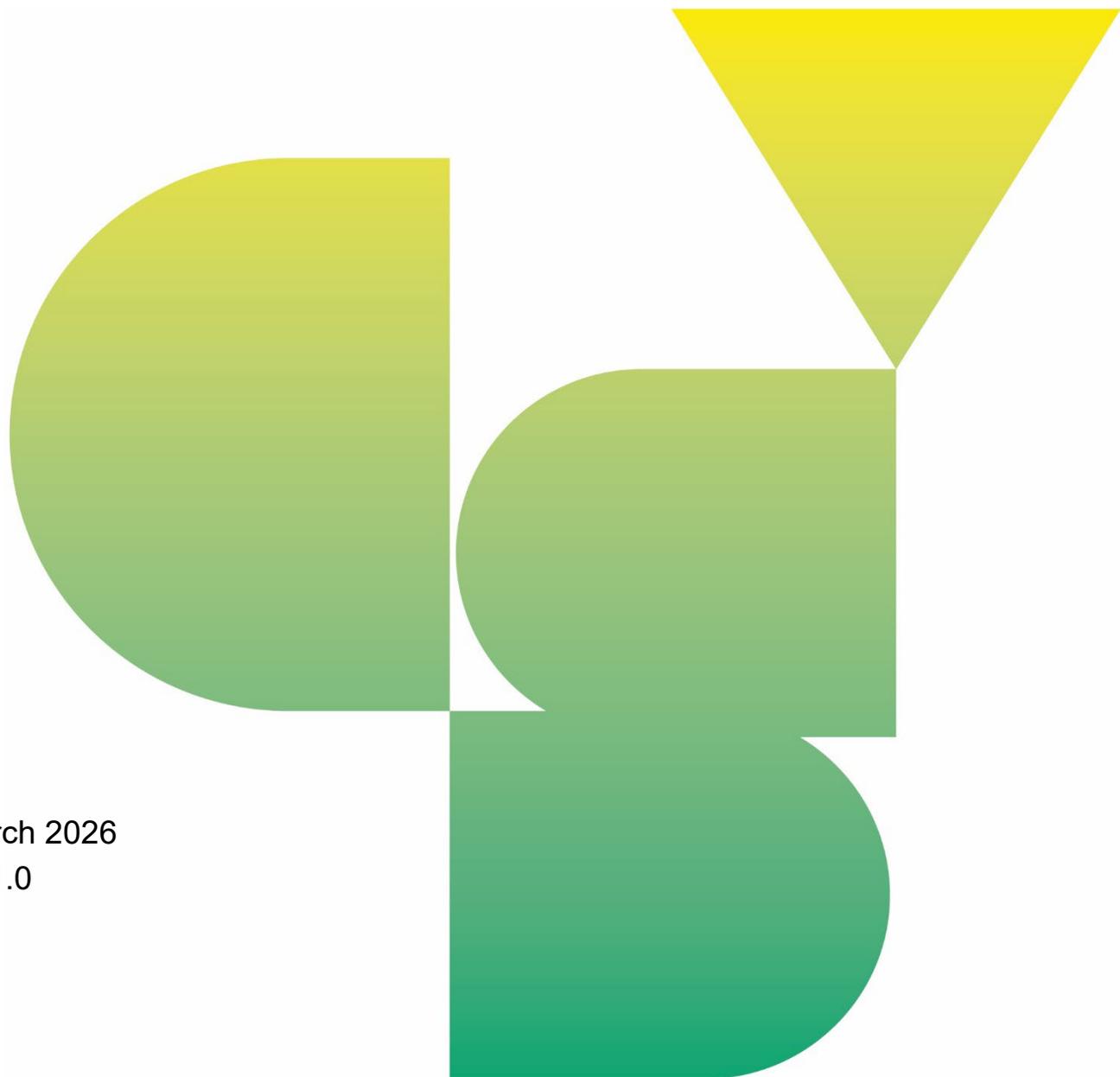




Litigation Guardians

A General Guideline to assist people asked to be Litigation Guardians



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1 Introduction

A litigation guardian is a person who is entitled to conduct a court case on behalf of another person, either because the other person is not yet 18 or they have a disability that prevents them from attending to the things needed for the court case to proceed. A litigation guardian has to make all the decisions in the court case that the represented person would otherwise be required to make.¹

This general guideline will help you understand what it means to be a litigation guardian, what you have to do and what are your responsibilities. This guideline applies to proceedings in Supreme, County and Magistrates' Courts of Victoria.²

Most litigation guardians are family members or support persons for the person who is unable to conduct their court case.

