



NCAT: Guardianship Division: Procedural Direction

Costs

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| Application | Proceedings in the Guardianship Division |
| Effective Date | 2 January 2014 |
| Replaces Practice Direction | Not Applicable |
| Notes | You should ensure that you are using the current version of this Procedural Direction. A complete set of Procedural Directions and Guidelines is available on the Tribunal website at: www.ncat.nsw.gov.au |

Introduction

1. This Procedural Direction sets out:
 - (a) Costs and the nature of Guardianship Division proceedings
 - (b) General rule in relation to costs
 - (c) Who may apply for costs?
 - (d) How to apply for costs
 - (e) Special circumstances
 - (f) Costs and the nature of Guardianship Division proceedings
 - (g) Representation and applications for costs
 - (h) Resources

Definitions

2. References to sections in this Procedural Direction are, unless otherwise stated, references to sections in the *Civil and Administrative Tribunal Act 2013*.
3. Words used in this Procedural Direction have the same meaning as defined in the Act.

| Word | Definition |
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| Act | <i>Civil and Administrative Tribunal Act 2013</i> |
| Party | A party is a person who: <ul style="list-style-type: none">• falls within the definition of party in s 3F of the <i>Guardianship Act 1987</i> or• falls within the definition of a party in s 35(2) of the <i>Powers of Attorney Act 2003</i>, or |

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| | <ul style="list-style-type: none"> has been joined as a party to the proceedings by the Guardianship Division under s 44 of the <i>Civil and Administrative Guardianship Division Act 2013</i>. <p>Please see the information sheet on parties to proceedings and the fact sheet 'Who is a party to Guardianship Division Proceedings' for more information.</p> |
| Interlocutory hearing | A hearing of the Guardianship Division to determine interlocutory applications such as leave to be represented or applications to be joined as a party before the substantive hearing. |
| Subject person | The person who is the subject of the application/s to the Tribunal being considered in the Guardianship Division |
| Substantive hearing | A hearing of the Guardianship Division to determine the substantive application(s), for example an application for guardianship or financial management orders. |
| Ancillary hearing | A hearing of the Guardianship Division to determine ancillary applications, such as applications for costs. |
| Tribunal | NSW Civil and Administrative Tribunal |

Costs and the nature of Guardianship Division proceedings

- The Guardianship Division of the NSW Civil and Administrative Tribunal exercises a protective jurisdiction in relation to people with decision making disabilities. When exercising any of its functions under the *NSW Civil and Administrative Act 2013* or the *Guardianship Act 1987*, it must have regard to the principles set out in s 4 of the *Guardianship Act* including the requirement to give paramount consideration to the welfare and interests of persons who have disabilities.
- The Tribunal must also seek to give effect to the following matters when it exercises any of the powers given to it by the Act:
 - The objects set out in s 3 of the Act;
 - The guiding principle set out in s 36(1) of the Act to facilitate the just, quick and cheap resolution of the real issues in the proceedings;
 - The requirement that the practice and procedure of the Tribunal is implemented so as to facilitate the resolution of the issues between the parties in such a way that the cost of the parties and the Tribunal is proportionate to the importance and complexity of the subject matter of the proceedings (s 36(4)).
- All parties to proceedings as well as an Australian legal practitioner or another person who is representing a party in proceedings is under a duty to co-operate with the Tribunal to give effect to the guiding principle to facilitate the just, quick and cheap resolution of the real issues in the proceedings and, for that purpose, is under a duty to participate in the processes of the Tribunal and comply with directions and orders of the Tribunal (s 36(1) and (3)).

8. The Tribunal conducts its proceedings in an investigative/inquisitorial manner rather than in an adversarial manner. It is not bound by the rules of evidence and may inquire into and inform itself on any manner in such a manner as it thinks fit, subject to the rules of natural justice (s 38(2)). It is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms (s 38(4)).
9. The Tribunal is to take such measures as are reasonably practicable to ensure that all parties to proceedings before it understand the nature of the proceedings. It is, if requested to do so, to explain to the parties any aspect of the procedure, or any decision or ruling, that relates to the proceedings, as well as ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings (s 38(5)).
10. The practice and procedures of the Guardianship Division reflect the intent of the *Guardianship Act 1987* and the Act. They aim to make it as simple as possible for any member of the community who is genuinely concerned about the welfare of a person to make an application to the Tribunal for an order to promote and protect that person's interests. Many applicants are family members, friends or carers of the subject person or their service providers such as social workers, health professionals or medical practitioners.
11. No fees are required to lodge an application. Parties are not required to complete prescribed forms or submit evidence in affidavit form. The majority of parties represent themselves in Guardianship Division hearings. If a party wishes to have legal representation or to be represented by another person (such as a family member or friend), then the proposed representative may seek leave from the Tribunal. The Tribunal may, at its discretion, grant or refuse leave to a person to represent a party in proceedings and may revoke any leave that it has granted (s 45(3)).

