Legislative Council

24/10/2002

Guardianship Amendment (Enduring Guardians) Bill Hansard - Extract

Second Reading

The Hon. CARMEL TEBBUTT (Minister for Community Services, Minister for Ageing, Minister for Disability Services, Minister for Juvenile Justice, and Minister Assisting the Premier on Youth) [5.02 p.m.]: I move:

That this bill be now read a second time.

Since January 1998, capable adults in New South Wales have been able to appoint their own guardians—called enduring guardians. An enduring guardian is a person who is empowered, by the person appointing them—the appointor—to make personal or life-style decisions for them, the appointors, when they no longer have the capacity to make those decisions for themselves. The sorts of decisions an enduring guardian can make include deciding where the appointor shall live and what health care they shall receive. They can act as the appointor's substitute decision-maker in relation to medical and dental treatment proposed for them by others. They can make a range of other personal decisions if the appointor empowers them to do so, including deciding what services the appointor should receive in order to help them to continue to live in their own home.

This initiative of the Carr Labor Government, to give people the dignity of choosing the person they want to make personal decisions for them when they are incapable of doing so, has been very successful. The concept of enduring guardianship has been promoted energetically by the Guardianship Tribunal, the Office of the Public Guardian, the Benevolent Society and a number of other bodies. Solicitors have shown considerable interest in this new form of appointment and have regularly recommended it to their clients, particularly when their clients are becoming less cognitively capable of making decisions for themselves. While there has been, and continues to be, growing interest in adults appointing their own enduring guardians, the need for some finetuning of the legislative provisions has been found. This is what this bill is about—finetuning the legislation so that some of the difficulties perceived in making appointments of enduring guardians can be disposed of. Also, this bill introduces some flexibility for joint guardians and in relation to other matters.

I think the best way to proceed is to highlight the key changes to the existing legislation which would be brought about by the enactment of the bill. The first is the method of appointment of an enduring guardian. At the moment, it is necessary that both the appointor and the appointee be in the same place at the same time. This is because it is incumbent on the lawyer or clerk of the Local Court witnessing the appointment—the eligible witness—to explain to both of them what the effect of the appointment is, to witness their signatures to the appointment and to certify that they appeared to understand the effect of the appointment.

The advantage of the present requirements is that both the appointor and the appointee receive the same explanation about the nature and effect of an appointment of enduring guardianship at the same time from the same person. While this is the preferred position, it will no longer be required where it will be difficult to achieve. Under the provisions of the bill, it will no longer be necessary for the one eligible witness to explain the meaning of the appointment to the appointor and appointee, to witness both of them signing it and to certify as to their understanding of it.

This change has been suggested by a number of solicitors and a number of others because of the difficulty in this large State of getting the appointor and the appointee to the same place at the same time. Under the bill, one eligible witness will be able to explain the matter to the appointor, witness the signature and certify that the appointor understood, while another can do the same for the appointee. This means that if the appointor is located in Lismore and the person he or she wishes to appoint as enduring guardian is located in Albury, one or both of them does not have to travel so that they can meet.

Under the present legislation, if two enduring guardians are appointed, they have to act jointly. That means both of them have to make all of the decisions together. Under the bill, if the appointor wishes to, he or she can appoint two or more guardians to act jointly or severally. This means, where one or more of the guardians is away or unavailable for some reason, the other guardian or guardians can make the necessary decisions. The amendments also provide that if there is more than one enduring guardian appointed, the death, resignation or incapacity of one or more of the appointees does not operate to terminate the appointment of the other appointee or appointees.

Also under the amendments, an appointor will be able to appoint an alternative enduring guardian who will be able to exercise the functions of the original enduring guardian if the original enduring guardian dies, resigns or becomes incapacitated. It is necessary for an enduring guardian to have access to the information that the appointor would have access to in order to make properly informed decisions on behalf of the appointor. This matter has already been addressed in the Health Information Privacy Bill, which has recently passed through Parliament. It deals with medical information. Sometimes an enduring guardian will need access to other information in order to be able to make an appropriately informed decision in the best interests of the appointor. Public agencies will have a discretion to disclose necessary personal information to the enduring guardian.

The present legislation does not set out the process by which an appointee can resign the appointment. Under the bill, if an enduring guardian wishes to resign while the appointor still has capacity, he or she must give written notice to that effect to the appointor. The resignation must be signed by the enduring guardian and witnessed by an eligible witness. If the enduring guardian wishes to resign after the appointor has lost capacity, the resignation has to be approved by the Guardianship Tribunal. The purpose of this provision is to ensure that the interests of the now incapable appointor are protected in a way that is appropriate to the circumstances that apply at that time.

Where an enduring guardian has died, resigned or become incapacitated, the Guardianship Tribunal will be able to appoint a substitute enduring guardian or appoint a guardian whose appointment it will review from time to time on the grounds of ongoing need. Where a person was in the process of appointing an enduring guardian, and that process was not completed, the Guardianship Tribunal shall have a discretion to confirm the intended appointment as if it had been finalised.

The purpose of these provisions is to give maximum effect to the wishes and intentions of the appointor either where there is evidence of the parties having gone some, if not most, of the way to complete the appointment of an enduring guardian or where there is evidence that an enduring guardian has died, resigned or become incapacitated and the appointor has lost capacity to provide a proper basis for the tribunal to appoint a substitute enduring guardian.

There are already provisions in place for the recognition in New South Wales of guardians and financial managers appointed by guardianship boards and tribunals in other States and Territories. This bill provides for the recognition in New South Wales of the appointments of enduring guardians in other States and Territories which have similar legislation to New South Wales. It is not unusual for people who have lost the capacity to move interstate either to live with or live near other family members. It is important that their attempts to appoint their own substitute decision-makers do not fail just because they have moved across a State or Territory border.

I am advised that both South Australia and Tasmania have enduring guardianship legislation similar to that of New South Wales so that it will be appropriate to provide for enduring guardians appointed in those States to be recognised in New South Wales. The regulation-making power in the bill will allow for this and for the extension of this recognition process to enduring guardians, however described, in other States or Territories.

I am confident that the provisions in the bill will make it easier for people to go through the process of appointing enduring guardians and thus exercise the right they have had since January 1998 to appoint their own enduring guardians. The greater flexibility in relation to enduring guardians will reduce the need for formal guardianship orders to be made by the Guardianship Tribunal in circumstances where a person has appointed, or attempted to appoint, his or her own enduring guardian but for some reason that appointment was not completed or is now no longer continuing. I commend the bill to the House.