



FAMILY LAW SECTION NEW ZEALAND LAW SOCIETY

NZLS EST 1869

LAWYER FOR THE SUBJECT PERSON BEST PRACTICE GUIDELINES

ACTING FOR A SUBJECT PERSON UNDER THE PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988

1 INTRODUCTION

- 1.1 The appointment of lawyer for subject person (lawyer) is made pursuant to section 65 of the Protection of Personal and Property Rights Act 1988 (Act).
- 1.2 At all times, the lawyer will conduct themselves in accordance with the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (rules).
- 1.3 These guidelines must be read in conjunction with the Family Court Practice Notes: Lawyer for the Subject Person: Selection, Appointment and Other Matters and Applications under the Protection of Personal and Property Rights 1988.
- 1.4 These guidelines replace all previous guidelines issued by the Family Court and the New Zealand Law Society's Family Law Section on the role of lawyer for subject person.

2 OBJECT

- 2.1 The object of these guidelines is to promote quality and consistency of practice of the role of lawyer for the subject person.

3 GUIDING PRINCIPLES

- 3.1 The subject person has the right to competent representation from an experienced and skilled lawyer.
- 3.2 At all times, the lawyer must exercise their professional judgement in the role and the practice of the lawyer must be guided by the principles relating to capacity, competence and intervention under the Act.
- 3.3 In terms of a person's capacity to manage their own affairs in respect of that person's personal care, welfare and property, every person shall be presumed, until the contrary is proved to:
 - (a) have the capacity to understand the nature, and to foresee the consequences of decisions and to communicate decisions in respect of those matters (section 5); and
 - (b) be competent to manage their own affairs (section 24).
- 3.4 In accordance with section 65, the lawyer must evaluate solutions for the problem for which

the order is sought and take account of the need to find a solution that:

- (a) makes the least restrictive intervention possible in the life of the subject person, having regard to the degree of that person's incapacity; and
- (b) enables or encourages the subject person to exercise and develop such capacity as they have to the greatest extent possible.

- 3.5 The lawyer must have regard to the subject person's right to be present throughout a hearing unless they have been excused or excluded, or there are exceptional circumstances that justify the absence of the subject person (section 74).
- 3.6 The lawyer must also have regard to the subject person's right to be heard by the court, either in person or through a lawyer and to call witnesses and cross examine any witness called by a party to the proceedings. Where the subject person is present and appears capable of addressing the court, the court will give the subject person the opportunity to do so (section 75).
- 3.7 The lawyer should be conscious that there is no obligation on a subject person to express any views to the lawyer.
- 3.8 The lawyer must be aware of issues including gender, ethnicity, sexuality, culture, religion, and disabilities, in dealing with any particular case.
- 3.9 The lawyer should give consideration to any other cultural issues relevant to the subject person, including Te Tiriti o Waitangi (the Treaty of Waitangi).

4 ROLE OF LAWYER FOR THE SUBJECT PERSON

- 4.1 The lawyer is to provide legal representation and advice to the subject person.
- 4.2 The lawyer must ascertain the wishes of the subject person (if they are able to be obtained) and put those views before the court together with all information relevant to the proceedings (sections 12(7), 31(7) and 65(2)).
- 4.3 Where there is a conflict between the views of the subject person and information relevant to the welfare and best interests of that person, the lawyer will discuss the issues with the subject person as far as possible and attempt to resolve the conflict with that person.
- 4.4 If the conflict is unable to be resolved, it may be appropriate for the lawyer to ask the court to appoint a lawyer to assist the court (section 65A)).

5 TASKS OF LAWYER FOR THE SUBJECT PERSON ON AN APPLICATION UNDER THE ACT

- 5.1 The lawyer must meet with the subject person unless it is not practicable to do so due to the subject person's circumstances (section 65(2)). If the lawyer does not meet with the subject person, it is prudent to seek a direction from the court to dispense with the meeting.
- 5.2 The lawyer must explain the nature and the purpose of the application with the subject person, ascertain and give effect to the subject person's wishes and evaluate solutions for the problem for which the order is sought (section 65(2)).

- 5.3 The lawyer should contact the applicant, through their lawyer if they are represented, to explore the basis for the application having regard to the criteria in sections 12(5) and 31(5) or other relevant sections within the Act.
- 5.4 The lawyer must consider whether the subject person is subject to any orders under the Mental Health (Compulsory Assessment and Treatment) Act 1992 and/or the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 and/or the Substance Addiction (Compulsory Assessment and Treatment) Act 2017 and the implication of such orders if an order is made under the Act.
- 5.5 The lawyer should consider whether it is appropriate to contact family or whānau members of the subject person to evaluate options, check for any conflicts, identify the need for any further consents to be filed by the applicant and check whether service of the proceedings is required on family or whānau members or any other person (section 63).
- 5.6 The lawyer should consider whether a family meeting or whānau hui, mediation, pre-hearing conference, and/or hearing would be appropriate to resolve issues if it becomes apparent that there is not agreement to the orders sought.

