

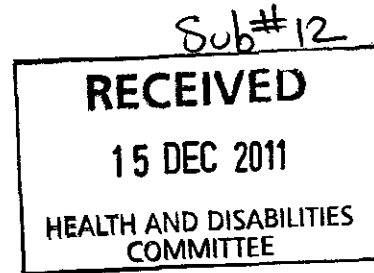
Your Ref: Review of Queensland Guardianship Laws

Quote in reply: 21000326.46 - Elder Law Committee and Succession Law Committee

15 December 2011

Research Director
Health and Disabilities Committee
Parliament House
Brisbane QLD 4000

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



11.1.4.3

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.

¹ P 23 Issues Paper, Health and Disability Committee.

² see the UK Lasting Powers of Attorney legislation.

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 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.

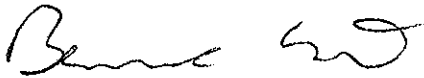
If the Public Trustee or the Adult Guardian [for non-financial or property matters] was appointed as litigation guardian where the adult does not have the assets to pay their legal costs, the appointment would be a form of legal aid, which would not be otherwise available to a person who was not under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

Your Ref: Advanced Health Directives

Quote in reply: 21000326.46 - Elder Law Committee

15 December 2011

The Hon. Geoff Wilson MP
Minister for Health
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Brisbane QLD 4001

By email: health@ministerial.qld.gov.au

Dear Minister

ADVANCE HEALTH DIRECTIVES - A REVIEW OF QUEENSLAND'S GUARDIANSHIP LAWS

Thank you for your letter of 11 November 2011 inviting the Queensland Law Society to comment on Guardianship Laws in Queensland and Advance Health Directives.

This letter is written with the assistance of the Elder Law Committee of the Queensland Law Society.

Inquiry – QLRC recommendations on Guardianship Laws in Queensland

Please find **attached** the Society's submission to the Health and Disabilities Committee in relation to the Inquiry into the Guardianship Laws in Queensland, for your kind consideration.

Advance Health Directives

The Society refers to your letter and understands that the Hon. Paul Lucas has been approached by representatives of GP partners who are concerned about the accessibility of advance health directives and other documents in relation to patient care.

Our members have found that there has often been poor understanding by health care professionals regarding the substitute decision making framework, in that many are not aware or do not understand or ignore the order of priority set out in s66 of the *Guardianship and Administration Act 2000*.

Many health care professionals treat the next of kin as the substitute decision maker for adults with impaired capacity when in fact, the order is:

- The directions and the attorney appointed under an Advance Health Directive; (or if there's no Advance Health Directive);
- A guardian appointed by the Tribunal; (or if there is no guardian appointed);
- The attorney appointed under an Enduring Power of Attorney; (or if there's no Enduring Power of Attorney);¹
- The Statutory Health Attorney who is available and in the following order:
 - A spouse of the adult; or
 - An unpaid carer for the adult who is over 18 years of age; or
 - A close friend or relative of the adult who is over 18 years of age and not a paid carer of the adult; or if all the above is not available;
 - The Adult Guardian.²

Often health care institutions lack systems to prompt patients and interested parties for information on Advance Health Directives, guardianship Tribunal appointments, enduring powers of attorney or statutory health attorneys. This issue is compounded in that there is no formal registration system to assist health care professionals when making key decisions about patient care.

Some of our members have attempted to ameliorate this by providing their clients cards to place in their wallets advising any reader about instruments held in their office, together with certified copies of enduring powers of attorneys and similar documents. Often the attorneys are provided with certified copies of these documents as well.

Our members have found that they have mainly prepared and witnessed enduring powers of attorney (rather than an Advance Health Directives) as:

- It is difficult for clients to contemplate an Advance Health Directive;
- It is difficult to obtain instructions in anticipation of a client losing capacity, particularly in circumstances where a terminal illness has not already diagnosed;
- It is less invasive for the client than an Advance Health Directive, which deals with end of life decisions;
- It is not required to be signed by a doctor, whereas an Advance Health Directive is required to be signed by a doctor.

As doctors and health care professionals are more familiar with Advance Health Directives, our members have found that in some circumstances health care professionals have insisted on only considering Advance Health Directives and have ignored enduring powers of attorney. There has also been some misconception as to whether certified documents may be used.

Ultimately, the problems identified can be addressed by:

- educating health care professionals and members of the public as to the operation of these documents when making key decisions about patient care;
- introducing a central online system of registration for enduring powers of attorney and advance health directives; and
- updating the EPA and AHD forms to outline the order of priority for substitute decision makers to make decisions for adults with impaired capacity pursuant to s66 of the *Guardianship and Administration Act 2000*.

¹ s66 *Guardianship and Administration Act 2000* (QLD)

² s63 *Powers of Attorney Act 1998* (QLD)

Thank you again for the opportunity to make comments in this very important area of law.

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