A PRACTITIONER'S GUIDE TO…
THE GUARDIANSHIP DIVISION OF NCAT

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1. Overview of the jurisdiction

The Guardianship Division is the second busiest Division of the NSW Civil and Administrative Tribunal (**NCAT**) after the Consumer and Commercial Division[2]. The Division deals with approximately 12,000 applications or reviews per year and the numbers are growing.

The orders made by the Guardianship Division can have a significant impact on the basic civil rights of the person, including at times the person's freedom of movement and action, control over their finances, bodily integrity or medical treatment including the right to refuse treatment.

Applications are made to the Guardianship Division about people[3] with decision-making disabilities, such as dementia, intellectual disability, mental illness or brain injury. Dementia is the most common condition in cases before the Guardianship Division.

Applications are generally made where the informal arrangements are not working or are insufficient to ensure a decision or decisions can be made in the welfare and interests of the subject person. This might be where there is:

- Conflict between the subject person and service providers
- Conflict between family members
- Abuse, neglect or exploitation of the subject person
- A legal need for an order, for example to sell a house or to authorise others to return a person should they attempt to leave their accommodation (such as a nursing home)

The Guardianship Division hears and determines:

(i) Applications for a guardianship order[4];

(ii) Requests to review guardianship orders and end-of-term reviews of guardianship orders[5];

(iii) Reviews of an appointment of an enduring guardian[6];

(iv) Applications for a financial management order[7];

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[2] According to the *NCAT Annual Report 2018-2019* the Guardianship Division received 11,716 applications in 2019/2019, which comprised 17.1% of the applications dealt with by NCAT that financial year.
[3] The person the subject of the application is often referred to as the 'subject person'.
[4] Refer to Part 3 Divisions 2 and 3 of the *Guardianship Act 1987*. Note that applications can only be made in respect of persons who are 16 years of over: ss.9(2) of the *Guardianship Act 1987*.
[5] Refer to Part 3 Division 4 of the *Guardianship Act 1987*.
[6] Refer to s.6K and 6J of the *Guardianship Act 1987*.
[7] Refer to Part 3A Division 1 of the *Guardianship Act 1987*.

(v) Reviews of a financial management order where the requirement for review was contained in the order[8];

(vi) Applications to vary or revoke a financial management order[9];

(vii) Requests to review the appointment of a financial manager[10];

(viii) Applications to review the making, revocation or operation and effect an enduring power of attorney[11];

(ix) Applications for the Tribunal to consent to certain medical or dental treatment where a person is 16 years or over and incapable of giving consent[12]; and

(x) Applications for the approval of clinical trials[13].

Guiding principle of the CAT Act

The guiding principle in the *Civil and Administrative Tribunal Act 2013* (**CAT Act**) is to "*facilitate the just, quick and cheap resolution of the real issues in the proceedings*[14]." Also, the practice and procedure of the Tribunal should facilitate the resolution of the issues in such a way that the cost to the Tribunal and the parties is "*proportionate to the importance and complexity of the subject-matter of the proceedings*"[15].

Section 4 of the *Guardianship Act* - General principles and the paramount consideration

Section 4 of the *Guardianship Act 1987* is central to the exercise of the jurisdiction. It sets out a series of considerations for the Tribunal when exercising Division functions:

> "*General principles*
> *It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:*
>
> *(a) the welfare and interests of such persons should be given paramount consideration,*
> *(b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,*
> *(c) such persons should be encouraged, as far as possible, to live a normal life in the community,*
> *(d) the views of such persons in relation to the exercise of those functions should be taken into consideration,*
> *(e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,*
> *(f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,*

[8] Refer to ss.25N(1) and (2) of the *Guardianship Act 1987*.
[9] Refer to Part 3A Division 2 of the *Guardianship Act 1987*.
[10] Refer to Part 3A Division 3 of the *Guardianship Act 1987*.
[11] Refer to s.36 of the *Powers of Attorney Act 2003*
[12] Refer to Part 5 of the *Guardianship Act 1987*. This paper does not cover the regime for substitute consent to medical and dental treatment contained in Part 5 of the *Guardianship Act 1987*.
[13] Refer to Part 5 Division 4A of the *Guardianship Act 1987*.
[14] Subsection 36(1) of the CAT Act.
[15] Subsection 36(4) of the CAT Act.

(g) such persons should be protected from neglect, abuse and exploitation,

(h) the community should be encouraged to apply and promote these principles."

The welfare and interests of the person are given paramount consideration. The jurisdiction is squarely focussed on the person the subject of the application. Orders are made where it is in the welfare and interests of the person to do so[16].

