

GUIDELINES FOR COUNSEL FOR SUBJECT PERSON APPOINTED UNDER THE PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988

1 INTRODUCTION

- 1.1 This set of guidelines is for counsel appointed to act for subject persons under the Protection of Personal and Property Rights Act 1988.
- 1.2 All section references are to the Protection of Personal and Property Rights Act 1988.
- 1.3 These guidelines are in addition to the duties set out in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 and the Practice Note: Applications under the Protection of Personal and Property Rights Act 1988.
- 1.4 The role and practice of counsel for the subject person (counsel) must be guided by the principles relating to intervention under the Act: a presumption of competence (ss 5 and 24) and that the Court is to make the least restrictive intervention possible (ss 8 and 28).
- 1.5 The appointment is made pursuant to s 65.

2 DISCRETION

- 2.1 The intent of the guidelines is to promote quality and consistency of practice without fettering the discretion of counsel to exercise professional judgement.
- 2.2 It is essential counsel responds to the characteristics of each case and client rather than following a formulaic approach.
- 2.3 The guidelines seek to establish benchmarks for good practice while allowing counsel to tailor practice to the needs and circumstances of individual subject persons.

3 THE ROLE OF COUNSEL FOR THE SUBJECT PERSON

- 3.1 Counsel is to provide representation and advice to the subject person.
- 3.2 In some cases there will be a clear doubt about the level of competence. In other cases competence may be recoverable after a stroke, mental illness or alcoholism.
- 3.3 Where the subject person lacks competence to manage his or her affairs, the role of counsel will necessarily be to take a best interests approach, while always bearing in mind that the objective is to make the least restrictive intervention possible and to enable or encourage the subject person to exercise and develop such capacity as he or she has to the greatest extent possible.
- 3.4 Counsel has a duty to put before the Court the views of the subject person where that person has a view, whether or not counsel considers that is a valid point of view.
- 3.5 Where there is a conflict between the views of the subject person and information relevant to the welfare and best interests of that person, counsel shall discuss the issues with the subject person as far as possible and attempt to resolve the conflict with that person, but also put before the Court all relevant information from a best interest point of view.
- 3.6 Separate counsel can be appointed to assist the Court where appropriate (s 65(3)).

3.7 Where the subject person is able to express a clear view, that view should be put before the Court and, in appropriate circumstances, a hearing held.

4 TASKS FOR COUNSEL FOR THE SUBJECT PERSON ON AN APPLICATION FOR APPOINTMENT OF WELFARE GUARDIAN AND/OR PROPERTY ADMINISTRATOR

4.1 In every case, it is necessary to meet with the subject person (s 65).

(a) Where a subject person is unable to communicate, check that adequate protections will be in place (see, for example, the attached draft order for ex-Kimberley residents, where NASC is required to file a report every 12 months after observing the subject person. This is a process negotiated specifically for ex-Kimberley residents, and is included here as Appendix B).

(b) If there is a compulsory order under the Mental Health (Compulsory Assessment and Treatment) Act 1992, explain why an order is necessary (see *Vukor v McDonald* (1998) 17 FRNZ 545).

4.2 Contact other family members and/or friends to check for any conflicts and/or consents.

4.3 If there is conflict within the family, consider whether a family meeting, mediation or settlement conference would be appropriate to resolve issues.

4.4 Consider:

(a) whether any specific direction/condition needs to be included in the final order (s 10);

(b) the capital and income limits prescribed in s 11 for a property administrator;

(c) whether a personal order is a lesser intervention instead of the appointment of a welfare guardian. **Note: Appointment of welfare guardian requires that the subject person “wholly lacks capacity” (s 12(2) cf s 6);**

(d) if a personal order is required for medical treatment, whether a provision to enforce transport to that treatment is needed.

4.5 File a memorandum for the Court as set out in paragraph 4.2 of the Practice Note: Applications under the Protection of Personal and Property Rights Act 1988 covering the following matters.

(a) Jurisdiction (including adequacy of medical evidence).

(b) Service (including service on subject person) and whether any other persons are to be served (s 63(2)).

(c) Whether the subject person should be excused attendance at Court (s 74) and, if the subject person should attend, what special arrangements need to be made (if any) so that the subject person can be heard.

(d) Any conflict within the family.

(e) The most suitable order to meet the test of least restrictive intervention.

(f) Any interim order necessary.

(g) Any specific recommendations for the form of the order (ss 10, 11, 12).

