

PRACTICE NOTE No. 1 of 2009

Legal Practitioners and Guardianship Tribunal proceedings

1 Commencement

- 1.1 This Practice Note will apply from 18 May 2009 to all proceedings before the Guardianship Tribunal.

2 Definitions

- 2.1 In this Practice Note:

Act means the *Guardianship Act 1987*

Tribunal means the Guardianship Tribunal

Subject person means the person who is the subject of the Tribunal proceedings

3 Purpose

- 3.1 This practice note is a guide for legal practitioners and others in relation to:

- The nature of Tribunal proceedings
- The different roles that legal practitioners may have in Tribunal proceedings
- Applications for leave for a party to be legally represented
- The role of a legal practitioner as a McKenzie Friend / legal support person
- The role of legal representatives before and during hearings
- Revocation of leave to be legally represented
- Appointments of separate representatives.

4 Nature of Tribunal proceedings

- 4.1 The Tribunal exercises a protective jurisdiction in relation to people with decision making disabilities. The Tribunal's procedures aim to make its legal process accessible for people with disabilities and their families. The role of a legal representative during a Tribunal hearing should be considered in this context.
- 4.2 The Tribunal conducts its proceedings in an investigative/inquisitorial manner rather than in an adversarial manner. It can inform itself as it thinks fit, is not bound by the rules of evidence and is obliged to conduct proceedings with as little formality and legal technicality as the circumstances of the case permit (s 55 of the Act). The Tribunal must seek to bring the parties to a settlement if this is possible or appropriate(s 66 of the Act).
- 4.3 The Tribunal seeks to ensure that the subject person, family members and other parties and witnesses can understand and participate in hearings. Tribunal members usually identify key issues and explore them with participants at the hearing, rather than always expecting parties to present and argue a case.

5 Roles legal practitioners may have in Tribunal proceedings

5.1 Legal practitioners may represent or assist a client in Tribunal proceedings in several ways:

- **General legal advisor** - A legal practitioner may provide advice and assistance to a party without appearing at a hearing. They may, for example, assist a party in pre hearing discussions with other parties, or assist a party in preparing documents and gathering evidence.
- **McKenzie Friend¹** - A legal practitioner may attend the hearing as a party's McKenzie Friend by providing support but not representation. Practitioners do not need to seek the leave of the Tribunal to attend as a McKenzie friend.
- **Legal Representative** - A legal practitioner may attend the hearing as a party's legal representative and act as their advocate on their instructions. **The leave of the Tribunal is required for a legal practitioner to have this role.**
- **Separate Representative** - A legal practitioner may act as the separate representative of the subject person and appear at the hearing to make submissions about the best interests of their client. The Tribunal appoints separate representatives.

5.2 Legal practitioners may also be involved in Tribunal proceedings as a:

- **Party** - A legal practitioner may be a party to Tribunal proceedings either because they are an applicant or for example, in some matters, if they are an attorney pursuant to a power of attorney; or
- **Witness** - A legal practitioner may appear at a Tribunal hearing as a witness to give evidence. For example, evidence may be required about the circumstances surrounding the making of an enduring power of attorney where the legal practitioner has prepared and witnessed the document and the validity of the document is in question.

6 Applications for leave to be legally represented in Tribunal proceedings

6.1 There is no entitlement as of right to legal representation at proceedings before the Tribunal. If a party wishes to be represented by a legal practitioner, that party must obtain the leave of the Tribunal (s 58(1) of the Act).

6.2 Applications for leave of the Tribunal are not frequently made and in the majority of proceedings before the Tribunal the parties are not legally represented.

7 Who can apply for leave to be represented?

7.1 Only parties to proceedings may apply for leave to be legally represented.

7.2 Section 3F of the Act identifies the parties to different types of proceedings before the Tribunal. Section 35(2) of the *Powers of Attorney Act* 2003 sets out the parties to proceedings conducted under that Act.

7.3 A party may make the application for leave to the Tribunal or the application can be made on their behalf by the legal practitioner who intends to represent them at the hearing.

¹The role of a McKenzie friend was established in *McKenzie v McKenzie* [1971] P33 and is discussed in more detail later in this Practice Note.

