



CASE GUARDIANS IN FAMILY LAW

What is a case guardian?

A case guardian, referred to as a litigation guardian in the Federal Circuit Court, may be appointed to conduct a case on behalf of a party to a family law matter where a party is unable to act for themselves.

The role of a case guardian is to provide a legal representative with the instructions necessary to conduct the family law litigation where the client is not capable of doing so themselves.

The rules relating to case guardians are found in Part 6.3 of the *Family Law Rules 2004* and Part 11.2 of the *Federal Circuit Court Rules 2001* (“the Rules”).

When might a case guardian be needed?

The decision to seek to appoint a case guardian should not be taken lightly and should be considered as a last resort. A lawyer has an obligation to raise the question of their client’s capacity in circumstances where the lawyer is concerned that their client does not understand the nature and possible consequences of the proceeding or is not capable of adequately conducting, or giving adequate instruction for the conduct of, the proceeding.¹

For further information regarding capacity see the Law Society of NSW publication [“When a client’s mental capacity is in doubt: A Practical Guide for Solicitors”](#)

Who is eligible to be a case guardian?

A person may be a case guardian if the person:

- (a) is an adult;
- (b) has no interest in the case that is adverse to the interest of the person needing the case guardian;
- (c) can fairly and competently conduct the case for the person needing the case guardian; and
- (d) has consented to act as the case guardian.²

How to appoint, replace or remove a case guardian

A person may apply for the appointment, replacement or removal of a person as a case guardian by making an application in a case.³ An application in relation to a case guardian may be made by a party, a person seeking to be made the case guardian or by a person authorised to be a case guardian.⁴

A person who is a manager of the affairs of a party⁵ is taken to be appointed as the case guardian of the party if the person has filed:

- (a) a notice of address for service; and
- (b) an affidavit which:
 - (i) provides evidence that the person has been appointed manager of the affairs of the party; and
 - (ii) states that the person consents to being appointed as the case guardian of the party.⁶



How must a case guardian conduct a case?

A person appointed as the case guardian of a party is bound by the Rules and is required to do anything which the Rules require is done by a party.⁷ The case guardian may, for the benefit of the party, do anything which the Rules permit the party do pursuant to the Rules.

When seeking a consent order (other than an order relating to practice or procedure), a case guardian must file an affidavit setting out the facts relied on to satisfy the court that the order is in the party's best interests.⁸

The case guardian for a child or a person with a disability⁹ is bound by the duty of disclosure. The case guardian may be personally liable for an order for costs where the guardian is found not to have satisfied the obligation to provide full and frank disclosure pursuant to the Rules.¹⁰

Costs of a case guardian

The court may order the costs of a case guardian to be paid by a party or from the income or property of the person for whom the case guardian is appointed.¹¹

Endnotes

- 1 Family Law Rule 6.08A to 6.14; Federal Circuit Court Rule 11.08 to 11.15.
- 2 Family Law Rule 6.09, Federal Circuit Court Rule 11.10.
- 3 Family Law Rule 6.10, Federal Circuit Court Rule 11.11.
- 4 Family Law Rule 6.10.
- 5 A 'manager of the affairs of a party' includes a person who has been appointed, in respect of the party, a trustee or guardian under a Commonwealth, State or Territory law. See Federal Circuit Court Rule 11.12.
- 6 Federal Circuit Court Rule 11.12.
- 7 Family Law Rule 6.13.
- 8 Family Law Rule 6.13.
- 9 A 'person with a disability' is defined as someone who because of physical or mental disability, does not understand the nature or possible consequences of a case or, is not capable of adequately conducting or giving adequate instruction for the conduct of the case. See Family Law Rules Dictionary.
- 10 Family Law Rule 6.13.
- 11 Family Law Rule 6.14, Federal Circuit Court Rule 11.14.