

# SUPREME COURT OF YUKON

Citation: [J.A.M.] (*re Guardianship*),  
2024 YKSC 8

Date: 20240320  
S.C. No. 24-B0004  
Registry: Whitehorse

BETWEEN:

PURSUANT TO THE *DECISION MAKING, SUPPORT AND PROTECTION TO ADULTS ACT*, S.Y. 2003, C. 21 (the “*Act*”); specifically SCHEDULE A, *THE ADULT PROTECTION AND DECISION MAKING ACT*, PART 3, COURT APPOINTED GUARDIANS (Part “3”)

IN THE MATTER OF THE APPLICATION FOR GUARDIANSHIP OF  
[J.A.M.] also known as [A.M].

Before Chief Justice S.M. Duncan

Counsel for the Applicant, Public Guardian  
and Trustee

Cindy Freedman

Counsel for [M.L.D.]

Noel Sinclair

## ENDORSEMENT

[1] Immediately after I gave my Reasons for Decision and Order for guardianship of [J.A.M.] by the Public Guardian and Trustee on February 29, 2024, counsel for [M.L.D.] raised several issues. These included the ability of an order from the Supreme Court of Yukon to be enforced in Alberta, where [J.A.M.] is currently and where he jointly owns a home with. [M.L.D.]; related to this, counsel’s concern that [J.A.M.] incapability assessment does not meet Alberta capability assessment standards, thereby affecting the enforcement of the Order in Alberta and providing a foundation for this Court to order another assessment either in Alberta or consistent with its standards; and the legal rights of [J.A.M.] with respect to challenging the Order.

[2] Counsel for the Public Guardian and Trustee (“PGT”) responded at the hearing that they would work with the Alberta Public Guardian and Trustee (“Alberta PGT”) and with counsel qualified to practice in Alberta to determine the enforceability of the Yukon Order (the “Order”) in Alberta. Another incapability assessment is unnecessary and inappropriate: the Court has made its decision on the basis of the incapability assessment provided in support of the application, and if there is a significant change in [J.A.M.]’s capability, s. 51 of the *Adult Protection and Decision-Making Act*, SY 2003, c 21, Schedule A (the “Act”), provides a process for reviewing a guardianship order. The issue of the legal rights of [J.A.M.] to challenge the Order could have been raised during the hearing before the Order was granted but was not.

[3] I requested written submissions from both counsel on the jurisdictional issues before finalizing the Order. These have now been received. In the following I will summarize them and explain my conclusion that there will be no change to the Order.

[4] Counsel for the PGT explained they would retain counsel qualified in Alberta to advise them on the process of resealing the Order in Alberta, make application on the PGT’s behalf, with costs to be paid by [J.A.M.]’s estate. They referenced several sections of the *Alberta Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2 (“Alberta Act”), in support of the ability to do this (ss. 73; 82; 38).

[5] Counsel for [M.L.D.] responded: 1) the Alberta PGT should make application for the enforcement of the Order in Alberta; for the Yukon PGT to do so would be *ultra vires* because such a power is not in the enabling legislation and is not permitted under the principles in *R v Carlyle*, 2019 YKSC 38 (“*Carlyle*”), and *Endean v British Columbia*, 2016 SCC 42 (“*Endean*”); 2) there is no authority in the enabling statute to deduct costs

of the application to enforce the Order in Alberta from [J.A.M.]’s estate; 3) there was evidence of the possibility of improvement in [J.A.M.]’s capacity contemplated in the Yukon *Guidelines for Conducting Incapability Assessments* (“*Guidelines*”) and a capability assessment done according to Alberta law by an Alberta qualified assessor should be ordered now in the event an Alberta court requires it for the determination of whether the Order is enforceable in Alberta; 4) the transcription of the Reasons for Decision should be expedited; and 5) a stay of the enforcement of the Order for 30 days should be granted to allow [J.A.M.] or [M.L.D.] to retain and instruct counsel about a potential appeal of my ruling on the qualifications of the Yukon occupational therapist and the admissibility of her assessment report.