8 Information available before making an application for leave

- 8.1 Before making an application for leave to be legally represented, a party or their legal representative may wish to discuss this with the Tribunal's Coordination and Investigation Officer who is involved in the matter.
- 8.2 The Tribunal also has an information sheet *"Representation at Hearings"* available on its website (www.gt.nsw.gov.au).

9 How to apply

- 9.1 There is no approved application form for applications for leave and applications should be made by way of a letter to the Tribunal.
- 9.2 The application should be addressed to the Registrar of the Tribunal and should include:
- the name of the subject person
 - the name of the party for whom the legal practitioner is acting and on whose behalf the practitioner is making the application
 - the grounds for the application (see paragraph 11 below).
- 9.3 **Applications should be made as soon as possible after instructions to act have been received and no later than five working days before the hearing date of the substantive proceedings**, unless special circumstances apply.

10 Determining applications for leave to be legally represented

- 10.1 Applications for leave will be listed for hearing before a Tribunal Member.
- 10.2 Directions hearings are routinely conducted each Thursday morning at the Tribunal's Balmain premises and participants may choose to attend or participate by telephone. The vast majority of applications for leave for legal representation are conducted by telephone conference or dealt with on the papers.
- 10.3 **Late applications** - if the application is received **less than five working days** before the scheduled hearing date of the substantive proceedings, then it will most likely be listed for hearing on the scheduled hearing date and will be dealt with by the Tribunal at the commencement of the hearing.

11 Relevant factors to address in applications for leave to be legally represented

- 11.1 The Act gives the Tribunal a broad discretion to decide whether to grant an application for leave to be legally represented. The Tribunal takes into account the principles in section 4 of the Act when making a decision about such an application.
- 11.2 Some considerations which may be relevant to the Tribunal's determination to grant leave are :

- Whether representation will promote the principles in s 4 of the Act, in particular the paramountcy of the interests of the subject person.
 - Any disability or other factor that impedes the party's capacity to fully participate in the hearing.
 - The nature and seriousness of the interests of the party that are affected by the proceedings.
 - Whether the party's interests and point of view conflict with those of other parties.
 - Whether the proceedings involve complex legal or factual issues.
 - Fairness between the parties. It may be unfair if one party is represented but another is not, particularly if the subject person is unrepresented or the parties are in conflict.
 - Whether representation may assist a party to focus on the relevant issues and may promote a conciliatory approach to the proceedings.
- 11.3 The above list is not exhaustive and the Tribunal may take into account any other factors which are relevant in the particular circumstances of the subject person.

12 Representation for the subject person : Special considerations

What if the subject person is unable to give instructions?

- 12.1 If the subject person is unable to give instructions to a legal practitioner the Tribunal may appoint a separate representative instead of granting leave for the subject person to be legally represented.
- 12.2 Practitioners are referred to the Law Society of New South Wales publication "*When a client's capacity is in doubt*", March 2009.

Other considerations

- 12.3 The Tribunal considers whether to grant leave to a party to be represented. The Tribunal does not grant leave to a specific legal practitioner to provide that representation. However, the Tribunal may, in certain circumstances, grant leave to a party to be represented, but refuse to allow a particular legal practitioner to be the representative. For example:
- **The legal practitioner is a possible witness**
- 12.4 A legal practitioner cannot represent a party in proceedings in which the legal practitioner will also be a material witness. This may arise, for example, where a legal practitioner has witnessed the execution of an enduring power of attorney and the issue in dispute is whether the principal had the requisite capacity to execute that document. Both the *Solicitors' Rules* and the *Barristers' Rules* prohibit a legal practitioner from acting where they are or may be a witness in proceedings.²
- **The legal practitioner has a conflict of interest**

² *NSW Solicitors Rules*, Rule 19; *NSW Barristers' Rules*, Rule 87(c)

- 12.5 In the guardianship jurisdiction, parties to proceedings often have a close family or personal relationship to the subject person. They may perceive that they share a common interest with the subject person and believe there is no difficulty in instructing a legal practitioner to represent both themselves and the subject person in Tribunal proceedings. However, it is not appropriate for a legal practitioner to represent both the subject person and other parties in such proceedings due to the potential conflict of interest in either the current Tribunal proceedings or related matters.