As His Honour Justice Lindsay stated in *Re W and L (Parameters of Protected Estate Management Orders)* [2014] NSWSC 1106 at [23]:

> *"…care needs to be taken not to subordinate the interests of a person in need of protection to the convenience of others, including persons who, from time to time, might be engaged with management of their affairs or in advancement of their interests."*

Guardianship

To make a guardianship order, the Tribunal needs to first be satisfied that the person is a "person in need of a guardian" which is a slightly confusing term. A person in need of a guardian is "*a person who, because of a disability, is totally or partially incapable of managing his or her person*"[17] In hearings, the Tribunal often describes this as someone incapable of making "important life decisions".

A person who has a disability is a person:

> *"(a) who is intellectually, physically, psychologically or sensorily disabled,*
>
> *(b) who is of advanced age,*
>
> *(c) who is a mentally ill person within the meaning of the Mental Health Act 2007 , or*
>
> *(d) who is otherwise disabled,*
>
> *and who, by virtue of that fact, is restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation*."[18]

"Disability" is a concept not tied to a particular diagnosis or condition and encompasses a broad range of conditions including being "of advanced age", which is likely to imply "the frailty of old age"[19]. It is also the case that the person can be partially incapable of managing their person and therefore "a person in need of a guardian", which in turn hinges on the impact that any condition has on the person's functioning such that they require supervision or services "*to be, or become, able to function normally in community with others*".[20]

Once satisfied that the subject person is a person about whom an order could be made the Tribunal then decides whether or not to exercise its discretion to make an order, under s.14 of the *Guardianship Act*. In doing so the Tribunal must have regard to[21]:

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[16] Refer to the cases cited by His Honour Justice Lindsay at [10] of *G* v *G* [2016] NSWSC 511.
[17] Subsection 3(1) of the *Guardianship Act 1987*.
[18] Subsection 3(2) of the *Guardianship Act 1987*.
[19] As observed by His Honour Justice Lindsay in *P* v *NSW Trustee and Guardian* [2015] NSWSC 579 at [295].
[20] Refer to the comments of His Honour Justice Lindsay about "social habilitation" in *P* v *NSW Trustee and Guardian* [2015] NSWSC 579 at [303].
[21] These considerations are set out in ss.14(2) of the *Guardianship Act 1987*.

- the views of the subject person and their spouse and carer[22];
- the importance of preserving the person's existing family relationships;
- the importance of preserving the persons particular cultural and linguistic environments; and
- the practicability of services being provided without the need for an order.

Much of the hearing can be focussed on what is sometimes described as "need", that is, whether or not there is a need for an order or whether services can be provided without any order being made.

Key case: *IF* v *IG & Ors* [2004] NSWADTAP 3

There is a two-step process when exercising the power to make a guardianship order: the Tribunal is to satisfy itself that the person is a "person in need of a guardian" and then to determine whether to exercise a structured discretion to appoint a guardian, having regard to the matters set out in ss.14(2) of the *Guardianship Act 1987*. In doing so the Tribunal may be guided by one or more of the s.4 principles. Refer to [24]-[30].

This aligns with the principle in s.4(b), that is, that the decision-making of the person should be restricted as little as possible.

If it decides to make a guardianship order, the Tribunal can appoint a private person as the guardian (known as a 'private guardian') or a public body called the Public Guardian. The Public Guardian cannot be appointed if the circumstances are that a private guardian can be appointed[23].

Guardians are given "functions", or areas of decision-making, in the order. The most common functions are to make decisions about: accommodation, health care, medical and dental consent and services.

More than one guardian can be appointed. Appointments can be joint (with the guardians having the same functions and agreeing and acting together) or separate (each having different functions)[24]. The Public Guardian cannot be appointed as a joint guardian[25].

Guardianship orders are time-limited. An initial order is generally made for 12 months (or lesser period)[26]. A review of the order is undertaken at the end of the term of the order.[27] This is sometimes referred to as an end-of-term review or statutory review[28]. A request for review can also be made

[22] Note the definitions of "spouse" and "carer" in section 3 and 3D of the *Guardianship Act 1987*.
[23] Refer to ss.15(3) of the *Guardianship Act 1987*. The criteria for appointment of a private guardian are contained in s.17(1) of the *Guardianship Act 1987*. A useful case on when an order appointing a private guardian can "properly" be made is *W* v *G* [2003] NSWSC 1170 – refer to [25]-[26].
[24] Subsection 16(3) of the *Guardianship Act 1987*.
[25] Subsection 16(3) of the *Guardianship Act 1987*.
[26] Although there is provision for the making of longer orders, if certain other criteria are met: ss.18(1A) and (1B) of the *Guardianship Act 1987*.
[27] Unless the Tribunal specified that the order not be reviewed at the expiration of the period it has effect – refer to ss.16(2A) of the *Guardianship Act 1987*.
[28] Refer to ss.25C(2) of the *Guardianship Act* for the powers of the Tribunal on an end-of-term review.

during the course of the order[29]. The Tribunal can also specify that the order will not be reviewed at its end if it is satisfied it is in the best interests of the person that the order not be reviewed[30].

