

## **Presidential Direction**

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: 4 September 2012

### **Scope:**

A person may appoint an enduring guardian pursuant to Part 5 of the *Guardianship and Administration Act 1995*. An instrument is not effective to appoint an enduring guardian unless it is registered with the Board.

This direction applies when an instrument is received for registration and the Board has either (i) received an application for the appointment of a guardian which has not been determined, or (ii) made an order appointing a guardian and such order was in effect or remains in effect at the time of execution or registration.

### **Relevant provisions:**

Section 32(2)(d) Requires that an enduring guardianship be registered to have effect.

Section 89 Requires the Board to keep a register of instruments appointing enduring guardians and to make that register available for public search.

Section 20 Establishes the tests of which the Board must be satisfied before appointing a guardian.

Regulation 4 Specifies the information that shall be included with an application for guardianship.

### **Background:**

An adult may appoint an enduring guardian to make personal decisions after the appointing adult has lost capacity to do so. The appointor (donor) must have capacity to execute that document, and if he or she does not, this constitutes grounds for the Board to declare the instrument of appointment invalid.

On occasions the Board has received an instrument or purported instrument for registration when there is an application on foot before the Board for the appointment of a guardian for the appointor (donor) or there is a current guardianship order.

Where the Board has either (i) made an emergency guardianship order that is still current or (ii) has an application on foot, it means that the Board is in possession of

*prima facie* evidence that the appointor (donor) lacks capacity to make decisions. Therefore when a purported instrument is executed at, or near, the time at which the Board has evidence of possible invalidity of the instrument which impacts upon whether or not the document is registrable.

The Board assumes that there is a duty to ensure the integrity of the register, i.e. to ensure that the Board does not knowingly register a document that is likely to be invalid. This assumption is supported by the fact that all documents must be registered to be effective and that it is a public register, available for public search.

The existence of a valid enduring power of attorney renders the Board incompetent to make an administration order (section 53). However there is no correlating provisions with respect to an enduring guardianship, which means that the Board could continue to hear an application for guardianship and appoint a guardian even where there is an enduring guardian, however, the existence of an enduring guardian is relevant to the Board's assessment of whether a person is 'in need of a guardian' (section 20).

### **Practice Direction:**

Where the Registrar receives for registration an instrument or purported instrument appointing an enduring guardian and:

- (i) The Board has previously received an application for the appointment of guardian and a completed Health Care Professional Report which relates to the date of execution of the instrument or purported instrument and such application has neither been withdrawn, dismissed or rejected (a "live application"), or
- (ii) The purported appointor (donor) is a represented person under an existing guardianship order (whether full or limited, emergency or other),

The Registrar shall:

- (a) Notify the purported appointor (donor) and the named guardians of the existence of the application or order, and
- (b) Provide the appointor (donor) and the named guardians with a copy of any Health Care Professional Report or medical opinion that suggests that the appointor (donor) may not have had capacity to execute the instrument or purported instrument, and
- (c) Invite the appointor (donor) and the named guardians to submit alternative medical evidence such as would satisfy the Registrar that the instrument or purported instrument was executed at a time when the appointor (donor) had mental capacity to make it, and
- (d) Inform appointor (donor) and the named guardians that the instrument or purported instrument will not be included in the Register until the Registrar has made a decision based on materials supplied in the response.

Upon receipt of a response from the appointor (donor) and the named guardians, the Registrar shall decide to register or not register the instrument or purported instrument.

If the instrument or purported instrument is registered by the Registrar:

- (d) The applicant to any live application may elect to withdraw the application pursuant to Clause 6, Schedule 2, or to proceed to a hearing of the application, or
- (e) The Board may reject the application pursuant to section 11(13) as lacking in substance, or
- (f) The Board may refuse to allow a withdrawal of the application, and/or
- (g) The Board may proceed to hear the application.

At a hearing of the application the Board may:

- (h) Appoint a guardian pursuant to section 20 and may or may not authorise or give directions to the Board-appointed guardian to revoke any registered enduring guardianship.

Anita Smith  
PRESIDENT