Some examples:

- 1) Tom, an accountant, has a severe brain injury as a result of a car crash. The crash was the fault of the other driver. Tom has lost the ability to understand basic concepts or manage his money. His parents wish to help Tom to sue the other driver for damages.

Tom will need one of his parents to be appointed as litigation guardian to assist him and provide instructions and information to his lawyer in the court case.
- 2) Jane, who is not yet an adult, has an intellectual disability which resulted from complications at her birth in a maternity hospital. Jane's parents have been advised to sue the hospital and medical specialist alleging there was medical negligence.

Jane's mum, Alice, or her dad, Valentino, will need to be appointed as her litigation guardian for this court case as Jane is not yet 18.
- 3) A creditor commences a court case seeking recovery of a debt against Ming, aged 62. After the case commenced, Ming is confused about it, because of her advancing dementia.

If Ming's confusion continues, her lawyer needs to consider the appointment of a litigation guardian so that Ming can proceed with her defence to the debt claim.

Usually, litigation guardians are not entitled to be paid for their role.

A litigation guardian must have a lawyer to act for the person under disability.

There are two ways to become a litigation guardian.

- 1) Your lawyer can complete documents, including a document with your consent, and file these with the Court at the beginning of the court case, or
- 2) Where a court case is already underway, the Court can appoint you. The Court needs your consent for this appointment.

A litigation guardian may not be required where the represented person has an administrator. An administrator is appointed by the Victorian Civil and Administrative Tribunal (VCAT) and a Court can refer a matter to VCAT for the appointment of an administrator.

¹ Court Services Victoria acknowledges the importance of the publication [Guardian ad Litem Code of Conduct](#) by the NSW Department of Communities and Justice for the development of this guideline.

² This guideline may also provide general assistance to litigation guardians appointed in Victorian Civil and Administrative Tribunal proceedings. However, the law and procedure that applies to Tribunal proceedings are different from those that apply in the Supreme, County and Magistrates' Courts of Victoria. This guideline does not address these differences.

Speak to your lawyer about things you do not understand and also about alternatives to see if they are more appropriate than being the person's litigation guardian. This general guideline does not address these alternatives.

2 Overview

A litigation guardian is a person who is entitled to conduct a court case on behalf of another person who is unable to manage their affairs in relation to the court case.

2.1 For whom can a litigation guardian act?

The Court Rules provide that a 'person under disability' must commence or defend court cases by way of a litigation guardian.

A 'person under disability' means:

- ◆ a minor, that is, under the age of 18, or
- ◆ a person who is incapable, by reason of their disability (e.g. a brain injury or mental illness) to manage their affairs in relation to the court case.

In this guideline, the person under disability will be referred to as the 'represented person', that is, the person who is represented by their litigation guardian.

A Litigation Guardian is an appointment made in civil cases before VCAT, the Magistrates' County or Supreme Court. Different rules apply in family proceedings or criminal proceedings where a party is unable to manage their affairs in relation to those types of court case.

2.2 The role

The role of litigation guardian is a very important one and should not be undertaken lightly. A litigation guardian has to make all the decisions in the court case that the represented person would otherwise be required to make.

The authority of a litigation guardian comes from the Court. A litigation guardian is not a party to the court case but is an officer of the Court. Being an officer of the Court primarily means that

- ◆ the Court has power to regulate their behaviour and conduct, and
- ◆ the litigation guardian's most important duty is to the Court to further the administration of justice.

The litigation guardian must appoint a lawyer, and provide them with instructions in relation to the conduct of the court case on behalf of the represented person.

3 For whom is this guideline written?

The guideline is written for you if you are contemplating being a litigation guardian for a member of your family or someone else for whom you are a support person.

4 What is the purpose of this document?

This guideline is designed for the proposed litigation guardian: -

- ◆ to understand what the appointment of a litigation guardian involves
- ◆ to know what their duties are as a litigation guardian and properly discharge those duties, and

- ◆ to understand the implications of the court case in relation to costs and damages that may be awarded by the Court.

5 Who can be a litigation guardian?

To be a litigation guardian –

- ◆ you must be over the age of 18
- ◆ you must not have an interest in the court case that is in conflict with that of the represented person
- ◆ you cannot be bankrupt, and
- ◆ you must be capable of managing the court case for the represented person

A litigation guardian can be a family member and/or support person of the represented person, or a hired professional, such as a lawyer.