6 APPLICATION FOR WELFARE GUARDIAN AND/OR PERSONAL ORDERS

- 6.1 Where an application is made for the appointment of a welfare guardian and/or personal orders the lawyer should consider and, subject to the specific terms of the brief, file a memorandum reporting on:
- (a) whether there is a valid enduring power of attorney as to personal care and welfare which may avoid the need for an order.
 - (b) the views of the subject person to the extent that person is able to express them.
 - (c) jurisdiction for the specific orders sought, including the adequacy of medical evidence.
 - (d) service, including service on the subject person and whether any other persons are to be served (section 63(2)).
 - (e) whether the subject person should be excused attendance at court (section 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.
 - (f) any conflict within the family or whānau.
 - (g) the most suitable order to meet the principle of least restrictive intervention, including whether the appointment of a welfare guardian is the only satisfactory way to ensure that appropriate decisions are made in relation to any particular aspect(s) of the subject person's personal care and welfare (section 12(2)), and whether a personal order under section 10 or 11 may be more appropriate as a less restrictive intervention.
 - (h) whether an urgent interim order is necessary.
 - (i) any specific recommendations for the form of the order (sections 10, 11 and 12), including any directions and/or conditions that should be included in the order as may be necessary or expedient to give effect or better effect to the order (section

10(4)).

- (j) the suitability of the proposed welfare guardian/property administrator, including consideration of whether this person:
 - (i) will support the involvement of other friends and family or whānau members;
 - (ii) raises any concerns as to the requisite understanding and ability to carry out the tasks required; and
 - (iii) will be sufficiently available to carry out the tasks (time and geographical availability).
- (k) the appropriate procedure to resolve the issues, for example, a family meeting or whānau hui, mediation, orders made on the papers, pre-hearing conference, and/or a hearing.
- (l) whether to propose that the court exercise its jurisdiction to make a recommendation relating to the course of action that it considers should be followed by the parties or by the subject person instead of making an order under sections 10 to 12 (section 13).
- (m) the appropriate review date for any order (sections 86(7)).
- (n) whether orders need to be suspended pending an appeal (section 82).
- (o) whether fees for the lawyer for the subject person should be paid out of the subject person's estate or out of the consolidated fund.

7 APPLICATION FOR APPOINTMENT OF PROPERTY MANAGER

7.1 Where an application is made for the appointment of a property manager, the lawyer should consider and, subject to the specific terms of the brief, file a memorandum reporting on:

- (a) whether there is a valid enduring power of attorney as to property which may avoid the need for an order.
- (b) the views of the subject person to the extent that person is able to express them.
- (c) jurisdiction for the specific order sought, including the adequacy of medical evidence.
- (d) whether the property exceeds the limit for an order to administer property (section 11) and, if not, whether such an order would be more appropriate. The lawyer should also consider whether the assets could be reduced to qualify for such an order by actions such as establishing a funeral fund or purchasing furniture or equipment for the subject person.
- (e) service, including service on the subject person, and whether any other persons ought to be served (section 63(2)).
- (f) whether the subject person should be excused attendance at court (section 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.
- (g) whether the application indicates the property is owned, or controlled, or there may be an interest in Māori land (section 31B) or whether any further evidence is required in terms of the property.

- (h) what the least restrictive intervention is.
- (i) whether any urgent temporary order is necessary.
- (j) the suitability of the proposed property manager, including consideration of:
 - (i) any conflict of interest (including any conflict arising from the terms of the subject person's will (if any));
 - (ii) financial competence of this person;
 - (iii) the ability of this person to file statements as required by the Act;
 - (iv) the ability of this person to consult appropriately with other family or whānau members and the subject person, where appropriate (section 43);
 - (v) whether this person will be sufficiently available to carry out the necessary tasks; and
 - (vi) whether consideration should be given to the appointment of an independent property manager within the context of the specific proceedings.
- (k) the appropriate procedure to resolve the issues, for example a family meeting or whānau hui, mediation, orders made on the papers, pre-hearing conference, and/or a hearing.
- (l) powers required by the appointee under Schedule 1 and 2 of the Act (noting, where relevant, the threshold set by the specified sum).
- (m) whether the subject person ever signed a valid will. If so, the lawyer should endeavour to obtain or view a copy of the will, although it is not necessary for the lawyer to advertise to ascertain whether a will exists, unless directed by the court.
- (n) the appropriate review date for any order (section 87(8)).
- (o) whether orders should be suspended during an appeal.
- (p) whether fees for the lawyer should be paid out of the subject person's estate or the consolidated fund.

