

Understanding litigation guardians (or case guardians) in family law

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Sometimes, people involved in a family law matter may be unable to represent themselves due to age, incapacity or disability. In these circumstances, a litigation guardian (or often referred to as a case guardian) may be appointed. This role plays an important part in ensuring that vulnerable people can still access the legal system and pursue a claim.

In this article, we explain what a litigation guardian is, who can be one, when they are required in family law, and what responsibilities come with the role.

What is a litigation guardian?

A litigation guardian is a person appointed to make legal decisions during court proceedings on behalf of someone who cannot do so themselves due to age, disability, or incapacity.

A person may require a litigation guardian if they cannot properly understand:

- what their case is about;
- what could be a possible outcome of the proceedings; or
- how to manage their case or give clear instructions.

A litigation guardian should essentially ‘step into the shoes’ of the individual they are representing. They make decisions related to

the court proceedings and give instructions to lawyers on behalf of the person they represent.

Who can be a litigation guardian?

Not just anyone can be appointed as a litigation guardian. The court requires that to be appointed, a person must:

- be over the age of 18;
- have no personal interest in the proceedings that is adverse to the person being represented (for example, an interested party in a property matter, such as a family member who loaned monies);
- be capable of acting fairly and competently;
- be able to provide a sworn affidavit confirming they understand and accept their responsibilities.

Often, litigation guardians are family members, trusted friends, or professional advocates (like a lawyer or legal representative from an independent body).

Importantly, the proposed guardian must not be involved in the dispute or have any conflict of interest with the person they're representing.

When is a litigation guardian required in family law?

The Federal Circuit and Family Court of Australia requires a litigation guardian to be appointed in certain circumstances, including when a party:

- is under the age of 18;
- has a disability (physical or psychological) that affects their ability to manage their own legal matters;
- has been found by the court to lack legal capacity.

The court must be satisfied that the person cannot effectively participate in the proceedings without a litigation guardian.

The process for appointing a litigation guardian

A litigation guardian can either be appointed by the court or a party can apply to be a guardian.

How to apply

A person applies to be appointed as a litigation guardian by filing an Application in a Proceeding.

They must also provide an "Affidavit – Family Law and Child Support" explaining why the person cannot manage their own case and confirm that they meet the eligibility criteria.

The court reviews the application and, if satisfied, will formally appoint the guardian.

If no suitable person is available, the court may request involvement from a public advocate or guardian organisation in the relevant State or Territory.

Duties and responsibilities of a litigation guardian

Being a litigation guardian is a serious responsibility.

The guardian must:

- act in the best interests of the person they are representing;
- keep them informed where possible (depending on their capacity);
- avoid making decisions that favour their own interests;
- instruct lawyers, make decisions, and attend court as needed;
- comply with all the obligations under the Family Law Rules;
- ensure any settlement or agreement is appropriate and fair.

If the litigation guardian does not act properly, the court can remove them or hold them accountable for their actions.

Costs associated with being a litigation guardian

The court may decide that the litigation guardian's costs/expenses should be paid either by one of the parties to proceedings or from the income or property of the person they are representing.

Litigation guardian vs legal representative

It's important to understand that a litigation guardian:

- is not necessarily a lawyer, but can instruct lawyers;
- does not replace the legal team, but acts as a conduit for instructions;
- makes decisions on behalf of the represented person, not just offers support.

This is distinct from legal representation alone, where a lawyer acts directly for a client with capacity.

Ending the role of litigation guardian

A litigation guardian's role may end when:

- the case concludes;
- the court removes the guardian (due to, for example, misconduct or conflict);
- the represented person regains capacity;
- another suitable person is appointed.

The court must approve any change to ensure the represented person's rights and interests remain protected throughout the proceedings.

Get help from a family lawyer

Litigation guardians are essential for protecting the rights of vulnerable people involved in family law disputes. They help ensure fair treatment and access to justice, even when someone cannot speak or act for themselves.

Whether you’re considering becoming a litigation guardian or are involved in a case where one is needed, it’s important to understand the responsibilities and legal processes.

Seek legal advice early if you’re unsure whether a litigation guardian is needed or suitable in your case.

The information contained in this article is of general nature and should not be construed as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.