

## **Practice Direction – Who is a “party” to an application before the Board?**

This practice direction is issued pursuant to Clause 6, Part 2, Schedule 2 of the *Guardianship and Administration Act 1995* (the Act).

Anita Smith, President

Date: 21 June 2010

### **Scope:**

The *Guardianship and Administration Act 1995* does not specifically define a “party” to a hearing under part 10 of the Act. This practice direction gives guidance to members about identifying who is a “party” to proceedings or who has a “direct interest” in the proceedings.

### **Relevant provisions:**

Section 12	Enables exclusion of persons from a hearing where they do not have a “direct interest” in the proceedings
Section 69	Defines the list of parties to whom notice of a hearing must be given
Section 73	Defines which parties are entitled to representation at a hearing and which must apply for leave to be represented
Section 74	Qualifies the scope of persons who may request a statement of reasons to “persons aggrieved” by a determination of the Board
Section 76	Defines the parties who may appeal a determination of the Board

### **Background:**

In *Kioa v. West* [1985] HCA 81; (1985) 159 CLR 550, particularly paragraphs 21-27, Brennan J stated that the term “interested party” is more limited than the scope of any person who may be curious or may have an opinion about the possible outcomes of a proceeding. In particular, his Honour stated:

“It is not the state of mind of an individual but the interest which an exercise of power is apt to affect that is relevant to the construction of the statute. A “legitimate expectation” cannot arise unless an exercise of the power is capable of affecting, for good or ill, the interests of the person who holds that expectation.”

The Board considered the meaning of “interested party” in *HDH (No2) (Costs)* [2005] TASGAB 6. It said:

“The Act does not define who is a party to an application. However, some guidance is provided in sections 69(1) and 73 about the status of certain parties. The relevant parts of section 69(1) provide that notice must be given to the applicant, the person in respect of whom the hearing is to be held, the Public Guardian and “any other person who the Board is satisfied has a proper interest in the matter.”

Section 73(1) specifies that the applicant, the person in respect of whom the hearing is to be held and the Public Guardian are entitled to representation at the hearing. All other persons must seek the leave of the Board to be represented. The Board is of the view that it is appropriate to extrapolate from these legislative provisions that the legislature intended that the “parties” for the purposes of this kind of application are the applicant, the person in respect of whom the hearing is to be held and the Public Guardian.”

The Board confirmed these remarks in *HI (No2) (Guardianship)* [2010] TASGAB 3.

### **Practice Direction:**

Whether or not a person will be defined as a party will determine important questions about the level of participation that person can expect in a hearing. “Parties,” unlike “witnesses,” will have a greater entitlement to notice, access to all documentation and evidence and representation at the hearing.

The following are persons who can automatically be considered a “party” for the following kinds of applications:

**Table 1.**

Application for Guardianship (including reviews and advice and direction)	<ul style="list-style-type: none"> <li>• The proposed represented person</li> <li>• The applicant(s)</li> <li>• A person nominated for appointment as a guardian</li> <li>• The Public Guardian</li> </ul>
Application for Administration (including reviews and advice and direction)	<ul style="list-style-type: none"> <li>• The proposed represented person</li> <li>• The applicant(s)</li> <li>• A person nominated for appointment as an administrator</li> <li>• The Public Guardian</li> <li>• The Public Trustee</li> </ul>
Application for consent to medical or dental treatment	<ul style="list-style-type: none"> <li>• The person who is the subject of the application</li> <li>• The applicant(s)</li> <li>• The medical practitioner who will carry out the treatment</li> <li>• A ‘person responsible’ for the person who is the subject of the application</li> <li>• The Public Guardian</li> </ul>

Application to review an enduring guardianship (and advice and direction)	<ul style="list-style-type: none"> <li>• The appointor (donor) or purported appointor (donor)</li> <li>• Any guardians or purported guardians</li> <li>• The applicant(s)</li> <li>• The Public Guardian</li> </ul>
Application to review an enduring power of attorney (and advice and direction)	<ul style="list-style-type: none"> <li>• The donor or purported donor</li> <li>• Any attorneys or purported attorneys</li> <li>• The applicant(s)</li> <li>• The Public Guardian</li> <li>• The Public Trustee</li> </ul>
Application for a statutory will or alteration of a statutory will	<ul style="list-style-type: none"> <li>• The proposed testator</li> <li>• A guardian or administrator appointed for the proposed testator</li> <li>• The applicant</li> <li>• Any person who would be entitled to receive any part of the estate of the proposed testator</li> <li>• Any person who might be likely to make an application under the <i>Testator's Family Maintenance Act 1912</i></li> <li>• Any person for whom the proposed testator might reasonably be expected to make provision for under a will</li> <li>• The Public Guardian</li> </ul>

This does not restrict the ability for the Board to add further parties in appropriate circumstances.

Where a person is a “party” they may choose to be represented by an advocate or a legal practitioner. In that case the advocate or representative has a right to participation in the hearing on that person’s behalf. A “party” is more likely than a witness to make, and be granted, preliminary applications for adjournments, exchange of documentation or representation.

Certain people are not automatically “parties”, although they may wish to participate in the hearing as witnesses. Unless they are also involved in one of the roles set out in Table 1 above, the following persons are not automatically a “party” in a proceeding and therefore there may be a disparity between the participation of these people as opposed to parties in the proceeding:

- Spouses, de facto partners, partners, co-residents
- Adult children of the represented person
- Carers
- Parents
- Siblings
- Accommodation, health care or other service providers
- Case co-ordinators, case managers, rehabilitation providers

- Friends
- Creditors and debtors (e.g. landlords or tenants)
- Potential beneficiaries (except in Statutory Will applications)

A person who wishes to attend the hearing who is neither a party, nor a witness, nor an advocate or representative of a party or witness, has no entitlement to notice, documentation or representation. In those cases, the extent to which that person may participate in the hearing is limited to the extent of his or her interest. (For example, a person who wishes to vouch for the reputation of a proposed administrator ought only participate in the hearing to that extent.)

Generally, Board hearings are conducted informally and in an inquisitorial style. In some circumstances, it may be necessary to conduct proceedings in a more formal or traditional style. In those cases, it will be important to distinguish between who is a “party” and who is a “witness”. The Board may choose to only allow a “party” to view the entire hearing, requiring “witnesses” to speak to the Board in turn and individually.

Anita Smith  
PRESIDENT