[6] The written submissions of counsel for [M.L.D.] went beyond my request for submissions on the issue of the enforceability of the Order in Alberta. Some of counsel’s arguments represent an attempt to reargue the matters I have already decided.

[7] First, this is not the same situation as in *Carlyle* or *Endean*. In *Carlyle*, the relevant issue was whether a territorially constituted review board could hold a hearing outside of the Yukon and exercise its coercive powers in that foreign jurisdiction. In *Endean*, the relevant issue was whether superior court judges from British Columbia and Ontario, who were implementing a pan-national class action settlement, had the power to sit together, with a superior court judge from Quebec, outside their home provinces to hear submissions by counsel and decide a motion relating to it. The motion was brought in the context of a settlement agreement which required orders “without any material differences” to be made in all three courts.

[8] Here, I have given reasons about why this Court had jurisdiction to hear the PGT's application for guardianship, despite [J.A.M.]'s current presence in Alberta and his joint ownership of a house there. The hearing occurred in the Yukon, not in Alberta. What remains is for the Order to be recognized in Alberta, in order to have effect there. As set out in the *Alberta Act*, recognition of a foreign guardianship order is done by way of resealing. It does not require a re-hearing, but instead, a review of the order, among other things, to determine what powers have been granted. The sections in the *Alberta Act* provided by counsel for the PGT set out the process.

[9] The basis of [M.L.D.s'] argument that the PGT cannot bring the application for resealing is not clear. The *Alberta Act* states "a person" can bring an application. Requesting another court to recognize or reseal a foreign order is not a request for a re-hearing, nor is it the holding of an initial hearing, as was the case in *Carlyle* and *Endean*. Further, whether the Yukon PGT is or is not a proper person to bring an application for a resealing order is a matter for the Alberta court to determine.

[10] Second, there is authority for the PGT to charge fees for their activities in ss. 2-14 of the *Regulations to the Public Guardian and Trustee Act*, OIC 2005/83. In addition, s. 15 provides the ability of the PGT to waive payment where it considers it appropriate to do so. There is nothing in that fee schedule that precludes the charging of costs of an application for resealing of the Order against the Adult's estate.

[11] Third, there was no evidence before the Court in this hearing from the physicians or the assessor that [J.A.M.]'s capacity or condition would improve. The *Guidelines* referred to by counsel for [M.L.D.] are general in nature and not specific to [J.A.M.]. The request for an Alberta-approved assessment was made by counsel for M.L.D. in her

original argument about the inadequacy of the Yukon assessor. This request was denied. As noted above, an application for a resealing order is not a re-hearing of the original application for guardianship. There is no basis for a request for another assessment now, after I made a finding of [J.A.M.]’s incapability based on the incapability assessment and the other evidence that was provided at the hearing and ordered that the PGT become his guardian.

[12] Further, counsel for [M.L.D.] suggested in court after I issued my decision that another assessment be done in six months and the PGT objected to this in its written submissions. I have requested a status report and the holding of a case management conference in six months because of the unusual and complex nature of this application for guardianship. This request did not include a request for submissions on a potential order for another assessment. Further, s. 51(1) of the *Act* provides that if there are significant changes to [J.A.M.]’s needs, circumstances, or ability to manage his affairs and a change or cancellation of the guardianship order appears to be in his best interests, at any time, the PGT must request a review of the guardianship order. Section 51(2) of that *Act* provides any person may apply for a review of the terms and conditions of an order appointing a guardian if the person has information about significant changes to the Adult’s needs, circumstances or ability to manage their affairs, or the guardian’s circumstances have changed in a way that affects their suitability or ability to act as guardian. Discussion of the need for or value of another assessment may occur in the context of significant changes to [J.A.M.]’s condition at the case management conference or at any time.

[13] Fourth, the transcribed Reasons for Decision were received by the Court on March 15, 2024. They will be reviewed and released on or before March 22, 2024.

[14] Fifth, no basis or argument was provided for a 30-day stay of the Order to be granted. A consideration of its legal implications and any potential next steps is not a sufficient reason for a stay.

[15] The Order will issue as amended by the PGT to reflect my decision and the discussion at the hearing.

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DUNCAN C.J.