It should be noted that if a guardianship order is made it operates to suspend any enduring guardianship appointment[31]. Whilst the wording of the section is a little unclear, it is generally accepted that a guardianship order "trumps" an appointment of enduring guardian even if the functions are not the same and the guardianship order does not contain all of the functions in the enduring guardianship appointment.

Reviews of an appointment of an enduring guardian

The Tribunal also has jurisdiction to review an appointment of an enduring guardian[32]. On review the Tribunal can:

- revoke the appointment; or
- confirm the appointment, with or without varying the functions.

Alternatively, if the Tribunal thinks it is in the best interests of the appointor, it can deal with the review of the enduring guardianship as if either a guardianship application, financial arrangement application, or both has been made[33].

The Tribunal also has power to appoint a substitute enduring guardian where an appointee has died, resigned or become incapable[34].

One thing that might be overlooked by practitioners is the fact that if an enduring guardian wishes to resign at a point where the appointor is now "a person in need of a guardian" they should seek the approval of their resignation from the Tribunal[35]. The policy behind this provision is likely to be that it enables the matter to be brought before the Tribunal to determine whether it might be in the best interests of the appointor that either a guardianship order or financial management order be made (or both) or perhaps a substitute enduring guardian appointed.

It is also important to note that if the appointor wishes to revoke the enduring guardianship appointment (whilst he or she has the legal capacity to revoke it) an important step is to give written notice of the revocation to the appointee[36].

Financial management

The Tribunal needs to be satisfied of the following in order to make a financial management order:

[29] Refer to s.25C as to who can request a review of a guardianship order and ss.25C(1) for the powers of the Tribunal on this type of review of a guardianship order.
[30] Refer to subsection 16(2A) of the *Guardianship Act 1987*.
[31] Section 6I of the *Guardianship Act 1987*.
[32] Refer to s.6J of the *Guardianship Act 1987*.
[33] Refer to s.6K(3) of the *Guardianship Act 1987*.
[34] Section 6MA of the *Guardianship Act 1987*.
[35] Subsection 6HB(b) of the *Guardianship Act 1987*.
[36] This is a requirement for revocation: see ss6H(2)(d) of the *Guardianship Act 1987*.

(a) the person is not capable of managing their affairs; and
(b) there is a need for another person to manage the affairs; and
(c) it is in the person's best interests that the order be made[37].

Note that the legal criteria for financial management differs from guardianship in that there is no connection with any disability or condition which might cause an incapacity for self-management. There is also no age requirement, meaning that applications can be made about persons under 16 years[38].

Key case: *P* v *NSW Trustee and Guardian* [2015] NSWSC 579 – Lindsay J:

- Consideration of the question of incapacity to manage one's affairs involves consideration of the subjective financial affairs of the person [279]
- A finding of incapacity for self-management is one factor to be considered in the exercise of the jurisdiction. Consideration should also be given to the practical necessity or utility of an order [273]
- The focus is not on what condition the person has but on their functioning in the area of their management capacity [301]
- "*Is the person reasonably able to manage his or her own affairs in a reasonably competent fashion, without the intervention of a protected estate manager charged with the duty to protect his or her welfare and interests?"* [307]
- "*…a focus for attention is whether the person is able to deal with (making and implementing decisions about) his or her own affairs (person and property, capital and income) in a reasonable, rational and orderly way, with due regard to his or her present and prospective wants and needs, and those of family and friends, without undue risk of neglect, abuse or exploitation."* [308]
- Have regard to: past and present experience, the person's support systems and the extent to which the person can be relied on to make sound judgements about his or her welfare and interests: *CJ* v *AKJ* [2015] NSWSC 498 cited in *P* at [309].

In assessing a person's capacity for self-management, the Tribunal is not just to form a view about that on the day of the hearing, but rather is to consider the reasonably foreseeable future: *McD* v *McD* [1983] 3 NSWLR 81 at 86C-D.

If the Tribunal decides to exercise the discretion to make a financial management order it can appoint a "suitable person", such as a family member or friend, as the person's financial manager (often

[37] Section 25G of the *Guardianship Act 1987*.
[38] Refer to footnote 4 above.

referred to as a private manager)[39]. Alternatively, the Tribunal can appoint the NSW Trustee and Guardian as manager[40].

