Litigation by Administrators and Guardians

Background Information

Last Revised February 2007
Guardianship and Administration Board, Tasmania

LITIGATION BY ADMINISTRATORS AND GUARDIANS
Background Information

1. Introduction

This document is intended as background information for persons using the "*Litigation for Administrators and Guardians - Guidelines for Applicants*" issued pursuant to Part 2 of Schedule 2 of the *Guardianship and Administration Act 1995* (the Act).

Some confusion has arisen about the method, timing and kinds of applications required where a person with a disability requires a person with legal authority to conduct litigation on their behalf.

The Guardianship and Administration Board ('the Board') can appoint a guardian or an administrator for an adult with a disability where the requirements of section 20 or 51 of the *Guardianship and Administration Act 1995* have been met.

The Board has no power to appoint a litigation guardian. However, a person appointed as a guardian or administrator may take up litigation on behalf of the represented person in that or another capacity where that activity is consistent with the terms of their appointment.

2. Terminology

Litigation guardian, guardian ad litem, next friend, tutor, committee, and case guardian – will all be referred to in these guidelines as 'litigation guardians'.

Various court rules create roles for litigation guardians (however described) where a person is involved in court proceedings but does not understand the nature and possible consequence of the proceeding or is not capable of adequately conducting, or giving adequate instructions for the conduct of the proceeding.

A "proposed represented person" means a person who is the subject of an application for the appointment of a guardian or an administrator.

3. Scope

A guardian or administrator can only be appointed for a person over 18 years of age with a disability. These guidelines have no application for litigation on behalf of persons below 18 years of age.

The conduct of criminal proceedings relating to a person with impaired capacity is entirely governed by the provisions of the *Criminal Justice (Mental Impairment) Act 1999* and the *Mental Health Act 1996* and is not relevant to these guidelines.

These guidelines relate only to the functions of the Board and guardians and administrators appointed by the Board.

4. Rules of Courts

The threshold for appointment of a litigation guardian by the various State and Federal courts is determined by the rules of court in each jurisdiction and is not a role for the Board. Applicants to the Board should ensure that the appointment of an administrator or a guardian as a litigation guardian is acceptable to the relevant forum where instructions for legal proceedings are required.

The rules of courts relevant to the appointment of a substitute decision maker in legal proceedings in Tasmania are presently as follows:

Charter of Justice 1831 – Clause 22

Supreme Court Rules 2000 - Part 10, Division 1, rules 292 – 301

Magistrates Court (Civil Division) Rules 1998 – Part 3, Div 2, rules 20 – 24

Federal Court Rules – Order 43, rules 1 – 13

Federal Magistrates Court Rules 2001 – Rules 11.08 – 11.15

Family Law Rules 2004 – Part 6.3, rules 6.08 – 6.14

5. Relevance of guardians to certain legal proceedings:

Guardians are appointed when the ability of a person to make reasonable judgments about his or her person or circumstances are impaired by a disability. The role of a guardian is limited to non-financial aspects of a person's life[1]. Therefore, only legal proceedings that relate to non-financial aspects of a person's life will be relevant to the appointment of a guardian. These are sometimes referred to as 'matters of the heart'[2]. Such circumstances are quite limited.

For example:

Restraint Orders: An application pursuant to Part XA of the *Justices Act 1959* for a restraint order relates to the powers of a guardian to 'restrict visits to a represented person to the extent as may be necessary in his or her best interests[3].'

Family Court – Children's Matters: Proceedings in the Family Court or Federal Magistrates Court of Australia relating to a child or children of the represented person, for instance where the represented person's children live and whether the represented person may visit them relates to decisions about 'with whom the represented person is to live.[4]' The guardian can only make decisions relevant to the represented person in the process of litigation. The relevant court or authority will determine decisions about that person's children.

Child Protection: Where the represented person has an interest in proceedings for a Care and Protection Order under the *Child, Young Persons and Their Families Act 1997* this relates to his or her 'person and circumstances'[5]. As above, the guardian can only make decisions relevant to the represented person in the process of litigation. The relevant court or authority will determine decisions about that person's children.

