centrelink to the Hospital.

The Tribunal asked the treating team if it would provide informal support to assist Mr Stephens with his finances, if the order were revoked. The social worker indicated a willingness to do so but said that whilst

the treating team can work with Mr Stephens they do not have the same access to his financial data as the Trustee.

Mr Stephens' mother expressed the view that it would be beneficial for her son to manage his finances.

DETERMINATION

The Tribunal was satisfied on the evidence before it that was in Mr Stephens' best interests that the financial management order of September 2010 be revoked. The Tribunal took into account the considerations in section 88 of the Act and the principles of the Charter in s 39.

It is clear that from the content of section 88 that an order may be revoked solely on a best interest's basis, and even if a patient is incapable of managing their finances, as a result of amendments to the Act on 15 May 2015. In addition, the Act was amended to define 'patient' as including a forensic patient and to allow patients in a mental health facility to apply for the revocation of orders. The Tribunal may now consider applications by persons who are patients (as well as in the community) and by forensic patients. This amendment brings the *NSW Trustee and Guardian Act 2009* into alignment with the tests for revocation under s 25P of the *Guardianship Act 1987*. Mr Stephens is a forensic patient within the meaning of the *Mental Health (Forensic Provisions) Act 1990* having been found not guilty by reason of mental illness in relation to various charges referred to above. He remains a patient detained under that Act.

Mr Stephens asserted that he was capable of managing his finances. He relied on his accounting system of current and proposed expenditures. He was supported by his key worker, who said that Mr Stephens managed his money on outings from the Unit. Mr Stephens' solicitor submitted that it was in his best interest that he regains control of his finances.

Neither 'capable of managing his or her own affairs', nor the 'best interests of the protected person' is defined under the *Mental Health Act 2007* or the *NSW Trustee and Guardian Act 2009*. However both phrases have been the subject of considerable analysis by the courts. Before turning to the meaning of both terms it is necessary to consider the impact of the section 39 General Principles of the Charter.

Section 39 Principles of the Charter

The Act replaced the *Protected Estates Act 1983* with a number of key changes including introducing the section 39 principles. Those principles are drawn from section 4 of the *Guardianship Act*. In the second reading speech of the *NSW Trustee and Guardian Bill*, the then Attorney – General, Mr John Hatzistergos, stated:

'The benefits of this approach will include greater consistency in decision-making across these related areas of law, giving legislative recognition to the models of "best practice" which already exist in the provision of services to people with disabilities, including within the Office of the

Protective Commissioner, and giving greater protection to the human rights of people with disabilities to live with dignity and as much autonomy as possible.’

Mr Ian Cohen, Member of the Greens added:

‘The first amendment in clause 39 creates concurrence with the principles of section 4 of the Guardianship Act relating to financial management concerning the making of orders or the performance of functions under the Act. People with disabilities require decisions to be made for them about their financial affairs in the same way as they require decisions about health and lifestyle matters. This clause is designed to create a duty on those exercising functions under this Act to do so in a manner that is least restrictive on the inherent rights and freedoms of the protected person.’

The section 39 principles require the Tribunal to promote the autonomy, well-being and interests of the affected person with as least restriction as possible and to recognise their right to participate in the community on an equal footing with other members of the community, including the right to make decisions. Their protection from abuse and exploitation must be taken into account. It is the right of all persons under the Act to lead a normal life in the community and to be self-reliant.

His Honour Justice Lindsay, discussing the section 4 principles of the *Guardianship Act* regarded them

‘as ‘informing the evaluative decision’ to be made and are not be applied ‘formalistically, but they provide important points of reference’ (see *P v NSW Trustee and Guardian* [2015] NSWSC 579 (para 207)).

‘Capability’

Recently in *P v NSW Trustee and Guardian* [2015] NSWSC 579, His Honour Justice Lindsay examined the meaning of ‘capability’. His Honour favoured a subjective test which takes into account the particular circumstances of the subject person. His Honour’s endorsement of a subjective test is consistent with a number of recent cases that have moved away from the objective test espoused by His Honour Justice Powell in *PY v RJS* (1982) 2 NSWLR 700.

In *PY v RJS*, His Honour Justice Powell stated that a person was capable if they were able to deal ‘in a reasonably competent fashion, with the ordinary routine affairs of man’. The ‘objective test’ has become entrenched in the common law and has been widely cited as ‘the general legal test for capacity’ (See Law Society Journal of New South Wales, *Client Capacity Guidelines: Civil and Family Law matters* 2009).

