



Chapter 26

Litigation guardians

CONTENTS

Introduction	570
Current law	570
Community responses	571
The Commission's views and conclusions	573

INTRODUCTION

26.1 This chapter deals with the ability of substitute decision makers to conduct legal proceedings for represented persons and their personal liability for costs when doing so.

CURRENT LAW

- 26.2 Sometimes there will be a need for a substitute decision maker, or some other person, to bring or defend legal proceedings on behalf of a person with impaired decision-making ability.
- 26.3 A litigation guardian is an adult appointed under court rules through whom a person under 18 years of age or a 'handicapped person' conducts litigation.¹ A person with a disability may need a litigation guardian if they cannot instruct their solicitor or manage their affairs in relation to the proceeding.² A litigation guardian usually has to employ a lawyer to conduct the proceeding.³
- 26.4 A person must consent to act in the role of litigation guardian, unless the court exercises its power to appoint a litigation guardian itself.⁴ Many people are reluctant to act as a litigation guardian because they may be personally liable for costs if the proceedings are unsuccessful. The courts have decided, however, that a litigation guardian is generally entitled to be indemnified by the represented person for any costs order made against them when they have acted properly and in good faith.⁵
- 26.5 The interaction between an administrator's statutory powers to conduct litigation on behalf of a represented person and the requirements of the Supreme Court Rules concerning the need for a litigation guardian for a 'person under disability' is not completely clear. Section 58B (2)(l) of the *Guardianship and Administration Act 1986* (Vic) (G&A Act) permits an administrator (with appropriate powers) to 'bring and defend actions and other legal proceedings in the name of the represented person'.⁶ The scope of this power is unclear because it is unlikely that an administrator is empowered to bring or defend any proceedings on behalf of a represented person. Proceedings that are unrelated to the estate of the represented person would appear to fall beyond this power.
- 26.6 The recent Victorian Court of Appeal case of *State Trustees Ltd v Andrew Christodoulou*⁷ suggests that an administrator may be required to seek appointment as a litigation guardian to exercise the power granted by the G&A Act to conduct litigation in the name of a represented person. In this case, the court refused State Trustees' application for leave to appeal against the trial judge's decision to make a costs order against State Trustees in its personal capacity rather than in its capacity as administrator for a represented person and not to provide it with an indemnity against the estate of the represented person.⁸

1 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 15; *County Court Civil Procedure Rules 2008* (Vic) O 15; *Magistrates' Court General Civil Procedure Rules 2010* (Vic) O 15.

2 See *Supreme Court (General Civil Procedure) Rules 2005* (Vic) rr 15.01, 15.02; *County Court Civil Procedure Rules 2008* (Vic) rr 15.01, 15.02; *Magistrates' Court General Civil Procedure Rules 2010* (Vic) rr 15.01, 15.02.

3 See *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 15.02(3); *County Court Civil Procedure Rules 2008* (Vic) r 15.02(3).

4 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 15.03(6)(a); *County Court Civil Procedure Rules 2008* (Vic) r 15.03(6)(a).

5 *Anthony v Vaclav [No 2]* [2009] VSC 626, [7]–[8]; *Slaveski v State of Victoria and Others* (2009) 25 VR 160, citing *Pryor v Hennessy* [1973] VR 221, 222–3.

6 *Guardianship and Administration Act 1986* (Vic) s 58B(2)(l).

7 *State Trustees Ltd v Andrew Christodoulou* [2010] VSCA 86. The issue at trial was whether a transfer of property by Mrs Christodoulou to her son was vitiated by his undue influence and unconscionable dealing. Justice Kaye ruled that Mrs Christodoulou transferred the property independently and not because of any undue influence. Nor was she 'affected by any special disadvantage or disability' which would make the transfer unconscionable: *Christodoulou v Christodoulou* [2009] VSC 583, [105], [111] (Kaye J).

8 *Christodoulou v Christodoulou* [2009] VSC 583 (Kaye J).