Mental Health Act: The role of a guardian is relevant to proceedings under the *Mental Health Act 1996* where a Community Treatment Order or Continuing Care Order is proposed and that terms of such orders or leave of absence provisions issued under such orders relate to medication[6] and accommodation.

Where legal proceedings involve both financial and non-financial aspects (for example an action for Worker's Compensation) of a represented person's or a proposed represented person's life, an applicant should apply for the appointment of an administrator.

Please Note: When making an application for the appointment of a guardian for the purposes of the above types of litigation, a standard guardianship application will usually be sufficient. Please contact the Investigation and Liaison Officers of the Board (Phone: (03) 6233 3085) if you are unsure which application form(s) to use.

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[1] Part 4 *GAA*
[2] Office of the Public Advocate, Victoria, Practice Guidelines No. 15*Litigation Guardian*
[3] Section 25(2)(d) *GAA*
[4] Section 25(2)(b) *GAA*
[5] Section 20 *GAA*
[6] Section 25(2)(e) *GAA*

6. Relevance of an administrator for legal proceedings

Administrators are appointed when the ability of a person to make reasonable judgments about his or her estate are impaired by a disability. The role of an administrator is limited to the financial aspects of a represented person's life.[7] In the legislation this is described as a person's "estate". Although the word "estate" is often used to describe property left by a deceased person, "estate" in this document refers to the property of a living person.

Section 56(2)(l) of the Act provides that an administrator who has been appointed under section 54 "*may, in the name and on behalf of the represented person and so far as may be specified in the administration order … bring and defend actions and other legal proceedings in the name of the represented person*;"

Because most litigation has the potential to impact upon a represented person's estate, the appointment of an administrator to conduct legal proceedings will be appropriate more often than the appointment of a guardian. Examples of the kinds of litigation that may require the appointment of an administrator include giving instructions and negotiating/settling actions for:

Damages claims – Claims for compensation for damages arising from motor vehicle accidents (e.g. MAIB claims), criminal injuries, medical negligence or anti-discrimination actions may all result in the payment or reimbursement of significant funds. Therefore, an administrator is best placed to give instructions on these matters.

Estate litigation - Testator's family maintenance actions, applications under intestacies, protection of life estates all relate to promoting or protecting a person's entitlement under another person's will or intestacy.

Recovery or protection of the person's assets or entitlements - recovery of debts, property settlements in Family Law issues also relate to protecting or promoting a person's rights to property or assets.

It is important that the relationship between the solicitor and their client and their client's representative is established as early as possible for the proper conduct of the litigation. Therefore, it is highly preferable for an application for the appointment of an administrator to be made **prior** to the commencement of litigation or upon discovery of the fact (e.g. upon receipt of a conclusive medical report) that a client has become or is incapable of giving his or her solicitor instructions.

[7] Part 7 *GAA*

7. Making an application:

Any person can make the application[8]. However, an application for appointment of an administrator for the purposes of litigation is usually made by a solicitor who has taken initial instructions from a family member or a support person of a person with a disability.

A successful application to appoint an administrator must satisfy the Board that the requirements of Part 7 of the Act have been met. There is a standard application form issued by the Board for this purpose. For further information see the Board's website or Facts Sheets.

Primarily, the Board must be satisfied that the appointment of an administrator will be in the best interests of the proposed represented person. Therefore, where an applicant seeks the appointment of an administrator primarily for the purpose of making decisions about litigation, the Board will also give consideration to whether or not the litigation is in the best interests of the person. For instance, where the litigation appears to the Board to be overtly spurious or vexatious, the Board may decline to appoint an administrator to pursue that litigation.

It is important that an applicant provide the Board with sufficient materials to determine that pursuing the proposed litigation will provide some benefit to the proposed represented person and not merely expose him or her to an unwarranted risk of adverse legal costs. Of course it is not the role of the Board to 'second guess' the more careful processes of legal representatives who have greater experience in particular areas of litigation. The role of the Board is to ensure that the person's broad best interests have been considered, which may include whether the person has had the benefit of advice from sufficiently competent legal practitioners.

Therefore, satisfying the Board of the merits of litigation on behalf of the represented person may require the submission of copies of any legal opinions obtained by the applicant or given by the applicant where the applicant is the legal practitioner having carriage of the action. Such submission will require the applicant to give consideration to the legal professional privilege attached to such opinions. Applicants considering disclosure of legal opinions should note sections 85 and 86 of the *Guardianship and Administration Act 1995*.