(h) Suitability of proposed welfare guardian/property administrator, considering:

(i) whether this person will support the involvement of other friends and family members;

(ii) whether this person raises any concerns as to the requisite understanding and ability to carry out the tasks required, including honesty (especially for a property administrator);

- (iii) whether this person will be sufficiently available to carry out the tasks (time and geographical availability).
 - (i) Procedures necessary, that is, mediation; orders made on the papers; directions for hearing; hearing.
 - (j) Review date.
 - (k) Whether orders need to be suspended pending an appeal (s 82).
 - (l) Whether fees for counsel for the subject person should be paid out of the estate or out of the Consolidated Fund.
- 4.6 Be present for service, if considered appropriate. Note that it is not appropriate for counsel to serve the subject person with the proceedings.
- 4.7 At a mediation or hearing, represent the interests of the subject person. **Counsel is reminded that under s 75 the subject person has the right to be heard.**
- 4.8 Ensure the application is progressed in a timely manner without inappropriate delay.

5 TASKS FOR COUNSEL FOR SUBJECT PERSON ON APPLICATION FOR APPOINTMENT OF PROPERTY MANAGER

- 5.1 In every case, it is necessary to meet the subject person to explore any contribution he or she can make to the relevant issues.
- 5.2 Make contact with the applicant, through their lawyer if they are represented, to explore the reasons for the application.
- 5.3 Make contact with other family members and/or friends to check for any conflicts and/or consents.
- 5.4 Carry out some investigation to ascertain if the property exceeds the limits for an order to administer property (s 11) and consider if such an order would be a preferable order. Consider if the assets could be reduced to qualify by setting up a funeral fund or purchasing some furniture or equipment for the subject person so as to reduce their capital.
- 5.5 Consider whether the subject person ever signed a valid enduring power of attorney which may avoid the need for an order.
- 5.6 Check whether the subject person has a will. If so:
- (a) endeavour to obtain or at least view a copy of the will; and
 - (b) check for conflict in relation to the role of property manager, for example, whether a major part of the estate is left to a different person.
- It will not be necessary for counsel to advertise to ascertain if a will exists, unless directed by the Court.
- 5.7 File a memorandum for the Court as set out in paragraph 4.2 of the Practice Note: Applications under the Protection of Personal and Property Rights Act 1988 covering the following matters.
- (a) Jurisdiction, including adequacy of medical evidence.
 - (b) Service (including service on the subject person and whether any other persons are to be served (s 63(2))).
 - (c) Whether the subject person should be excused attendance at Court (s 74) and, if the subject person should attend, what special arrangements need to be made (if any) so that the subject person can be heard.

- (d) Whether the application indicates the property is owned or controlled. Whether there is any interest in Māori land (s 31B).
 - (e) Whether there is any conflict within the family.
 - (f) What the least restrictive intervention is.
 - (g) Whether any urgent temporary order is necessary.
 - (h) The suitability of the proposed property manager, considering:
 - (i) whether any further inquiry as to honesty is indicated;
 - (ii) financial competency;
 - (iii) ability to file annual returns;
 - (iv) conflict with provisions of the will;
 - (v) whether this person will consult appropriately with other family members and the subject person, where appropriate (s 43);
 - (vi) whether this person will be sufficiently available to carry out the necessary tasks.
 - (i) Procedures necessary, that is, settlement conference; orders on the papers; directions for hearing; hearing.
 - (j) Powers required by appointee (Schedule 1 - note limits in clauses (n) and (o)).
 - (k) Whether the person needs a will or a new will (s 55).
 - (l) Whether orders should be suspended during an appeal.
 - (m) Whether fees for counsel for the subject person should be paid out of the estate or the Consolidated Fund.
- 5.8 Be present for service, if considered appropriate. Note that it is not appropriate for counsel to serve the subject person with the proceedings.
- 5.9 At a mediation or hearing, represent the interests of the subject person. **Counsel is reminded that under s 75 the subject person has the right to be heard.**
- 5.10 Ensure the application is progressed in a timely manner without inappropriate delay.
- 5.11 If the Court directs that a will be prepared, Appendix A (attached) sets out the tasks required to be taken.

COMMENCEMENT DATE

These revised Guidelines are issued on 24 March 2011 and come into operation on 24 March 2011.