- 26.7 The Court of Appeal stated that:
it is arguable that once State Trustees decided to commence the proceedings in the name of Mrs Christodoulou and to conduct the litigation on her behalf, it ought to have taken the requisite steps under rule 15 ... to have itself appointed as Mrs Christodoulou's litigation guardian.⁹
- 26.8 The Court referred to rule 15.03(2) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic), which provides that:
Where a person is authorised by or under any Act to conduct legal proceedings in the name of or on behalf of a handicapped person, that person shall, unless the Court otherwise orders, be entitled to be litigation guardian of the handicapped person in any proceeding to which that person's authority extends.¹⁰
- 26.9 This rule does not sit comfortably with rule 15.02(1), which provides that '[e]xcept where otherwise provided by or under any Act, a person under disability shall commence or defend a proceeding by his or her litigation guardian'.¹¹ Section 58B(2)(l) of the G&A Act is clearly a provision that empowers an administrator to bring and defend actions and other legal proceedings in the name of the represented party.
- 26.10 In *Christodoulou*, the Court of Appeal determined, however, that, in spite of section 58B(2)(l), 'the rules relating to litigation guardians ... continue to be applicable, at least in this case'.¹² It seems desirable that the Supreme Court consider the apparent tension between rules 15.02(1) and 15.03(2).
- 26.11 The Court of Appeal upheld the decision by the trial judge to award costs personally against the administrator, State Trustees, and not to provide the administrator with an indemnity against the estate of the represented person. The outcome of this case might add to the reluctance of administrators to conduct litigation on behalf of a represented person because of their fear of exposure to an adverse costs order.
- 26.12 The issues under discussion in this chapter apply to civil matters only. If a person with impaired capacity is involved in a criminal proceeding, and is unable to participate in the process because of their mental impairment, the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) is applicable. This Act is discussed in more detail in Chapter 25.

COMMUNITY RESPONSES

- 26.13 In the consultation paper, the Commission observed that the risk of adverse costs orders and lack of clarity about who is available to conduct litigation on behalf of people with impaired decision-making ability is highly undesirable because it affects their capacity to assert and defend their legal rights.
- 26.14 We sought community views on who should conduct litigation for a represented person and whether courts or tribunals should have the power to order costs against guardians and administrators when they conduct litigation for a represented person.

WHO SHOULD ACT AS LITIGATION GUARDIAN?

- 26.15 There was no clear consensus in responses to the consultation paper about who should act as a litigation guardian. Some submissions noted that the answer depends on the potential cost implications of acting in the role.

9 *State Trustees Ltd v Andrew Christodoulou* [2010] VSCA 86 [21].

10 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 15.03(2).

11 *Ibid* r 15.03(2).

12 *State Trustees Ltd v Andrew Christodoulou* [2010] VSCA 86 [21].

- 26.16 Carers Victoria said that litigation should be one of the functions of guardians and administrators and that the Victorian Civil and Administrative Tribunal (VCAT) should decide who is the most appropriate person to conduct proceedings.¹³ However, the Federation of Community Legal Centres recommended that new legislation should set out when such an appointment might be necessary.¹⁴ It makes the point that:
- with the proposed legislative shift to a continuum of capacity and ongoing processes of assessment, there may be some legal contexts in which the represented person does not need the equivalent of a litigation guardian.¹⁵
- 26.17 Where the represented person is a defendant in a case, Victoria Legal Aid suggested that guardians and administrators should have a duty to act as litigation guardian where the matter comes within the scope of their appointment. In cases where a person wishes to initiate proceedings, Victoria Legal Aid argued that there should be an obligation to investigate the claim:
- where an administrator or guardian becomes aware (either through the represented person or other information) that the represented person may have a claim or action to pursue that falls within or is connected to the scope of the guardianship or administration order, they should have a statutory duty to make enquiries and assess the merits of pursuing that claim. Both the substantive merits of the matter as well as the likely cost/benefit implications should be considered.¹⁶
- 26.18 Seniors Rights Victoria¹⁷ and Eastern Health¹⁸ favoured the establishment of a dedicated public body to conduct litigation for individuals with diminished capacity. The Victorian Equal Opportunity and Human Rights Commission noted that, where it falls within their area of ‘expertise’, the Public Advocate should act as litigation guardian, but otherwise a dedicated body should be created to conduct proceedings.¹⁹ The submission noted that ‘[t]he fundamental issue is to ensure that the rights of the represented person are not breached merely because there is no one available to conduct litigation on their behalf’.²⁰
- 26.19 The Public Advocate suggested that new guardianship legislation should describe those cases guardians should pursue and those cases that administrators should undertake.²¹ State Trustees also supported legislation clarifying that guardians may act in matters that are outside an administrator’s responsibilities.²²
- 26.20 Neither the Public Advocate nor State Trustees wished to act as a litigation guardian under compulsion. The Public Advocate emphasised the point made in her submission to the information paper that a court should seek her consent to act before appointing her as a litigation guardian.²³ State Trustees suggested that new guardianship legislation should provide that administrators with appropriate powers should not be required to seek formal appointment as a litigation guardian under court rules.²⁴

