

Litigation guardians in family law

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What is a litigation guardian?

A litigation guardian is someone who acts on behalf of a person who is a party to Court proceedings, who cannot act for themselves. Litigation guardians are needed when a person is unable to conduct their own proceedings due to mental or physical disability.

A litigation guardian will essentially step in to act as the person's substitute to make all decisions about the family law proceedings on behalf of the party they are assisting.

Who can be a litigation guardian?

Anyone can be a litigation guardian provided that they:

- are an adult;
- have no adverse interest in the proceeding (meaning that the litigation guardian cannot act where they have a conflict of interest with the person who is a party to the proceedings); and
- can fairly and competently conduct the proceedings.

Usually, litigation guardians are family members or close friends. However, if there is no one appropriate and available to act as litigation guardian, the Court may request that the Attorney-General appoint a person to act as litigation guardian.

When will a litigation guardian be appointed?

A litigation guardian will only be appointed if it is necessary to do so. For example, a litigation guardian is needed in the following circumstances:

- The usual litigant does not understand the nature of and possible consequences of the proceedings.
  The Federal Circuit and Family Court of Australia has released a Fact Sheet entitled "Family Law: Litigation guardians" that provides an overview of litigation guardians and highlights what a person must be able to understand to conduct their own proceedings.
- The usual litigant is not capable of properly conducting the proceedings (or giving adequate instructions to their lawyer for the conduct of the proceedings).
- The usual litigant is under 18 years of age (although the Court can make an Order for a litigant under 18 to proceed without a litigation guardian where appropriate).

Litigation guardians are not appointed for any other reasons, such as the usual litigant is busy, does not want to personally engage in the proceedings or finds the nature of the proceedings stressful. A litigation guardian will only be appointed as a last resort, which is why, even if a valid Power of Attorney exists, the attorney will not be able to act as litigation guardian unless there is a genuine need for same.

Court proceedings are not pleasant, and so while litigants may have support persons to assist and accompany them throughout the proceedings, litigation guardians are not appointed in these circumstances as the litigant still has the capacity to make their own decisions. There usually needs to be some additional factor that begs the need for a litigation guardian, rather than just a mere preference.

How can you prove that a litigation guardian is necessary?

There is a presumption that adult litigants do not need litigation guardians unless there is evidence to the contrary.

The evidence that shows that a litigation guardian is necessary will vary in each individual matter. A common example is medical evidence such as a letter from a person's treating medical practitioner stating that the person does not have capacity to conduct their own Court proceedings. However, this is not to say that such a letter will be enough evidence to convince the Court to appoint a litigation guardian. It will depend entirely upon the circumstances of the matter and the weight given to any evidence produced.

Ultimately, it will be a matter for the Court to decide, based on the available evidence. We recommend seeking legal advice before making any application to the Court to determine what evidence may be required to be submitted.

Contact us for advice and assistance:: 03 8625 8957

How to appoint a litigation guardian

A litigation guardian can be appointed on a party's application to the Court or on the Court's own initiative.

A person applying to the Court will need to file an application in a proceeding seeking that the litigation guardian be appointed. The application must be filed with a supporting Affidavit that sets out why the litigation guardian is needed, and why it should be the nominated person.

The nominated litigation guardian is also required to submit an Affidavit consenting to their proposed appointment.

An application seeking the appointment of a litigation guardian can be made before family law proceedings have commenced, and then at any point throughout the proceedings.

How Powers of Attorney interact with litigation guardians

In Victoria, you can make a Power of Attorney that appoints someone to conduct your legal affairs on your behalf.

If a person is authorised under a valid Power of Attorney to conduct legal proceedings for a person who needs a litigation guardian, they are known as ‘a manager of the affairs of a party’.

Assuming that the proceedings are within the authority of a ‘manager of the affairs of a party’, they are entitled to be a litigation guardian. However, they will only be permitted to act as such if there is a genuine need for a litigation guardian.

Powers of Attorney can be made to come into effect either immediately on the document being signed, or when the person making the Power of Attorney loses capacity. A litigation guardian will not be permitted to act in the Federal Circuit and Family Court of Australia in circumstances where the appointor has not actually lost capacity (even if the Power of Attorney gives them the authority to act upon the signing of the document). Remember, *“Litigation guardians are needed when a person is unable to conduct their own proceedings due to mental or physical disability.”*

How a family lawyer can help

If you or someone you know needs assistance in making an application for a litigation guardian, contact us for a free initial consultation to discuss your options and eligibility.

We can assist in determining the likely success of an application for a litigation guardian may be in your circumstances and provide you with information about the other aspects of your family law matter so that you have the knowledge you need to take your next steps.

Contacting Smith Family Law

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This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.