

## Guardianship and Financial Management applications in NSW

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The guardianship division of NSW Civil and Administrative Tribunal ("NCAT" or "the tribunal") deals with applications made in respect of people who are incapable of making their own decisions and who need someone to be appointed to make decisions on their behalf.

The need for these appointments may arise for a range of reasons including dementia or other age-related loss of mental capacity, other mental illness, where an accident or illness has caused a brain injury, and where a person who has had no mental capacity as a child becomes an adult and their parents are no longer able to make decisions for them as they are no longer a minor.

The Supreme Court of NSW also has jurisdiction to deal with applications of this nature but making the application through NCAT is a less formal process with modest legal expense.

Applications to the guardianship division may relate to:

1. The appointment of a guardian.
2. The appointment of a financial manager.
3. The review of an existing enduring power of attorney or enduring guardianship appointment.
4. Seeking consent for the impaired person to be treated by a doctor or dentist.
5. Seeking approval for the impaired person to have a clinical trial.

Applications in the guardianship division of NCAT must be in relation to people who are in New South Wales or have property or other financial assets in New South Wales.

A guardianship order shall not be made in respect of a person who is under the age of 16 years, a person who is the subject of an existing order made by the Supreme Court (unless the Court consents to the making of the order), or a person who is the subject of an order by the Children's Court.

If the tribunal is informed as to the urgency of a particular application it may prioritise the hearing of the application.

### General principles applicable in the guardian division

Section 4 of the Guardianship Act 1987 sets out the following general principles to be observed by anyone exercising functions under this Act:

- a) The welfare and interests of such person should be given paramount consideration.
- b) The freedom of decision and freedom of action of such person should be restricted as little as possible.
- c) Such person should be encouraged, as far as possible to live a normal life in the community.
- d) The views of such persons in relation to the exercise of those functions should be taken into consideration.
- e) The importance of preserving the family relationships and the cultural and linguistic environments of such person should be recognised.
- f) Such person should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs.

- g) Such person should be protected from neglect, abuse and exploitation.
- h) The community should be encouraged to apply and promote these principles.

### **When can an order for guardianship be made?**

An order for guardianship may be made where a person who because of some disability is totally or partially incapable of managing their general affairs and the tribunal is satisfied that the person is in need of a guardian.

### **Who can apply for guardianship orders?**

Applications can be made by the person who is the subject of the orders, the Public Guardian, or by any person who in the opinion of the tribunal has a genuine concern for the welfare of the person.

### **Who is to be appointed guardian?**

A person must be at least 18 years of age to be appointed as a guardian and to be appointed the tribunal must be satisfied that:

The personality of the proposed guardian is generally compatible with the impaired person;

There is no undue conflict between the interests of the proposed guardian and the impaired person.

The proposed guardian is both willing and able to exercise the functions conferred by the orders.

### **Matters to be taken into account**

In considering whether to make a guardianship order the tribunal must have regard to the views of the impaired person, their spouse if the relationship is close and continuing, and the person who has care of the impaired person. The tribunal must also have regard to item (e.) of the general principles and the practicability of services being provided to the person without the need for the making of such an order.

### **Supporting evidence**

The evidence that usually would be filed in support of an application for guardianship would include:

a report from the impaired person's treating doctor and if possible their treating specialist confirming the extent to which their patient does not have the capacity to manage their own affairs. This report will also usually include details of any existing medical conditions, symptoms and limitations arising from these conditions, details of treatment and medication, and prognosis;

a statutory declaration from any person who is acting as the impaired person's carer. They may well have prepared periodic reports on the impaired person's needs and limitations that can be readily utilised in the application without the need for a statement;

statutory declarations from the applicant, family members, friends and neighbours of the impaired person, detailing their involvement with the impaired person, their observations as to the impaired person's inability to manage their own affairs, details of the impaired person's current circumstances and opinion as to immediate matters that need to be addressed by a guardian.

### **Do you need a solicitor?**

In our experience applicants are best served by engaging a solicitor to prepare the application documents to ensure that all relevant matters set out in the legislation have been addressed in these statements and reports. This will then give the applicant the best chance of obtaining the orders they are seeking from the tribunal. It will also avoid delays where the tribunal asks the applicant to address a range of issues before it can properly consider the application.

## **NCAT application form for guardianship**

The supporting evidence is filed with the NCAT application form that sets out relevant information for the application and identifies other persons involved in the impaired person's life who may be able to assist the tribunal in making its decision. Any person who may disagree with the application must be identified as the tribunal may wish to contact them.

## **Service of application form and documents**

The completed application form and supporting documents need to be sent by the applicant to the Public Guardian, the person's spouse, the person's carer, any appointed enduring guardian, and to the impaired person. Proof of the service of these parties should be provided to the tribunal.