13 Submission CP 59 (Carers Victoria).

14 Submission CP 75 (Federation of Community Legal Centres (Victoria)).

15 Ibid.

16 Submission CP 73 (Victoria Legal Aid).

17 Submission CP 71 (Seniors Rights Victoria).

18 Submission CP 33 (Eastern Health).

19 Submission CP 66 (Victorian Equal Opportunity and Human Rights Commission).

20 Ibid.

21 Submission CP 19 (Office of the Public Advocate).

22 Submission CP 70 (State Trustees Limited).

23 Submission CP 19 (Office of the Public Advocate).

24 Submission CP 70 (State Trustees Limited).

SHOULD COURTS OR TRIBUNALS HAVE THE POWER TO ORDER COSTS AGAINST LITIGATION GUARDIANS?

- 26.21 There was broad acceptance of the principle that guardians or administrators should not be liable for the costs of conducting proceedings on behalf of another person, except where they have acted improperly. The Public Advocate suggested that a court should have the power to order costs where
- the litigation guardian's involvement in the litigation has not been in the interests of the represented person's personal and social wellbeing, or where the conduct of the litigation is in breach of appropriate professional standards.²⁵
- 26.22 Some submissions recognised that the potential for litigation guardians to be personally responsible for costs discourages people from acting in the role. Operating in a separate jurisdiction, but with similar rules relating to costs, the New South Wales Public Guardian noted that there are situations where they could initiate proceedings but decline to do so because of 'the risk of adverse cost awards'.²⁶ The Disability Discrimination Legal Service also noted that the potential financial liability is an inhibiting factor for those who might otherwise assume the role of litigation guardian, and observed that 'this leaves the represented person in limbo without any enforceable rights'.²⁷
- 26.23 Victoria Legal Aid²⁸ and the Law Institute of Victoria²⁹ both recommended that litigation guardians be entitled to an indemnity from the estate of those they represent.
- 26.24 State Trustees also suggested that new legislation should state that, where VCAT has directed an administrator to initiate legal action, they are not responsible for costs.

THE COMMISSION'S VIEWS AND CONCLUSIONS

CONDUCTING LEGAL PROCEEDINGS FOR A REPRESENTED PERSON

- 26.25 The Commission believes that new guardianship laws should clarify the role of guardians and administrators in conducting legal proceedings on behalf of a represented person. The power to conduct litigation with sound legal advice provides an important (and currently under-utilised) mechanism for people with impaired decision-making capacity to advance or protect their rights.
- 26.26 At present, the G&A Act does not specifically provide for guardians to conduct litigation on behalf of a represented person, while the extent of an administrator's power to conduct litigation is unclear. New guardianship legislation should remedy these deficiencies.
- 26.27 When appointing a personal guardian or financial administrator,³⁰ VCAT should be able to order that one of their powers is to conduct legal proceedings, either generally or of a specified kind, on behalf of the represented person. The Commission proposes that new guardianship legislation should expressly state that a personal guardian or financial administrator can be given the power to conduct litigation on behalf of a represented person.

25 Submission CP 19 (Office of the Public Advocate).

26 Submission CP 79 (NSW Trustee and Guardian).

27 Submission CP 56 (Disability Discrimination Legal Service).

28 Submission CP 73 (Victoria Legal Aid).

29 Submission CP 77 (Law Institute of Victoria).

30 In Chapter 5, the Commission recommends replacing the term 'guardian' with 'personal guardian' and 'administrator' with 'financial administrator'.

