

Your Ref:

Quote in reply: Elder Law Committee & Succession Law Committee: 21000326/46

15 December 2011

Research Director
Health and Disabilities Committee
Parliament House
BRISBANE QLD 4000

By email: hdc@parliament.qld.gov.au

Dear Director

REVIEW OF QUEENSLAND GUARDIANSHIP LAWS

I write on behalf of the Elder Law Committee and Succession Law Committee of the Queensland Law Society.

Recommendation 16.15 – Registration of an Enduring Power of Attorney

The Society supports the establishment of a central register for enduring powers of attorney and advance health directives (collectively referred to as “enduring power of attorney” in this submission).

There is now significant evidence from the reported QCAT and Court cases that the financial abuser use their powers as the adult’s attorney to facilitate most cases of financial abuse of elderly persons and persons under a legal disability.

In contrast, the instances of financial abuse by a person appointed by QCAT as financial administrator are small. The major reason for this discrepancy is because administrators are required by QCAT to lodge a financial plan and annual accounts, while attorneys do not have those obligations.

Without a register, no one knows who has been appointed as an adult’s attorney and the attorney knows that they have no reporting responsibilities [i.e. no one is watching them]. Therefore, the likelihood of:

- (a) deliberate abuse [such as using the adults funds for the attorney’s benefit]; or
- (b) not deliberate abuse [such as free occupancy of the adult residence]

is likely to occur in many cases. The cases heard by QCAT also, show that most attorneys are unaware of their duties and responsibilities, such as to keep records, keep property separate, the limitation on making gifts and conflict transactions.

By the time financial the abuse is discovered it is usually too late to take action to protect the financial interests of the adult, or to recover the stolen assets.

The QLS supports the recommendations made by the *Victorian Parliament's Law Reform Committee* earlier this year, for the creation of a mandatory registration system for enduring powers of attorney in that State.

A registration system would be best located in an existing body such as the guardianship division of QCAT, which has in-depth understanding of substitute decision making and existing systems that could be used to supervise attorneys. To ensure accessibility, the registration system should be able to be utilised online.

The QLRC reported that “concerns about privacy of information may discourage people from making an enduring power of attorney if registration was mandatory.”¹ The Society understands that the nature of the enduring power of attorney and similar documents was to convey key directions and assist third parties in making important decisions about an adult’s health, financial affairs or both. Therefore to frustrate this dissemination would not assist the adult or improve his or her wellbeing. Further adequate safe guards may be put in place to ensure these documents are not easily available to the public. For example, adopting similar practices as Queensland’s Births, Deaths and Marriages when applying for a certified copy of an enduring power of attorney.

Enduring powers of attorney should not be valid unless they are registered.²

In addition, there needs to be better process for certification of a principal’s capacity to make an enduring power of attorney (for example by the principal’s GP or other qualified medical practitioner). The validity of the enduring power of attorney should be determined at the time of registration of the enduring powers of attorney and also when the issue of the activation of an enduring power of attorney occurs e.g. to determine if the principal has lost capacity.

A registration system would:

- Better enable identification and recognition of attorneys by providing a central system by which professionals (including financial institutions, health providers, government agencies) can determine whether an enduring power of attorney for an adult exists and is entitled to be used and if so, validate the identity of the person appointed as attorney.
- Deter financial abuse of adults with impaired capacity (particularly when coupled with a personal monitoring system where the principal’s estate is substantial) and prevent multiple or fraudulent powers of attorney.

A registration system could act in tandem with a system to enable a better education of attorneys as to their rights and duties and requirements for accountability.

Recommendations 28.1 and 28.2 – Appointment of litigation guardian

The objective of Recommendations 28-1, 28-1(a) and 28-2(b) of the QLRC report is to ensure that the rights of a person under a legal disability are protected by having a litigation guardian of last resort

¹ P 23 Issues Paper, Health and Disability Committee.

² see the UK Lasting Powers of Attorney legislation.

provision, where by the Public Trustee [for financial or property matters] or the Adult Guardian [for matters other than financial or property matters] is appointed.

While the reasons for these recommendations are clearly to protect and ensure that the rights of the incapacitated adult, there are some issues of concern:

- The first issue is that because the absence of a litigation guardian may arise in QCAT proceedings for appointment of an administrator and/or guardian, where the appointment of the Public Trustee and/or the Adult Guardian may be the likely outcome of that application, there may not be a full assessment of who is the appropriate person to be appointed as the litigation guardian for the adult. A person who may be unsuitable to be appointed as administrator could still be the most appropriate litigation guardian. The role of litigation guardian in some legal proceedings may require a close personal relationship with the adult to be able to give appropriate instructions to the lawyers acting for the litigation guardian.
- The second issue is if a person is already acting as litigation guardian, the appointment of Public Trustee and/or the Adult Guardian should not also displace the litigation guardian's appointment, unless there has been a full examination by QCAT as to their suitability or otherwise.
- The third issue is the default appointment process may be exploited by the other party to the legal dispute. In *Re EEP* [2005] QGAAT 45, an application for the appointment of the Public Trustee as administrator was made, in the expectation that this would result the Public Trustee acting as litigation guardian for existing litigation between the applicant and the adult. The Public Trustee did not wish to accept the appointment as litigation guardian. The Tribunal followed the decision of Wilson J in *Fowkes v Lyons* [2005] QSC 7, where her Honour said that the Court would be loath to appoint someone who did not consent to appointment. This confirmed the submission by the Public Trustee that the appointed Administrator is under no obligation to consent to being a litigation guardian and it is only by the appointment of a litigation guardian that litigation can be progressed where a party is under a legal incapacity in accordance with Rule 93 of the Uniform Civil Procedure Rules.

Further consultation is required on the effect of the implementation of the recommendations. The appointment of the Public Trustee or the Adult Guardian as a litigation guardian with the need for their consent may create difficulties in taking action to protect the rights of an adult, if there is a person more suitable to be appointed. Should consideration should be given to expanding this power to appoint any person without their consent?

Litigation Guardian's Liability for Costs

There are considerable benefits in the cost recommendation in 28-4. However, there remains the potential of personal liability for costs for a litigation guardian commencing legal proceedings. QCAT hearings that result in the removal of an attorney or administrator for breach of duty also usually need legal proceedings to be commenced to recover misappropriated assets.

If the Public Trustee or the Adult Guardian [for non-financial or property matters] was appointed as litigation guardian where the adult does not have the assets to pay their legal costs, the appointment would be a form of legal aid, which would not be otherwise available to a person who was not under a legal disability.

The QLS supports the recommendation generally, but a question to be considered is that the likely result of this recommendation is that only some people with a legal incapacity would have their legal costs

funded by the Public Trustee or the Adult Guardian. Should this issue be a matter of special funding for legal aid for the victims of financial abuse?

The Society also **encloses** a copy of its letter to the Minister for Health, the Hon. Geoff Wilson, on the issue of advance health directives.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitor, Louise Pennisi on (07) 3842 5872 or l.pennisi@qls.com.au

Yours faithfully

Bruce Doyle
President