However, in *Re R* (2014) NSWSC 1818 [94], His Honour Justice White declined to follow *PY v RJS* reasoning that the

'test propounded by Powell J did not address the terms of the statute itself which speaks of a person being capable of managing his (or her) affairs, not the ordinary routine affairs of man.' [6].

In *P v NSW Trustee and Guardian* [2015] NSWSC 579, his Honour Justice Lindsay noted that

'... the statutory test of incapacity to manage one's affairs (for which section 86 of the NSW Trustee and Guardian Act provides) involves consideration of the subjective circumstances of the individual in question, rather than (as Powell J's test suggests) an objective assessment of a person's ability to deal competently with "ordinary routine affairs of man"'. [266].

His Honour Justice Lindsay in *PB v BB* [2013] 1223 stated

'Ultimately, the language of the statute must be applied, beneficially, to the particular facts of each case, with care taken not to place any restrictive gloss on its terms. The Court may consult both an objective and a subjective perspective but it must begin, and end, with a consideration of the statutory formula: informed, as it is, by the scope and purpose of the legislation; the nature of the problem of "management" it addresses; and the antecedent general law...' [5].

His Honour added:

'Whether viewed through the lens of s 41 or the antecedent general law, the question whether a person is incapable of managing his or her own affairs focuses attention on the personal circumstances of that person' [6].

'Of central significance is the functionality of management capacity of the person said to be incapable of managing his or her affairs, not: (a) his or her status as a person who may, or may not, lack "mental capacity" or be "mentally ill"; or (b) particular reasons for an incapacity for self-management [8].

In *P v NSW Trustee and Guardian*, His Honour Justice Lindsay put the issues squarely:

'Is a person reasonably able to manage his or her own affairs in a reasonably competent fashion, without the intervention of a [financial manager] charged with a duty to protect his or her welfare and interests? '

'... is.... the person ... able to deal with (making and implementing decisions about) his or her own affairs (person and property, capital and income) in a reasonable, rational and orderly way, with due regard to his or her present and prospective wants and needs, and those of family and friends, without undue risk of neglect, abuse or exploitation: [307, 308].'

In determining whether the person is 'able' His Honour Justice Lindsay regarded the following as relevant:

(a) 'past and present experience as a predictor of the future course of events;

(b) support systems available to the person; and

(c) the extent to which the person, placed as he or she is, can be relied upon to make sound judgments about his or her welfare and interests: [309].’

In terms of time frames, His Honour Justice Lindsay provided the following guidance:

‘... the concept of ‘capability’ is directed to the reasonably foreseeable future as well as the present time’. [311], and

‘ Any decision to make, or to revoke, a financial management order, by its very nature, requires a backward glance designed to elucidate the present and the future; a firm grasp of present realities; and an element of anticipation to future problems and solutions. Management of the estate of a person in need of protection involves an exercise in risk management.’ [275].

The wording of the section makes clear that the onus rests on Mr Stephens to prove he is capable. The standard of proof is on the balance of probabilities (*Re GHI (a protected person)* (2005) ALR 589, 594 [22]).

In summary, capability requires an assessment of whether the affected person is able to ‘soundly’ provide for their own present and future wants and needs. This may be informed by what is known about their current or past financial dealings and whether they have required any support. The nature and size of the person’s estate are also relevant considerations as is their level of skill in managing it.

Despite Mr Stephens’ claim that he was now able to manage his own finances, the weight of evidence was against him. This was demonstrated by:

- his failure to provide for the payment of Hospital fees in his books of account;
- his reluctance to repay his outstanding credit card debt;
- evidence of the social worker that he wished to spend the bulk of his funds allocated for clothing immediately and when allocated the money spent them on some other items;
- evidence that he currently requires supervision for the management of his finances and finds it difficult to budget within his means;
- his continued request for funds from the Trustee which were beyond his means.

Looking at Mr Stephens’ past conduct, it was clear that around the time that the order was made he sought to improve his worsening financial position by gambling and only sought the assistance of his treating team when his situation became parlous. He has made poor financial decisions. It is also clear that his mental state has since improved. However, his failure to provide for future liabilities and his desire to spend his limited funds on discretionary items indicate that he continues to have impaired judgment which may be related to the nature of his illness as was suggested by the nursing unit manager.

The Tribunal determined that Mr Stephens was not capable of managing his financial affairs.