There is no provision in the legislation which indicates a preference for appointment of a private financial manager over the NSW Trustee and Guardian. However, there has been a shift in the cases towards that approach. Previously there had been a preference in favour of the appointment of the (then) Protective Commissioner (a role now performed by the NSW Trustee and Guardian) but there has now been a shift to an extent where the welfare and interests of the person may favour the appointment of a private manager[41].

Key case: *Holt and Another* v *Protective Commissioner* (1993) 31 NSWLR 227**
Justice Kirby, the President of the Court of Appeal (as he then was), set out some competing advantages of appointing a family member or the (then) Protective Commissioner – refer to page 242-243 of the judgement.

** Note that *Holt* may not be available online but can be obtained from the NSW Law Reports or Lexis Nexis – Unreported judgements (BC9305256).

Any private manager is always subject to the supervision of the NSW Trustee and Guardian. This includes the NSW Trustee issuing the private manager with directions and authorities as to what decisions they can make[42]. Private managers are also required to submit a management plan to the NSW Trustee for approval and they are required to file annual accounts with the NSW Trustee.

The NSW Trustee and Guardian charges fees both as supervisor of a private manager and when acting as financial manager. Information about how these fees are calculated is available on the NSW Trustee and Guardian website.

The making of a financial management order operates to suspend any power of attorney whilst the order is in place[43], unless the Tribunal orders that the power of attorney remains in force in respect of part of an estate that has been excluded from management[44]. Also, the effect of a financial management order is that the power of the person to deal with their own estate is suspended[45].

Financial management orders also differ from guardianship orders in that generally they remain in place unless an application is made to review or revoke the order. However, the Tribunal can include a requirement that the order be reviewed when making a financial management order[46]. The Tribunal can also order that the appointment of a financial manager be reviewed[47].

[39] Section 25M(1)(a) of the *Guardianship Act 1987*.
[40] Section 25M(1)(b) of the *Guardianship Act 1987*.
[41] Refer the comments of His Honour Justice Lindsay in *M* v *M* [2013] NSWSC 1495 at [25], [29], [34], [39] and [47].
[42] Section 66 of the *NSW Trustee and Guardian Act 2009*.
[43] Subsection 50(3) of the *Powers of Attorney Act 2003*.
[44] Subsection 50(4) of the *Powers of Attorney Act 2003.*
[45] Subsection 71(1) of the *NSW Trustee and Guardian Act 2009*.
[46] Subsection 25N(1) of the *Guardianship Act 1987*.
[47] Subsection 25S(1A) of the *Guardianship Act 1987*.

The Tribunal can also exclude part of a person's estate from management. The part of the estate excluded from management can then be managed by the person themselves[48]. Sometimes the Tribunal makes this type of order in order to allow the person to manage their Centrelink pension but ensure that a large asset is protected by the order.

Applications to revoke or vary a financial management order

An application can be made to revoke or vary a financial management order. On review the Tribunal can vary, revoke or confirm the order. The Tribunal can also revoke the appointment of the manager and appoint another manager in substitution[49].

The Tribunal can only revoke a financial management order if:

- the protected person is capable of managing his or her affairs; or
- it is in their best interests that the order be revoked[50]

Applications to review the appointment of a financial manager

An application can be made to review the appointment of a financial manager. On review the Tribunal can revoke the appointment and appoint a different manager in substitution or it can confirm the appointment. The Tribunal can also review the financial management order itself and vary, revoke or confirm the order[51].

Section 71 authorisations

A protected person who wishes to gain more control over their affairs or to have an opportunity to demonstrate that they are capable of self-management can request that the NSW Trustee authorise them to deal with part of their estate[52]. Sometimes authority will be given to deal with pension income and to pay day to day bills. However, a s.71 authorisation can be withdrawn at any time by the NSW Trustee if it decides it should do so.

Reviews of an enduring power of attorney

The Tribunal has jurisdiction to review the making, revocation or the operation and effect of an enduring power of attorney[53].

On reviewing the making of an enduring power of attorney, the Tribunal can declare the principal did not have the mental capacity to make a valid power of attorney or that the power of attorney is invalid because:

(i) the person did not have the capacity to make it; or

[48] Subsection 25E(2) of the *Guardianship Act 1987*.
[49] Section 25P of the *Guardianship Act 1987*.
[50] Subsection 25P(2) of the *Guardianship Act 1987*.
[51] Section 25U of the *Guardianship Act 1987*.
[52] Section 71 of the *NSW Trustee and Guardian Act 2009*.
[53] Section 36(1) of the *Powers of Attorney Act 2003*.

(ii) the power of attorney did not comply with the requirements of the *Powers of Attorney Act 2003*; or

(iii) the power of attorney is invalid for any other reason[54].