- 26.28 In many cases, it may not be appropriate for VCAT to give a personal guardian or financial administrator the power to conduct litigation. Guardians and administrators are often unremunerated individuals who might find the stress of conducting legal proceedings unduly burdensome. However, not every type of legal action involves heavily contested litigation in the Supreme Court and there may be a range of less complex matters in which a personal guardian or financial administrator may be able to assist.
- 26.29 In its *Review of Guardianship Laws*, the Queensland Law Reform Commission recommended that a court have the power to appoint the Adult Guardian and Public Trustee as litigation guardian without their consent.³¹ They also recommended that litigation guardians not be liable for costs except in cases of negligence or misconduct.³²
- 26.30 On occasion, courts have appointed the Public Advocate as a litigation guardian where no other person was available to act. While the Commission understands the challenges faced by a court when an unrepresented litigant appears to be a person who lacks capacity to conduct their own proceedings, we do not believe that the Public Advocate, or State Trustees, should be appointed as a litigation guardian without their consent. Such an appointment subjects a public body to a potentially substantial and unbudgeted costs order. It also requires them to conduct litigation they might not consider advisable or to discontinue that litigation, thereby exposing the represented person or a public body to the risk of an adverse costs order.
- 26.31 There is clearly a need to establish a mechanism for assisting some people with impaired decision-making ability to locate a suitable litigation guardian. It might be possible to establish a pool of suitable volunteer litigation guardians and to create a fund which could be used to indemnify these people from adverse costs orders. The Commission suggests that the Attorney-General might wish to pursue this idea in conjunction with the Law Institute of Victoria, the Public Advocate and the Federation of Community Legal Centres.

RECOMMENDATION

Conducting legal proceedings for a represented person

432. New guardianship legislation should provide that VCAT may give a personal guardian and/or a financial administrator the power to conduct legal proceedings on behalf of the represented person.

THE DIFFERENT ROLES OF GUARDIANS AND ADMINISTRATORS

- 26.32 New guardianship legislation should specify the type of proceedings that can be conducted by a personal guardian or a financial administrator. In broad terms, it is appropriate to permit a personal guardian to conduct litigation that does not involve 'financial or property matters' and to permit a financial administrator to conduct litigation about 'financial or property matters'.
- 26.33 There is clearly overlap between litigation involving 'financial or property matters' and other matters. If a person has both the Public Advocate and State Trustees as substitute decision makers, the two bodies should liaise and determine the appropriate organisation to conduct the litigation. In other instances of overlap or lack of clarity, VCAT should determine who is authorised to conduct litigation on behalf of the represented person.

31 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) vol 1, cxxxiii, recs [28–1], [28–2(b)].

32 Ibid cxxxiv, recs [28–4(a)].

RECOMMENDATIONS

The different roles of guardians and administrators

433. New guardianship legislation should provide that a financial administrator may be given the power to conduct legal proceedings on behalf of the represented person where the matter relates to the person's financial or property interests.
434. New guardianship legislation should provide that a personal guardian may be given the power to conduct legal proceedings on behalf of the represented person where the matter does not relate to the person's financial or property interests.

LIABILITY FOR COSTS

- 26.34 New guardianship legislation should state that personal guardians and financial administrators should not be required to seek formal appointment as litigation guardians under the relevant court rules when conducting legal proceedings on behalf of a represented person within the confines of their authority. There is an unnecessary duplication of effort in requiring a formally appointed substitute decision maker to seek appointment as a litigation guardian to conduct litigation on behalf of a represented person when a VCAT order has already granted that power. While third parties are clearly entitled to notice of the fact that litigation in which they are involved is being conducted on behalf of a represented person by a personal guardian or financial administrator, court and tribunal rules should require that other parties to the proceedings be given appropriate notice of this role as early and as clearly as possible.
- 26.35 Despite this proposed general rule, courts and tribunals should retain a discretionary power to require a personal guardian or a financial administrator to seek appointment as a litigation guardian in exceptional circumstances. This power might be used when, for example, it is highly unlikely that the estate of a represented person would be able to cover an adverse costs order and the court or tribunal believes that the personal guardian or a financial administrator should be made aware of the possibility of a costs order against them personally.
- 26.36 The Commission also recommends that new guardianship laws should provide that a personal guardian or financial administrator who conducts legal proceedings on behalf of a represented person should not be personally liable for costs, in lieu of a costs order against the estate of the represented person, except where they have been negligent or engaged in misconduct. There is no reason why a personal guardian or financial administrator, who acts on sound advice to advance the interests of the represented person, should bear the costs of an unsuccessful legal action if there is sufficient money in the person's estate to cover those costs.

Litigation guardians



RECOMMENDATIONS

Liability for costs

- 435. New guardianship legislation should provide that a personal guardian or financial administrator who conducts legal proceedings on behalf of a represented person need not seek appointment as a litigation guardian, unless the court or tribunal directs that this course is necessary in a particular case.
- 436. New guardianship legislation should provide that, ordinarily, a court or tribunal should not make an order for costs against a personal guardian or financial administrator in lieu of a costs order against the estate of the represented person, unless the court or tribunal is satisfied that the personal guardian or financial administrator has acted negligently or engaged in misconduct in conducting the proceedings.