General rule in relation to costs

12. Each party to proceedings in the Tribunal is to pay the party's own costs (s 60(1)).
13. The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are 'special circumstances' warranting an award of costs (s 60(2)).

Who may apply for costs?

14. Any party to proceedings in the Guardianship Division may make an application for costs.

How to apply for costs

15. A party who wishes to apply for costs should:
 - (a) make the application before the end of the substantive hearing and preferably before the hearing date;
 - (b) as soon as possible, inform the Tribunal in writing of the intention to make a costs application;

- (c) apply by letter addressed to the Divisional Registrar of the Guardianship Division (there is no prescribed application form); and
- (d) send a copy of the application to all the parties (including the subject person) and the representatives of any of the parties (if any).

16. The costs application should:

- (a) identify the person or persons from whom the payment of costs is sought;
- (b) identify the attempts that have been made to resolve any costs issues;
- (c) provide a precise statement of the amount of costs sought;
- (d) identify the basis on which costs are sought (such as party/party, solicitor/client, or indemnity);
- (e) provide documentary evidence of the costs incurred, including any bills, accounts, invoices, receipts and/or costs agreements; and
- (f) provide a written submission in support of the application.

Special circumstances

17. The Tribunal has a broad discretion to determine whether it should award costs in proceedings if satisfied there are 'special circumstances'. Section 60(3) of the Act sets out matters to which the Tribunal may have regard in determining whether there are special circumstances warranting an award of costs. Those matters are as follows:

- (a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings;
- (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings;
- (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
- (d) the nature and complexity of the proceedings;
- (e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance;
- (f) whether a party has refused or failed to comply with the duty imposed by s 36(3); and
- (g) any other matter that the Tribunal considers relevant.

18. Applications for costs in protective jurisdiction matters are uncommon and the Guardianship Division does not make costs orders as a matter of course, nor do costs necessarily 'follow the event'.

Costs and the nature of Guardianship Division proceedings

19. The Tribunal may:
 - (a) determine the costs application during the substantive hearing; or
 - (b) adjourn the costs application and list it for a separate hearing; or
 - (c) adjourn the costs application and determine it 'on the papers' (that is without requiring the attendance of the parties or their legal representatives).
20. The Tribunal may make directions with respect to an application for costs.
21. If the Tribunal determines that costs should be awarded, it may:
 - (a) determine by whom and to what extent costs are to be paid; and
 - (b) order costs to be assessed on the basis set out in Division 11 of Part 3.2 of the *Legal Profession Act 2004* or on any other basis (s 60(4) of the Act).
22. 'Costs' include the costs of, or incidental to, proceedings in the Tribunal and the costs of, or incidental to, the proceedings giving rise to the application as well as the costs of or incidental to the application (s 60(5)).
23. The Tribunal may determine not to award costs and may dismiss the costs application.

Representation and applications for costs

24. In proceedings before the Tribunal, a party has the carriage of the party's own case and is not entitled to be represented by any person and may be represented by another person only if the Tribunal grants leave for the person to represent the party (s 45(1)).
25. If the Tribunal has granted leave for another person to represent a party in the substantive hearing, the Tribunal considers that leave continues to apply to any ancillary hearing to consider the application for costs.
26. A party who did not have leave to be represented by another person in the substantive hearing may apply for leave for the purposes of the costs application.

Resources

27. The following is a selection of published decisions in relation to costs orders in the protective jurisdiction, provided as a guide:

SWN [2011] NSWGT 5 (29 August 2011);
FAN [2011] NSWGT 4 (9 March 2011);
Bovaird v Guardianship Division [2009] NSWSC 452;
ACJ (No 2) [2007] NSWGT 24 (22 November 2007);
Snelgrove v Swindells [2007] NSWSC 868;
Re Ghi (a protected person) [2005] NSWSC 581;
In re an Incapable Person D [1983] 2 NSWLR 590.

28. Published decisions of the Tribunal are available on Caselaw at: <http://www.caselaw.nsw.gov.au> and Austlii at <http://www.austlii.edu.au>.

A handwritten signature in black ink, appearing to read 'Malcolm Schyvens', with a long horizontal stroke extending to the right.

2 January 2014

Malcolm Schyvens

Deputy President

Division Head, Guardianship Division