'Best Interests'

The meaning of 'best interests' has also been considered in a number of cases. His Honour Justice Young in *Re R* [2000] NSWSC 886 (17 August 2000) stated that it was difficult to find a good definition of 'best interests' but noted it:

'...must include the welfare, health and well-being of the person in a wider sense than is suggested by protection from neglect, abuse or exploitation.'

His Honour cited with approval the English case of *Re W* (2000) 1 ALL ER 175 which had found that in relation to a Power of Attorney that

'What is in the interests of the incapable person under the general cases has been taken to mean what is for the benefit of the lunatic personally, and not for his family or his friends or his estate.'

More recently, in *P v NSW Trustee and Guardian* [2015] NSWSC 579 His Honour Justice Lindsay explored the meaning of 'best interests' in 25P (2) (b) of the *Guardianship Act*. Section 25P (2) (b), is in the same terms as s 88 of the Act. His Honour gave the following guidance:

'One illustration of a case where it may be appropriate to dispense with a protected estate manager despite a finding of incapacity for self-management may be, by analogy with the Court's inherent jurisdiction, where there is no practical utility in burdening a person or his or her estate with the administrative infrastructure necessarily involved in protected estate management: *Re W and L* (parameters of protected estate management orders) [2014] NSWSC 1106 at [87]-[89] and [95]. Another, drawing specifically upon the liberal intent of the general principles set out in section 4 of the *Guardianship Act*, may be a case in which the Tribunal decides to take a risk in allowing a person in need of protection an opportunity to enjoy freedom of decision, freedom of action and the possibility of normal life living in community with an empathetic family: cf, *M v M* [1981]2 NSWLR 334 at 336A-B, 336C-D and 337F-338D; *CJ v AK* [2015] NSWSC 498 at [50]-[51] and [54] - [58]. See [219.]

Ultimately, what is done or not done, must be measured against whether it is in the interests, and for the benefit, of the particular person in need of protection; *Guardianship Act*, section 4(a); *Holt v Protective Commission* (1993) 31 NSWLR 227 AT 238D-F and 241G-242A; *GAU v GAV* [2014] QCA 308 at [48.]. See [320].

In summary, 'best interests' must relate to the interests and benefit of the protected person and is distinct from considerations as to what is in the interests of the estate. In this context 'best interests' may include

what may contribute to an affected person's wellbeing. In Mr Stephens' case, allowing him to regain control of his finances may confer benefits related to his sense of dignity, self-esteem and autonomy.

Whilst Mr Stephens had not demonstrated that he was able to plan for future expenses he was open to having the ongoing support of his treating team to assist him. It was evident that Mr Stephens was intensely pre-occupied by the financial management order and that it had caused him considerable distress and anxiety. The Tribunal accepted that Mr Stephens' negative interaction with the Trustee was having a negative impact on his psychological well-being. The Tribunal determined that the revocation of the order would be psychologically beneficial to Mr Stephens and represented an opportunity for him to take responsibility for his recovery.

Consistent with the principles of the Charter it is appropriate that he be given an opportunity to be independent and self-reliant and to be free of restriction. Mr Stephens' mental state has improved since the making of the order and his current mental state is stable. He impressed the Tribunal as genuinely wanting to apply himself to the task of managing his money and that he would rely on the support of his treating team. Applying the words of His Honour Justice Lindsay, the Tribunal considered it appropriate to take a 'risk' in allowing Mr Stephens to manage his money. However, the risk is contained by his restricted leave and the considerable input and supervision of his treating team who should be quick to observe any signs that Mr Stephens was mismanaging his finances. In such circumstances it would be open to the treating team to apply to the Tribunal for a new financial management order.

Another factor the Tribunal took into account was Mr Stephens' improved financial position since it had been managed by the Trustee. Mr Stephens' finances were largely in order and there was persuasive evidence that his outstanding debts (apart from the credit card debt) had been cancelled or waived.

In conclusion, the Tribunal determined that Mr Stephens should have an opportunity to manage his finances. Whilst he showed some deficits in capability this has to be balanced against the benefits to him of taking responsibility, albeit with the support of his treating team, for providing for his current and future needs. The chance to manage his finances will present Mr Stephens with an opportunity to demonstrate that he can make sound financial decisions and this would constitute an important process in his recovery. Consistent with the liberal intent of the s 39 principles of the Charter he is entitled to the 'dignity of risk' to 'pass or fail' as put by the nursing unit manager. Although for the reasons stated above, the risk is contained and calculated.

Signed:

Maria Bisogni, Deputy President

Dated: 9 November 2015