8 APPLICATION FOR TESTAMENTARY DISPOSITION

8.1 Where an application is made for a will to be prepared for the subject person, the lawyer should consider and, subject to the specific terms of the brief, file a memorandum reporting on:

- (a) the jurisdiction for the specific order sought, including consideration of the subject person's testamentary capacity (section 55(1)). When considering evidence about the subject person's testamentary capacity, the lawyer should be mindful of the need for evidence which includes:
 - (i) understanding that any will prepared disposes of their property on their death as contained in the will.
 - (ii) knowledge of the probable extent and value of the property which would be disposed of.
 - (iii) appreciation of the possible moral claims of relatives and others not

benefited by the will.

- (iv) sufficient memory and/or reaction when reminded of facts relevant to the matters referred to in (i), (ii) and (iii).
- (b) whether the court has the following information where practicable:
 - (i) full particulars of the family or whānau.
 - (ii) the extent and value of the estate.
 - (iii) the income, expenses and general background and circumstances of the subject person's affairs.
 - (iv) the likely views of the subject person while still of testamentary capacity.
 - (v) particulars of any person(s) who may have an interest in the application.
- (c) the current views of the subject person to the extent they are able to express a view.
- (d) the appropriate procedure to resolve the issues, for example a family meeting, whānau hui, mediation, orders made on the papers, pre-hearing conference, and/or a hearing.

9 FOR ALL APPLICATIONS

- 9.1 The lawyer must file a memorandum and serve this on the applicant within 28 days of being appointed, or within any other timeframe as directed by the court, addressing the matters set out in the brief.
- 9.2 Subject to any direction of the court, the lawyer should be present for service on the subject person if service is required. It is not appropriate for the lawyer to serve the subject person with the proceedings unless directed to do so by the court.
- 9.3 If appropriate, the lawyer should call any person as a witness in the proceedings and may cross examine witnesses called by any party to the proceedings or by the subject person (sections 65(4) and 75)).
- 9.4 The lawyer should give consideration as to whether it is appropriate to recommend to the court that a medical, psychiatric or psychological report on the subject person is necessary for the proper disposition of the application (section 76).
- 9.5 The lawyer will make best efforts to ensure the application is progressed in a timely manner.

10 OTHER PROFESSIONAL ISSUES

- 10.1 Before accepting any appointment the lawyer should be satisfied that they are able to give the time which the case requires.
- 10.2 Appointment of the lawyer is personal. The lawyer will not delegate substantive steps in the brief to another lawyer who is not approved by the court to accept appointments as lawyer for subject person. Where an agent is to be briefed, the agent is to be properly instructed and must be listed on the current court-approved lawyer for subject person list.
- 10.3 It is expected that the lawyer will have in place arrangements to undertake professional

supervision appropriate to the nature and extent of their lawyer for subject person practice.

- 10.4 Professional supervision is a contractually agreed working relationship between a supervisor (professionally trained and accredited) and a client supervisee (lawyer). Within this confidential relationship, the supervisor meets with the supervisee for the purpose of conducting a self-reflective review of practice, to discuss professional issues and to receive feedback on all elements of practice, with the objective of ensuring quality of service, improving practice, and managing stress. The primary focus of supervision is to maximise the competence of the supervisee in the provision of services to their clients.
- 10.5 It is expected that the lawyer will undertake an appropriate amount of continuing professional development (CPD) in areas relevant to their lawyer for subject person practice within each CPD year. CPD is defined in rule 3.1(i) of the Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education – Continuing Professional Development) Rules 2013. Any CPD hours may be part of the lawyer’s annual CPD requirement of ten hours.¹
- 10.6 All newly appointed lawyers to the list must be mentored by a senior lawyer for subject person for 12 months from when they receive their first appointment. A mentor will be appointed by the panel at the time the lawyer is appointed to the Ministry of Justice’s list. The appointed mentor may claim up to two hours CPD in each membership year.
- 10.7 All lawyers appointed to the Ministry’s list have an ongoing obligation to notify the liaison judge of the court where they receive appointments if the Law Society takes disciplinary action and/or upholds a complaint against the lawyer, and to notify the Principal Family Court Judge if they become the subject of any pending criminal charges or Police investigation.
- 10.8 A lawyer also has an ongoing obligation to disclose to the Law Society, as soon as practicable, information about any matter that might affect their continuing eligibility to hold a practising certificate.

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¹ Where a lawyer for subject person practises in other court-appointed counsel roles, such as lawyer for the child, the lawyer is required to carry out a minimum of 10 CPD hours in one year, as per the Law Society’s annual CPD requirements. There may be training that will overlap with other areas of family law.