On review of a revocation of a power of attorney the Tribunal can declare that the principal did not have capacity to revoke the power of attorney or that the power of attorney remains valid because:

(i) the principal did not have the necessary capacity to revoke it; or

(ii) the revocation is invalid for any other reason, for example because the principal was induced to make the revocation by dishonesty or undue influence[55].

The Tribunal has wide powers on review of the operation and effect of the power of attorney. The Tribunal can, if satisfied it would be in the best interests of the principal or would better reflect the wishes of the principal, make an order:

(a) varying a term of or a power conferred by the power of attorney;

(b) removing an attorney;

(c) appointing a substitute attorney;

(d) reinstating a power of attorney that has lapsed by reason of any vacancy in the office of attorney and appointing a substitute attorney to fill the vacancy;

(e) directing an attorney to:

- furnish accounts and other information to the Tribunal or another person;
- lodge records and accounts of dealings and transactions with the Tribunal;
- that the records and accounts be audited;
- submit a financial management plan for approval by the Tribunal;

(f) revoking all or part of the power of attorney; or

(g) such other orders as the tribunal sees fit[56].

Alternatively, instead of reviewing the making, revocation or operation and effect of the power of attorney, the Tribunal can decide not make an order under s.36 of the *Powers of Attorney Act 2003*, and may, if it considers it appropriate in all the circumstances to do so, decide to treat the application for review as an application for financial management[57]. The Tribunal does use this provision quite often.

2. Practical tips for running your case in the Guardianship Division

The Guardianship Division operates an enquiries service for anyone who wishes to discuss the making of an application. The service can be contacted on the Guardianship Division general phone

[54] Subsection 36(3) of the *Powers of Attorney Act 2003*.
[55] Subsection 36(3A) of the *Powers of Attorney Act 2003.*
[56] Subsection 36(4) of the *Powers of Attorney Act 2003.*
[57] Under ss.37(1) of the *Powers of Attorney Act 2003*.

number (Ph 9556 7600 or 1300 006 228 and Press '2'). The service receives a high volume of calls and so offers a call back service.

Application forms are available on the NCAT website. They can be filed by emailing them to the Guardianship Division email address (gd@ncat.nsw.gov.au) but it would be prudent to also send a copy by post. Unfortunately the nature of fillable pdf forms is that they can be a bit clunky at times.

There are generally multiple parties to applications in the Guardianship Division. As a matter of course it is a good idea to work out who the parties are to each application or review that is before the Tribunal. Refer to s.3F of the *Guardianship Act 1987* in order to do that. If it is a review of an enduring power of attorney, refer to ss.35(2) of the *Powers of Attorney Act* 2003. It can be that a person who is a party to one application is not a party to another application and it may be useful to point that out. There can be hearings with as many as fifteen people in attendance all wishing to address the Tribunal. It may be appropriate in these matters to draw attention to the fact that not all of these people will be parties. Where time permits, the Tribunal will often allow non-parties to give their views about the applications towards the conclusion of the hearing.

When lodging an application, the Applicant is expected to serve a copy of the application and any attachments on the other parties. In some cases, parties will be asked to serve all further material filed in the lead up to the hearing on the other parties. In other cases the Tribunal Registry will send to the parties any additional material filed. Despite this, it would be good practice for legal representatives to serve the material on the parties to ensure they have received it.

The Tribunal seeks to maximise the opportunity of the subject person to participate in the hearing. Sometimes this will mean hearing from the subject person first and if remaining in the hearing might lead to agitation or distress, allowing the person to leave the hearing. The Tribunal has also, on occasion, adopted a procedure whereby it hears from the subject person in the absence of the parties, but by summarising the evidence so obtained in order to comply with the requirements for procedural fairness. The Tribunal adopts this procedure infrequently but might do so if there was a likelihood that the views of the person could not be freely given if the parties remained in the hearing room.

In some cases, the Tribunal will order separate representation of the subject person. A separate representative is a solicitor, either from Legal Aid or a private practitioner assigned the matter under a Grant of Legal Aid. The separate representative's role is to obtain and assist the subject person to present their views to the Tribunal, but also to make submissions about the applications from the perspective of the welfare and interests of the person. The separate representative does not act on instructions, but has an independent role in the hearing.

Once filed, the Registry triages the incoming applications, with cases with a risk to the person or their estate listed as a matter of priority. The Tribunal can sit after hours, and this occurs from time to time particularly if the Tribunal needs to provide consent to medical or dental treatment for a person. There is a team within the Registry that fast tracks cases where the subject person is in hospital and ready

for discharge but a guardianship application is made to facilitate placement. Those cases are generally listed within three weeks of the filing of the application. All applications are prioritised based on risk and the majority of matters can generally take around eight weeks to get a hearing date if the necessary evidence in support of the application is provided and depending on the workload of the Tribunal at the time.