## **Preliminary matters prior to hearing**

On review of the application documents the tribunal officers may contact the applicant and ask

that further evidence be provided as to certain issues or that they clarify certain matters prior to the hearing. The tribunal members may join interested parties to the application. A person opposing the application may file evidence in the proceedings and seek leave to be joined as a party to the proceedings. There may also be applications by parties seeking leave to be legally represented at the hearing. A hearing usually occurs within about 2 months of the application being filed. If the application is urgent it can be dealt with earlier.

## **Applications for appointment of a financial manager**

An application for financial management can be made where a person is not capable of managing their own financial affairs, there is a need for a person to be appointed to manage their financial affairs, and it is in the best interest of the person to make that order. The financial management orders do not need to be made in respect of all of the impaired person's estate and specified parts can be excluded.

## **Who may apply and who should be proposed as the financial manager?**

The application can be made by any person who has a genuine concern for the welfare of the subject person, by the NSW Trustee and Guardian, or by the impaired person.

The proposed financial manager may be either a private person or the NSW Trustee & Guardian. (An application for guardianship may need to be made simultaneously with the application for financial management.)

## **Supporting evidence**

In these applications the evidence that is usually prepared includes:

a medical report addressing the matters earlier explained with the guardianship application but with some focus on the issue of the impaired person's ability to manage their own financial affairs;

Statutory declarations from family members, friends, and carers as to their observations as to how the impaired person is incapable of managing their own financial affairs, the details of the impaired person's financial position (i.e. assets, liabilities, income, and expenses), details of the ongoing decisions or actions that need to be taken in respect of the person's finances, details of the experience of the proposed financial manager in dealing with financial matters, and why the proposed financial managers will act in the best interests of the impaired person.

Relevant financial documentation of the impaired person such as recent bank statements, unpaid bills, insurance renewal statements, Centrelink correspondence, correspondence with NDIS, or other such documentation may need to be annexed to the applicant's affidavit.

### **Annual accounts and a management plan required**

If a person rather than the NSW Trustee and Guardian is proposed as the financial manager it should be kept in mind that this person will have to account to the NSW Trustee and Guardian by submitting a plan of management which must be approved. Thereafter they will have to provide annual accounts to NSWTAG and have the following year's management plan approved. They will also have to apply to NSWTAG for the right to charge fees for their work.

### **Hearings of guardianship and financial management applications**

These applications are usually heard by a panel comprised by a lawyer, a medical professional, and a community member who has experience in working with people with disabilities. The hearings are dealt with in an informal manner.

It is essential that the applicant, the proposed guardian or financial manager, and the impaired person attend the hearing. In some cases, the impaired person cannot attend the hearing due to the state of their health. Any other persons who have made statements should otherwise be contactable during the hearing by telephone should the tribunal need to speak to them.

A party or other interested party attending the hearing will not be allowed to have a legal representative to appear for them without leave of the tribunal. A leave application should be filed prior to the hearing. Even where leave is granted the role of a lawyer is limited by the manner in which these hearings proceed, as the tribunal members tend to direct their questions directly to the persons who have provided statements as opposed to the lawyers cross-examining witnesses as in a court hearing. The tribunal may invite a solicitor to make submissions and leave might be given for a solicitor to ask questions of a witness but the tribunal may not consider that it is necessary.

Where the supporting documentation is in order and the application is not opposed the application can be dealt with in a relatively short timeframe as the tribunal members have usually considered the application in advance and may have already indicated to the applicant the orders they are likely to make. This position is usually just conveyed by a telephone call to the applicant in advance of the hearing.

Where the application is contested there will usually need to be further exploration of the evidence filed by the parties and inquiries directed by tribunal members to the persons who have made statements. The process will take longer, there may be some cross-examination of witnesses, and the parties will usually make submissions.

### **Nature of guardianship orders**

Guardianship orders made by the tribunal are usually directed to specific decision-making areas such as accommodation or health care decisions, and are not open-ended. The orders are usually made for a limited timeframe with a date set for the orders to be reviewed. Interested parties may also at any time seek a review of the existing orders.

### **Reviewing the appointments of enduring guardians and powers of attorney**

The appointment of an enduring guardian can be reviewed by the tribunal upon the request of a person who has a genuine concern for the welfare of the person who made the appointment. Similarly, an enduring power of attorney can be reviewed by the tribunal where a person raises a concern that the EPOA is not operating for the welfare and benefit of the appointor.

The tribunal can revoke the appointment or vary it, or make appointments of guardians or financial managers.

## **Appeal of NCAT decisions**

Appeals from decisions of the tribunal are dealt with by the Appeal Panel of NCAT and must be filed within 28 days of a decision being made. Rather than appeal an interested party may seek a review of the orders at the end of the term of the orders or earlier.

## **Costs**

Normally each party in these applications pays its own costs. However, costs may be awarded if there are special circumstances to do so. These circumstances as set out in s60 of the Civil and Administrative Tribunal Act 2013, are rather narrow and are directed to some transgression by one of the parties or where the application that was brought was vexatious or misconceived

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