Experience from recent cases suggests that a solicitor's costs in preparing and attending Board proceedings are generally recognised as appropriate costs for the purposes of taxation of bills of costs in the action.

[8] Section 50 *GAA*

8. Responsibilities of an administrator:

The role of an administrator is demanding and time consuming and this is especially true for an administrator appointed for the purposes of litigation. The Board must ensure that a proposed administrator has the resources available to undertake such a complex and demanding role.

An administrator has particular responsibilities specified in section 57 of the Act. Any action that an administrator takes must be for the benefit of the represented person; otherwise it is done without authority[9]. Administrators who are not professional trustees should become familiar with the responsibilities of an administrator as set out in the Board's publication: *Information for Private Administrators – A Handbook for Private Administrators* (March 2006)[10], for example the requirements for annual reports and to participate in triennial review hearings.

After appointment an administrator must assess the merits of the litigation for himself or herself both at the start of the appointment and on a continuing basis throughout the appointment. An administrator may discontinue or settle litigation at any time if they form the opinion that continuing the litigation is not in the represented person's best interests. It would also be appropriate for an administrator to consider seeking second legal or medical opinions. An administrator may decide to change lawyers.

An administrator who does not act in good faith or with reasonable care may be subject to proceedings before the Board, which could result in the disallowance of improper expenses. If the Board disallows an improper expenditure, the administrator becomes personally liable for such expenditure. It is important that an administrator act responsibly with respect to the represented person's future entitlement, this includes refraining from overuse of legal and medical services in pursuit of the action, if such overuse may not be approved in a subsequent taxation of costs or if such costs are subsequently deducted from a settlement sum paid by an insurance company.

9. Limited vs. Full Order

The Board may appoint an administrator with particular powers limited to the requirements of the litigation or it may appoint an administrator with full powers to conduct all financial dealings on behalf of the represented person. The application should specify what kind of order the applicant is seeking. See the website for further information.

[9] *Crockett & Anor v Roberts & Anor* [2000] TASSC 148 at page 3
[10] Available on request from the Board Phone: (03) 6233 3085.

10. Additional appointment as a litigation guardian

Insofar as proceedings in the Supreme Court of Tasmania are concerned, recent decisions of that Court have confirmed that subsections 56(2)(l) and (5) of the Act make the appointment of a litigation guardian otiose (i.e. not required, serves no practical purpose).[11] In that jurisdiction, proceedings commenced or maintained on behalf of a person with a disability without a litigation guardian are not void but irregular[12] and the appointment of an administrator means that a litigation guardian need not be appointed.

Where an administrator assumes the additional responsibility of appointment as a litigation guardian, the administrator may be personally liable for the costs of the action. That is, his or her personal assets, not just the accounts that they hold for the represented person, are exposed to a potential claim of costs if the represented person loses the action. An administrator who declines appointment as a litigation guardian is not exposed to that liability.

Therefore, proceedings before the Board will generally result in the appointment of an administrator only. Before the Board will make a specific direction pursuant to section 61 of the Act, or makes it a condition of the administration order that an administrator also adopt the role of litigation guardian for the represented person, the Board would need to be satisfied that making such a direction is in the best interests of the represented person and that those interests cannot be met without the additional direction.

11. Jurisdiction conferred by the Charter of Justice

Where an administration order had been made with respect to the estate of a person with a disability, the administrator and the Guardianship and Administration Board has jurisdiction over that person's property and estate as provided by the Act. However that jurisdiction does not oust the jurisdiction of the Supreme Court over that person's property as conferred by the *Charter of Justice (Tas)* cl.22. The Court has a discretion to determine whether in any particular case it is desirable to exercise that jurisdiction.[13]

This means that, even where an administrator is appointed, the Supreme Court may exercise its discretion to approve or disapprove of a compromise of a legal action made on behalf of a person with a disability.