The application is assigned to a case officer within the Tribunal Registry. That person is responsible for preparing the case for hearing, including sending out Notices of Listing and preparing a brief Hearing Report. On occasion, where there is insufficient information, the case officer may ask health professionals involved with the subject person to provide a brief written report. One of their primary roles is to endeavour to contact the subject person and promote their understanding and participation in the proceedings.

It is usually the case that an application will not be listed for hearing until two professional reports have been provided about the person's decision-making capacity. It has historically been the case that treating health professionals are generally willing to prepare a report for the guardianship proceedings without charge because of their appreciation of the role of the Guardianship Division.

There is no published hearing list[58], but Notices of Listing are emailed to the parties, and if applicable, their legal representatives. It is a good idea to check the Notice of Listing as the Tribunal can sometimes bring forward an upcoming end-of-term guardianship review and list it at the same time as a requested review of a guardianship order.

During the COVID pandemic the Tribunal has largely convened hearings by telephone. Some hearings have been by AVL. AVL hearings are routinely conducted where the subject person is in gaol.

The Tribunal sits throughout regional NSW. The Registry is situated on Level 6 of John Maddison Tower. If attending a hearing at John Maddison Tower, practitioners should arrive at Level 6 more than 15 minutes prior to the hearing and ensure their name is marked off or noted by the officer at Reception. On occasion, the hearing may be on another level of NCAT and practitioners may be advised to go to another level. Some of these hearing rooms have a more formal physical setting, with a raised bench and witness box to the side.

On Level 6 the hearing rooms generally contain a large table with the Tribunal panel sitting on the far side and the parties on the other. Non-parties tend to sit in chairs at the back of the hearing room. The hearings are audio recorded and the Tribunal has facilities to link in people by telephone or AVL link. Witnesses regularly give evidence by telephone. The Tribunal will determine whether a witness is contacted and on occasion will not contact a witness proposed by a party.

[58] Although if it is an appeal from a Guardianship Division decision, the case will appear in the list for the Appeal Panel. This list is available the afternoon prior to the hearing on the NCAT website.

Those waiting for the commencement of a hearing wait in the foyer area until they are invited into the hearing room. Generally it is the practice of the Tribunal to seat the subject person in the middle of those sitting at the table, symbolic of the fact that the subject person is central to the proceedings.

There can be times when the Tribunal asks those attending to leave the hearing room. If this occurs the Tribunal asks those present to take any bags with them. The Tribunal will often allow people to leave their papers behind in the hearing room.

Straight forward cases tend to be listed for one hour or an hour and a half. More complex matters can be listed for longer timeslots.

It is common for the Tribunal to retire for a short period to deliberate its decision at the conclusion of the hearing and then re-enter the hearing to deliver its decision. The order will often then be received on the email shortly after the end of the hearing. In a smaller number of cases the Tribunal will reserve its decision. Written reasons are usually received within two months of the hearing and it is often the case the reasons are received within one month.

The decisions of the Guardianship Division are not routinely published. A selection of Reasons for Decision are de-identified and published on NSW Caselaw and also appear on Austlii. At the time of writing there were 346 Guardianship Division decisions available on NSW Caselaw. Pre-NCAT decisions of the (then) Guardianship Tribunal are available on Austlii. Decisions of the Appeal Panel on internal appeal from the Guardianship Division tend to be published on NSW Caselaw.

<u>Leave for legal representation</u>

The Guardianship Division is seen as a jurisdiction in which most people can represent themselves. Leave is required in order for a party to be legally represented[59] and many such applications are declined by the Tribunal. Practitioners wishing to make an application for leave are *strongly* encouraged to refer to the Guardianship Division Guideline on Representation when making any such application, particularly [19] which outlines some considerations for the granting of leave.[60] An application for leave to represent the subject person is more likely to succeed than an application to represent another party in the proceedings[61]. Generally, the subject person will be entitled to a grant of Legal Aid if they have leave to be legally represented[62].

Some arguments in support of an application for leave might include:

- the legal complexity of the case;
- the effect on maintaining relationships – having a lawyer represent a party might mean the applicant is not pitted directly against the subject person ; or

[59] Section 45 of the CAT Act.
[60] Available at: https://www.ncat.nsw.gov.au/documents/guidelines/gd_guideline_representation.pdf
[61] Note the comments of the (then) Guardianship Tribunal in *KTC* [201]] NSWGT 23 (available on Austlii) at [29] where the Tribunal said is saw an argument for construing the capacity of the subject person to instruct a solicitor "fairly liberally".
[62] Refer to Legal Aid Policy Online at 6.16: https://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/6.-civil-law-matters-when-legal-aid-is-available/6.16.-guardianship-matters

- the heated nature of the conflict – legal representation might provide a buffer between parties and allow the dispassionate presentation of the case.