13 Acting as a McKenzie Friend / legal support person

- 13.1 A legal practitioner may attend the Tribunal hearing with their client and act as their McKenzie Friend.³ In this role, a legal practitioner can support their client during the hearing by making notes or suggestions for their client, helping them to organise their papers or giving advice or prompts during the hearing. However, the legal practitioner does not have a right to participate in the proceedings as an advocate.

14 Role of a legal representative prior to a Tribunal hearing

- 14.1 A legal practitioner involved with Tribunal proceedings should establish contact with the Coordination & Investigation Officer handling the case in which they are involved. Practitioners are expected to act in a professional, courteous and non-adversarial manner when dealing with Tribunal staff.
- 14.2 Legal representatives may be required to ensure the distribution to other parties of documents submitted to the Tribunal.
- 14.3 If the legal practitioner's view is that the matter should be heard as a matter of urgency or if the legal practitioner has other information relevant to the listing of the matter, this should be discussed with the Officer.

15 Role of a legal representative during a Tribunal hearing

- 15.1 Legal representatives appearing at a Tribunal hearing should conduct themselves at the hearing in a way which is appropriate and sensitive to the special requirements of the protective jurisdiction of the Tribunal. A traditional adversarial process is not appropriate in proceedings which focus on people with disabilities.
- 15.2 During a hearing, a legal representative should:
- Address the Tribunal members as "Tribunal Member" or "Ms/Mrs/Mr Smith" or "Dr Smith"
 - Be conscious of the needs and level of understanding of a person with a disability who may be present at the hearing
 - Assist in conciliation between the parties if appropriate
 - Conduct themselves in a respectful manner, with an appropriate level of formality and avoid making the proceedings overly "legalistic".
- 15.3 The Tribunal has a statutory obligation to seek and consider the views of the subject person and may often wish to speak directly with them rather than to have those views

³ *McKenzie v McKenzie* [1971] P 33

summarised by the person's legal representative. In some circumstances, the Tribunal may speak with the subject person in the absence of other parties and witnesses.

16 Revocation of orders granting leave to be legally represented

- 16.1 The Tribunal may revoke an order it has previously made granting leave to a party to be legally represented in proceedings. This may be done on application or on the Tribunal's own motion.

17 Separate representatives

Appointment of a separate representative for the subject person

- 17.1 The Tribunal may appoint a separate representative for the subject person if it appears to the Tribunal that the person ought to be separately represented (s 58(3)). A separate representative is appointed on the own motion of the Tribunal.

The Act allows the Tribunal a broad discretion to decide whether a subject person should be separately represented. The section 4 principles of the Act guide the Tribunal's decision to appoint a separate representative.

- 17.2 The Tribunal may decide to appoint a separate representative if:

- There is a serious doubt about the subject person's capacity to give legal instructions but there is a clear need for the person's interests to be independently represented at the Tribunal hearing or they wish to be represented.
- There is an intense level of conflict between the parties about what is in the best interests of the subject person.
- The subject person is vulnerable to or has been subject to duress or intimidation by others involved in the proceedings or there are serious allegations about exploitation, neglect or abuse of the subject person.
- Other parties to the proceeding have been granted leave to be legally represented.
- The proceedings involve serious issues likely to have a profound impact on the interests and welfare of the person with a disability, such as end of life decision-making or proposed sterilisation treatment.

18 Role of a separate representative

- 18.1 The role of a separate representative is different from that of a solicitor acting on instructions. A separate representative's role is to make submissions to the Tribunal about the best interests of a person with a disability as they arise in the matter before the Tribunal.
- 18.2 A separate representative should seek out the views and opinions of the person with a disability wherever possible and present these to the Tribunal but they are not limited to conveying only those views. The role of a separate representative is not only to seek and inform the Tribunal of the wishes of the subject person but ultimately to represent the best interests of the person rather than act on instructions.

- 18.3 A separate representative may also canvass the views of all others involved in the proceedings and make a submission to the Tribunal, based on all the available information, about what is the best outcome for the person with a disability.

Further Information

If you need assistance or clarification about this document, please contact the Tribunal's Enquiries Service on 9556 7600.

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