Judge P F Boshier
PRINCIPAL FAMILY COURT JUDGE

APPENDIX A

TASKS FOR COUNSEL FOR SUBJECT PERSON WHEN A NEW WILL IS REQUIRED

- 1 Ensure that an affidavit from the subject person's regular doctor has been filed as to the subject person's testamentary capacity as follows.
 - (a) Does the subject person understand that by the will they would be disposing of their property on their death to one or more objects of their regard?
 - (b) Does the subject person know of the probable extent and value of the property which would be disposed of?
 - (c) Does the subject person have any appreciation of the possible moral claims of relatives and others not benefited by the will?
 - (d) Does the subject person have sufficient memory at least to react when reminded of facts relevant to the matters referred to in (a), (b) and (c) See: *B v H* [1992] NZFLR 2798 (281-282).
- 2 Ensure that the Court has the following information.
 - (a) Full particulars as to the family.
 - (b) The size of the estate.
 - (c) The income, the expenses and the general circumstances of the subject person.
 - (d) His or her nature while still of testamentary capacity.
 - (e) The general background to his or her affairs, together with particulars of those persons who may have an interest in the application.
 - (f) Reasons why he or she believes a will should be prepared.
- 3 Prepare and file submissions on the following matters.
 - (a) The subject person's views (if any) on the proposed will.
 - (b) Whether the will meet the test of the actual subject person, on the basis also that the person would have recognised the broad terms of any claims on the estate and would have been advised by a competent solicitor.
 - (c) Whether the proposed will gives effect to what the testator with all his or her traits and foibles would have seen fit to do if now able to do it.

APPENDIX B

1 ORDER CONFIRMING THE APPOINTMENT OF WELFARE GUARDIAN(S) AND ANCILLARY ORDERS

ON APPLICATION made to it, the Court makes an order confirming the appointment of [] and [] as welfare guardian for [subject person] of [address], [occupation].

THIS ORDER is made under s 86 of the Protection of Personal and Property Rights Act 1988 (the Act).

1.1 The welfare guardians are empowered to make decisions in relation to the following aspects of the personal care and welfare of [subject person].

- (a) The place from time to time at which [subject person] shall reside. In this regard the welfare guardians must have provided encouragement in terms of s 18(4)(a) of the Act where appropriate, and consulted in terms of s 18(4)(c) of the Act with the designated Needs Assessment and Service Co-ordination Service (NASC) and the preferred Service Provider as the case may be.
- (b) That [subject person] shall receive proper personal amenities and the necessities of life.
- (c) That [subject person] shall receive proper health and medical care and hospitalisation for appropriate treatment.
- (d) That [subject person] shall receive such standard and reasonable measures as are necessary to promote and maintain [his/her] physical, emotional and psychiatric health, personal hygiene, care and general well being.

The welfare guardians shall not be empowered in respect of any matter as prescribed in s 18(1) of the Act.

1.2 The welfare guardians may apply to the Court for directions relating to the exercise of their powers as welfare guardians for [subject person].

1.3 The welfare guardians must apply to this Court for a review of this order not later than three years after the date of this order. This order expires on that date unless, on a review of the order, the Court decides that it must continue beyond that date.

2 NASC

2.1 The NASC is required to prepare a report on [subject person] every 12 months, but may do so sooner if an issue arises. That report is to be prepared after the subject person has been examined and interviewed in so far as that is possible.

2.2 NASC is to file a copy of the report with the Court and to forward a copy to counsel for the subject person.

2.3 In the event of a disagreement between the welfare guardian(s) and the NASC or the service provider, in respect of placement in the community or other issues under ss 18(3) and (4), the NASC may apply to the Court for directions.

3 DIRECTIONS

- 3.1 *(Where appropriate)* The file is to be transferred to the Family Court at [.....] being the Family Court closest to the new residence for the subject person.
- 3.2 The appointment of counsel for the subject person is to continue. *(If the file has been transferred to a different Court, a new counsel will be appointed in that area).*
- 3.3 *(If the file is to be transferred)* Counsel appointed at the transferring Court is to prepare a summary of points to note for the new counsel to be appointed, and that summary is to be passed on with the Court documents to the new counsel appointed.
- 3.4 The brief of counsel for the subject person is:
- (a) to monitor all review and report dates;
 - (b) to contact the relevant NASC if a report is not filed on time and to notify the Court;
 - (c) to remind the welfare guardian to apply for review of orders as directed by the Court; and
 - (d) to report any difficulties to the Court and seek further directions where necessary.
- 3.5 Counsel is granted leave to apply to the Court at any time before the statutory review period expires in the event that the placement for the subject person is not working or there are issues in the NASC report which give cause for concern.

Registrar

Date