If leave is refused the Tribunal will generally allow a legal representative to assist a client as a McKenzie friend, if they wish[63]. There would also be nothing stopping a solicitor assisting their client to prepare their evidence prior to the hearing.

Joinder applications

The test for joinder is a wide one: the Tribunal thinks the person should be joined "*because of the person's concern for the welfare of the person the subject of the proceedings or for any other reason*.[64]"

Adjournments

Reference should be made to the Guardianship Division Guideline 'Adjournments'. There has been also some useful comments made by the Court of Appeal about the use of "formulaic" medical certificates relied on to obtain an adjournment[65] and by the Supreme Court about a loss of confidence in the administration of justice if adjournments are granted without "adequate justification"[66]

Costs orders

In order to get a costs order, it must be shown that there are "special circumstances" warranting an award of costs[67]. However, it should be noted that costs orders are rarely made in the Guardianship Division. Reference should be made to the Guardianship Division Guideline 'Costs'.

Appeals

Appeals from a decision of the Guardianship Division are by way of an internal appeal to the Appeal Panel of NCAT or to the Supreme Court[68]. Appeals must be made within 28 days of the Reasons for Decision being given to the person seeking to appeal and are on a question of law[69]. Leave is required to appeal on any other ground[70].

An appeal to the Supreme Court operates to stay the decision of the Guardianship Division[71], but an appeal to the Appeal Panel of NCAT does not operate to stay the decision[72]. However, a stay application can be made under s.43(3) of the CAT Act.

Regulation 9

[63] Note that there can be real problems acting as a McKenzie friend if the client is not in the same room as the solicitor or if the client has a hearing impairment or does not speak English.
[64] Clause 7 of Schedule 6 of the CAT Act.
[65] Refer to *AHB* v *NSW Trustee and Guardian* [2014] NSWCA 40 at [4]-[6].
[66] *EB & Ors* v *Guardianship Tribunal & Ors* [2011] NSWSC 767 at [50].
[67] Section 60 of the CAT Act.
[68] Subclause 12(1) of Schedule 6 of the CAT Act.
[69] Rule 25(4) of the *Civil and Administrative Tribunal* Rules and Subclause 14(2) of Schedule 6 of the CAT Act.
[70] Subsection 80(2) of the CAT Act and subclause 14(1) of Schedule 6 of the CAT Act.
[71] Clause 14 of Schedule 6 of the CAT Act.
[72] Subsection 43(2) of the CAT Act.

There is an additional power to set aside or vary a decision if all parties consent or if the decision was made in the absence of a party in certain circumstances[73].

3. Distinguishing features of the Guardianship Division

Requirement to convene a hearing and give reasons

The Guardianship Division is required to convene a hearing except for ancillary or interlocutory decisions[74]. The Tribunal must generally provide written reasons for decision, except where a less than three Member panel made an interlocutory or ancillary decision[75].

Multi-member multidisciplinary panels

The Tribunal panel hearing most substantive matters (other than guardianship reviews or reviews of financial management orders or appointments of managers) is constituted by three Members[76]:

(a) A legal member;
(b) A professional member, for example a doctor, psychologist or social worker; and
(c) A community member who has experience with people with a disability.

This is a particular strength of the Tribunal. Whilst the legal member presides on the hearing and does much of the talking, the questions from the other Members when they do come can cut through and provide vital evidence or elicit key responses from the person with the disability. Some panel members themselves are persons with disabilities.

Inquisitorial, informal proceedings with an "administrative" flavour

The cases in the Guardianship Division are not strictly between parties, but rather have a more administrative flavour[77].

It is also not the role of the Tribunal to resolve disputes between parties. As stated by the Appeal Panel in *BPY* v *BZQ* [2015] NSWCATAP 33 at [34]:

> "*The Guardianship Division's jurisdiction is essentially protective with the focus being on the person who is the subject of an application. The role of the Tribunal is not to resolve a dispute between parties but to consider applications made in relation to the subject person."*

The Tribunal adopts a more inquisitorial approach in its hearings. It directs the proceedings, starting with a brief introduction and then directing the questioning and order of when parties are to speak.

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[73] Refer to Regulation 9 of the *Civil and Administrative Tribunal Regulation 2013*.
[74] Clause 6 of Schedule 6 of the CAT Act.
[75] Clause 11 of Schedule 6 of the CAT Act. However, there are some temporary changes to the requirement to provide written reasons whereby an oral statement of reasons can be given: see cl 24 Schedule 2 of the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020*.
[76] However, there are some temporary COVID changes that allow the Tribunal to be constituted by a two-Member panel: cl 23(2) of Schedule 2 of *COVID-19 Legislation Amendment (Emergency Measures) Act 2020*.
[77] Refer to the comments of His Honour Justice Lindsay at [106] in the 2017 paper delivered to the NSW Bar Association Personal Injury and Common Law Conference (referred to in this paper under the heading '6. Some helpful resources') as well as *P* v *NSW Trustee and Guardian* [2015] NSWSC 579 at [28].