6 How are you appointed a litigation guardian?

A discussion would take place between you and the lawyer acting on behalf of the represented person about the requirement for a litigation guardian and your suitability and acceptance of the role.

If you agree to take on the role, the lawyer will then prepare the necessary court documents.

You are appointed as a litigation guardian at the commencement of a court case by the filing of a document giving your written consent to perform the role, together with a certificate by the lawyer acting for the represented person confirming the basis of the requirement for a litigation guardian and your suitability for the role.

You can also be appointed by an Order of the Court if it becomes apparent to the Court during the course of the court case that a litigation guardian is required.

7 Obtaining the services of a lawyer and costs

7.1 A lawyer must be appointed

Litigation guardians must appoint a lawyer to act on behalf of the represented person in the court case.

7.2 Finding a lawyer

If there is no lawyer appointed, your first step will be to appoint one. If you are unfamiliar with how to find an appropriate lawyer, the Law Institute of Victoria has a [Lawyer Referral Service](#) or you can search the internet (not all Victorian law firms are members of the Law Institute).

7.3 Appointing a lawyer

To appoint a lawyer, you will have to enter into a costs agreement.

The Legal Services Board and Commissioner provides helpful [guidance](#) about what you need to consider before appointing a lawyer.

Court cases can be expensive and so you must be clear about how legal costs, including lawyer's fees and external expenses (called 'disbursements'), such as expert reports, court fees, barristers' fees, will be paid for.

Some lawyers offer a 'no win, no fee' agreement. If this is the case, make sure that you fully understand it; especially in relation to what is a 'win' and whether it would constitute a win for the represented person. A 'no win, no fee' agreement will detail:

- ◆ How disbursements are to be paid
- ◆ If there is an additional payment for a successful outcome (called an 'uplift' fee)
- ◆ Whether some or all disbursements must be paid even if the case is lost, and
- ◆ If you don't win the case, whether you have to pay the other party's legal costs.

For more information about ['no win, no fee' agreements](#), see the [Legal Services Board and Commission's website](#).

When you are negotiating the costs agreement, be clear about how fees are calculated, what you expect the fee to be and what factors may change the final fee calculation. You are entitled to get a second lawyer's advice on the costs agreement.

In some cases, the lawyer may recommend a litigation funder who will pay some or all of the legal costs in exchange for a fee. If this is the case, the arrangement should be clear to you and you should understand its implications.

In some limited circumstances [legal aid](#) may be available.

7.4 Where there is already a lawyer appointed

Where the court case has commenced prior to the appointment of a litigation guardian, there will already be a costs agreement in place.

The existing costs agreement would apply to costs incurred prior to your appointment, unless the represented person lacked legal capacity to enter into that agreement.

However, following your appointment as litigation guardian, you will need to enter into a new costs agreement on behalf of the represented person in respect of the costs incurred after your appointment.

7.5 Is the litigation guardian personally liable for the lawyer's costs?

Yes, you will be personally liable for the costs incurred pursuant to the costs agreement that you sign in relation to the court case, unless it is a 'no win, no fee' agreement (see 7.3 above).

However, you are entitled to require that those costs be paid from the assets of the represented person. If the represented person does not have sufficient assets, you will have to pay the balance outstanding.

Where the court case is successful at settlement or at trial, there can be a gap between the costs awarded by the court to the successful party (called 'party-party costs') and the actual cost of your engagement of the lawyer (called 'solicitor-client costs'). You need to be clear how the gap is to be paid. Generally, the gap will be met from the damages awarded to the represented person.

Solicitor-client costs are not based on a percentage of the damages awarded.

7.6 What happens if there are costs and damages ordered against the represented person?

The general rule is that the litigation guardian is not personally responsible for any costs and damages ordered by the Court against the represented person. Usually, the represented person is responsible for these.

There is an exception to this principle where the litigation guardian is found to have acted improperly, for example, by continuing the court case despite advice that the claim of the represented person is without merit.

7.7 Is the litigation guardian paid for their service?

Usually, litigation guardians are not paid for their services. If a professional, such as a lawyer is appointed as a litigation guardian, they may require payment.

8 When your appointment ends

Usually, your appointment ends at the conclusion of the court case.