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[11] Ibid and see *Stevenson v State of Tasmania* [2005] TASSC 33 per Evans J.
[12] *Crockett & Anor v Roberts & Anor* [2000] TASSC 148 per Underwood J.
[13] *Re Andrew Philip Hodges* 1998 TASSC 96

12. Assessment of the Proposed Appointee

The Board has a duty pursuant to section 54 of the Act to ensure that an administrator will act in the best interests of the represented person and not be in a position where their interests conflict with the interests of the represented person.

This assessment is not required where the proposed appointee is The Public Trustee, the Public Guardian or Tasmanian Perpetual Trustees[14]. Other appointees are referred to as 'private administrators'.

A private administrator appointed under section 54 does not have to have particular expertise in law or any specialities in particular jurisdictions. Knowledge of the law is obviously a benefit and, in a competing application between potential administrators, a person with knowledge of the law who met other criteria would most likely be preferred.

An application should indicate the extent to which the private administrator is:

(i) Competent to understand the advice being given by counsel and to provide reasonable instructions in response to that advice (including reference to prior experience in litigation or as a substitute decision maker)

(ii) Able to be objective about and familiar with the factual situation that is the subject of the litigation

(iii) Familiar with the nature and effect of the disability of the represented person and the impact that his or her disability will have on the conduct of the litigation

(iv) In close contact with the represented person and willing and able to report progress of the litigation and to adhere to duties under section 57(2)(b) of the Act

(v) Adept at seeking more information where required, whether by way of further explanation from counsel or expert advice about financial implications of settlement, success or failure

(vii) Able to make a 'common sense' assessment based on the advice from counsel and seek second opinions to verify that assessment where necessary

(viii) Sensitive to the social, medical, financial and emotional effect of litigation upon the represented person, especially where the represented person will be required to give evidence and be cross-examined

(ix) Conservative with instructions that might cause unnecessary costs or unduly expose the represented person to an award of adverse costs,

(x) likely to have any conflict of interest

(xi) seeking to retain appointment as administrator following conclusion of the action to administer any resultant compensation funds

[14] Section 54(1)(a),(b) and (c) of the *GAA*

In summary, an administrator in these circumstances must be a rational and intelligent person with sufficient ability to balance the capabilities, needs and rights of the represented person against the advice of competent practitioners.

A person who has a potential conflict of interest, i.e. someone who stands to personally benefit from the litigation, would not be eligible for appointment under section 56(2)(l). A person who will be a party or a witness in the proceedings (e.g. a driver or fellow passenger in a motor vehicle accident where the proposed represented person seeks compensation for injuries sustained in that accident or named beneficiary under a will, where the proposed represented person commences an action for testator's family maintenance) has a conflict of interest which would mean that their appointment as administrator is inappropriate. Equally medical, legal or financial advisers to the proposed represented person would usually be inappropriate for appointment because of a conflict with their other professional duties.

A person seeking appointment as administrator for litigation purposes must attend the hearing of the application and be available for questioning by the Board about his or her suitability for appointment.

13. Orders made by the Board

The order of the Board appointing an administrator for the purposes of litigation may be a full administration order or an order limited to the conduct of the litigation. The Board may impose any conditions or directions that it believes are appropriate in the circumstances. The order may include particular directions, for instance, to report upon proceedings to the Board from time to time or to seek approval from the Board before taking certain steps in a legal action.

An order may impose a condition to review the appointment upon an agreement or order to pay damages to the represented person to ensure that compensation funds are administered appropriately in the represented person's best interests.

An order is limited to 3 years. At the expiry of 3 years the Board conducts a review of the appointment. Applications to review the order may be made at any time during the appointment[15]. An administrator may seek advice and direction[16] from the board during the appointment.

Orders appointing a private administrator will generally be limited to the period up until settlement where the amount of damages is predicted to be significant (e.g. cases involving payments for extended periods of future care or recognition of future lost earnings etc) at which point the Board may require a review of the appointment. This is because it requires a different expertise to administer a significant estate than to give instructions to a solicitor in a legal action.

In *Willett v Futcher* [2005] HCA 47 the High Court described the role of an administrator overseeing the management of a large compensation fund being to: "… husband a large sum of money over a long period of time in such a way as to ensure an even income stream but the complete exhaustion of the fund at the end of that period". It is a very complex task.

[15] Section 67 *GAA*
[16] Section 61 *GAA*