It could also end if the represented person no longer meets the definition of a 'person under disability'. This could be because:

- ◆ the person attains the age of 18 before the court case is finalised; or
- ◆ the represented person demonstrates to the Court that their circumstances have changed and that they have become capable of managing their own affairs in relation to the court case. For example, the represented person's poor mental health improved through treatment such that they now have the ability to manage their court case.

Further, you can be removed as litigation guardian by an Order of the Court if you become unsuitable to act in that capacity (for example, you become bankrupt) or someone more suitable becomes available, or you are guilty of misconduct or do not carry out your duties (for example, you disclose confidential information to the media).

9 Your Duties as a Litigation Guardian

Your role is to make the decisions in the court case that the represented person would otherwise make, this includes providing the lawyer with instructions based on the legal advice you have received and, where possible, in consultation with the represented person (see 9.4 below).

Your most important duty to the Court is to further the administration of justice, especially in relation to the represented person.

Following the duties set out below will assist you to meet your duty to the Court. If you have any questions about these duties, ask your lawyer.

If you fail to comply with your duties, this may negatively affect the conduct of the court case and the interests of the represented person. Depending upon the seriousness of the breach, the Court may remove you as litigation guardian and make costs orders against you personally.

9.1 Comply with laws, policies and lawful directions

You must:

- ◆ comply with:
 - any relevant laws, rules, policies and procedures, including the *Civil Procedure Act 2010* obligations to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute
 - any lawful directions given by the Court
- ◆ take steps to understand the law applicable to the performance of your role and responsibilities, and
- ◆ promptly respond to any reasonable requests relating to the case made by your legal representative.

9.2 Understand the case

You must take steps to understand the issues relating to the case and claim, particularly how they affect the represented person. You are encouraged to raise any questions with your lawyer.

9.2.1 Where the represented person is the plaintiff

Where the represented person is a plaintiff, questions to consider include:

- ◆ What is the injustice or harm that the represented person has suffered?
- ◆ What is the legal rule that results in the represented person's having a claim?
- ◆ What is the evidence to support that claim?
- ◆ Is it wise to begin this court case?
 - Does it have merit?
 - What will be achieved for the represented person if the case is won?
 - Is the case stronger than the defences available to the other side?
- ◆ Against whom is the court case being brought?
 - Is this the right person?
- ◆ Are there experts to be relied on?

9.2.2 Where the represented person is the defendant

Where the represented person is a defendant, questions to consider include:

- ◆ What is the claim being put against the represented person?
- ◆ Is there a proper basis for this claim?
- ◆ What defences does the represented person have?
- ◆ What evidence can support the defences of the represented person?
- ◆ Can there be a compromise with the plaintiff?

9.2.3 Understanding offers of settlement

A party may make the represented person an offer to settle the case.

When you are at this point, these questions may help you to work out whether to accept the offer:

- ◆ How will legal costs (party-party and solicitor-client) affect the amount the represented person will ultimately receive?
- ◆ How will the agreement affect any Centrelink, NDIA, Medicare or other entitlements or income streams of the represented person?
- ◆ Do your lawyers recommend the offer be accepted? Why?
- ◆ Does counsel recommend the offer be accepted? Why?
- ◆ If you don't accept the offer, what will happen?
- ◆ Should you be making a counter offer? If so, in what amount?
- ◆ If an agreement is reached, what are the next steps and when will they occur?
- ◆ Where and when will the settlement amount be paid and how will the represented person have access to it?

If you accept an offer of settlement, this has to be approved by the Court.

Any damages or money payable to the represented person is usually paid into the [Supreme Court](#) and managed by the Court on their behalf.

9.3 Promote the interests of the person you represent

You must:

- ◆ establish the interests of the represented person in connection with the court case. In doing so, you should, where possible, consult with the represented person as to what they want
- ◆ only act or make decisions in the case which are in the interests of the represented person
- ◆ take all reasonable steps which safeguard those interests, and
- ◆ when considering options, carefully consider the legal advice you have received, and weigh up the advantages of those options.

9.4 Consult and inform

You should, where possible, having regard to the age and abilities of the represented person, try to:

- ◆ consult the represented person before making any decision in the case that may affect their interests
- ◆ inform the represented person, in a reasonably understandable way, about:
 - the progress of the court case
 - the issues and applicable law in the case
 - the relevant procedures and practices of the Court, and
 - the appropriate standard of conduct generally expected by the Court of parties and the public
- ◆ advise the represented person of the reason(s) for acting or making a decision and establish, as best you can, what the represented person's views and preferences might be about the decision to be made in respect of the court case, and

- ◆ consult any other support persons and consider how they may be able to assist the represented person during the case.

If the represented person disagrees with the course you intend to take in the court case, discuss this with your lawyer. It is your duty to promote the represented person's interests.

9.5 Exercise diligence, care and attention in performance of responsibilities

You must perform your role and responsibilities in a diligent manner and with all necessary skill and care.

You must:

- ◆ if there is no lawyer appointed, appoint a lawyer
- ◆ instruct the lawyer for the represented person in a timely manner after the appointment is made
- ◆ promptly seek advice from the lawyer when necessary to make a decision relating to the case, and
- ◆ promptly respond to any reasonable requests relating to the case made by your lawyer.

If you have not heard from the lawyer for a long time, contact them to obtain an update.

9.6 Act honestly, ethically and with integrity, and avoid conflicts of interest

You must act ethically and with integrity and avoid conflicts of interest.

You must inform your lawyer and the Court of any actual or potential conflicts of interests which may impact on your performance as a litigation guardian.

Examples of conflicts of interest include:

- ◆ having a financial interest in the case, or
- ◆ having a personal relationship with an opposing party.

You must not, when communicating on behalf of the represented person:

- ◆ say to any person that a thing is true, knowing that it is untrue, or
- ◆ make any statement that is calculated to mislead or intimidate the other person.

You must take all necessary steps to correct any misleading statement as soon as possible after becoming aware that the statement is misleading.

9.7 Decline gifts or benefits affecting impartiality

You must decline any gift or benefit that may be intended or likely to influence you, or could be reasonably perceived as being intended or likely to influence you.

9.8 Respect privacy and maintain confidentiality

You must:

- ◆ respect the privacy and confidentiality of the represented person. This will not be breached by providing private and confidential information to your lawyer
- ◆ only use information from the other party to the court case for the purposes of the court case, and not for any other purpose, and

- ♦ take reasonable steps to ensure that legal professional privilege of the represented person is maintained. To do this, you must not disclose legal advice to any other person. Failing to do so may badly affect the course of the court case.

If you have any questions about these matters, it is important to speak to your lawyer.

9.9 Attendance at hearings, conferences and mediations

As litigation guardian you will be expected to attend at court during a trial to provide instructions to the lawyers. You may also be required to attend other hearings or mediations.

If the represented person is attending a hearing, conference or mediation you should:

- ♦ consider the represented person's accessibility requirements and any reasonable adjustments that may assist the person to attend and participate. You may ask the represented person themselves about any adjustments that could help. Examples might include wheelchair access, hearing loop access, interpreters, or additional breaks; and
- ♦ ask your lawyer to advise the Court or mediator of any special measures which may facilitate the represented person's attendance and participation.

The Judicial College of Victoria hosts the '[Disability Access Bench Book](#)' which sets out things that could assist a person with disability participating in a hearing. It includes an accessibility checklist.

9.10 Where there is a change to the circumstances of the person in relation to their capacity

You must inform your lawyer and the Court if the represented person:

- ♦ in the case of a minor, attains majority (turns 18), and
- ♦ in the case of a person with impaired decision-making capacity, they have regained decision-making capacity and are able to manage the court case. This may happen, for example, if the treatment for their mental illness has been successful.

9.11 Where there is a change to your circumstances

If there is a change in your circumstances such that you are no longer able to act as the person's litigation guardian, it is your duty to tell your lawyer and the Court.

A change of circumstances would include, for example:

- ♦ if you are declared bankrupt
- ♦ if you lose the capacity to manage the court case on behalf of the person, or
- ♦ if you develop an interest that is adverse to that of the person you represent.

9.12 Responsibilities upon termination of appointment

If your appointment as litigation guardian comes to an end or has been finalised, where possible you should:

- ♦ inform the represented person that it has come to an end, or that you are no longer able to assist them as their litigation guardian,
- ♦ where the case has finalised, obtain copies of any orders or judgments and explain their meaning to the represented person, and
- ♦ prepare any reports for the Court or your lawyer as may be required,

- ◆ unless ordered by the Court, you do not have an ongoing responsibility for the future management of any settlement funds.

9.13 After the court case

It is necessary that you continue to maintain the represented person's confidentiality and observe the terms of any terms of settlement or Court orders that apply to the represented person and, where applicable, to you as their litigation guardian.

10 If you have further questions ...

If you have further questions, ask your lawyer for advice and assistance.