The Tribunal may seek to speak directly to clients of legally represented persons. Depending on the style of the Presiding Member, first names might be used.

The Tribunal does not require the filing of written statements from witnesses prior to the hearing. It can be that evidence comes out in the hearing itself in oral evidence.

The Tribunal is not bound by the rules of evidence. This includes the rule about opinion evidence. For example, there are times when laypeople will give evidence about whether or not they think a person has dementia or is affected by a particular condition. It may be useful to raise the issue as to whether a layperson is equipped to make such an assessment, particularly if there is available evidence from health professionals in the papers.

Public interest element

The proceedings of the Tribunal cannot be dealt with on the basis that the parties consent to any proposed form of orders or consent to the dismissal of the application[78]. The reason is that there is a public interest element to the proceedings given their protective purpose.

Indeed, once made, applications cannot be withdrawn without the consent of the Tribunal[79].

Broad test for standing to bring an application or seek a review

There is a broad test for standing to bring an application or seek a review: that the person has a "genuine concern for the welfare of the person". Note that a solicitor is not to make an application in respect of their own client, except in very limited circumstances[80].

Prohibition on the publication of names or information that might identify

Hearings of the Guardianship Division are public hearings but a person is prohibited from publishing the name or any information that might identify the subject person, a witness or anyone mentioned or involved in the proceedings[81]. Refer to the Guardianship Division Guideline 'Confidentiality, privacy and publication'.

4. Related jurisdictions

Supreme Court – Equity Division, Protective

The Supreme Court has an inherent protective jurisdiction arising from the *parens patriae* power as well as a statutory jurisdiction under the *NSW Trustee and Guardian Act 2009* and the *Powers of Attorney Act 2003*.

[78] Refer to *M* v *M* [2013] NSWSC 1495 at [50] at (a).
[79] Cl 6 of Schedule 6 of the CAT Act.
[80] Refer to the comments of the Court of Appeal in *R* v *P* (2001) 53 NSWLR 664, per Hodgson JA at [63]-[64].
[81] Subsection 65(2) of the CAT Act.

Mental Health Review Tribunal

The Mental Health Review Tribunal can also make financial management orders under the *NSW Trustee and Guardian Act 2009*, although the only option for appointment is the NSW Trustee.

Merits review of decisions made by the Public Guardian or NSW Trustee and Guardian There is a right of administrative review of decisions made by the NSW Trustee or the Public Guardian. These matters are heard in the Administrative and Equal Opportunity Division of NCAT.

5. Some challenges in appearing in the Guardianship Division

Remaining courteous

Some of the cases in the Guardianship Division involve entrenched family conflict. Parties or others in attendance can become upset or angry in hearings and direct that towards others present including any legal or separate representative. Some people seek to interject whilst the solicitor is speaking. Solicitors have an ethical obligation to be courteous and this may be tested at times.[82]

Preserving the independence of Tribunal members

There can be occasions where it may be important for a legal practitioner to seek to preserve the independence of the Tribunal panel in a hearing. For example, if the Tribunal panel remains in the hearing room and sends those attending the hearing outside the hearing room it might be important to ensure that the Tribunal panel is not left alone with a party/person in the absence of the other parties. There might also be some casual discussion when a Member comes out to invite those attending into the hearing room. It may be important not to appear familiar with the tribunal member.

Adequacy of the expert evidence

There can be cases where there is limited available evidence about the person's disability or the degree of their impairment. It may be necessary to raise the fact that further or better evidence should be obtained given the fact that the making of orders is a significant intrusion on the rights of the person[83]. On the other hand, the Tribunal can inform itself as it sees fit[84] and it would be expected that the Professional and Community Members may contribute to the Tribunal's understanding of the evidence as to disability, including how the subject person presented at the hearing.

Working with older people

Some older persons have a hearing or vision impairment. Their ability to participate may be impacted if the hearing is on the telephone. The Tribunal has a Walkman type amplification device that can be used at John Maddison Tower and sometimes sent to a person if they are in hospital to use. There is a hearing loop available at John Maddison Tower. When writing to a person with low vision, practitioners might contemplate using very large font. Such persons will also have difficulty reading

[82] Refer to the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 – Rule 4.1.2 states that a solicitor must be "*be honest and courteous in all dealings in the course of legal practice*".
[83] Refer to the comments of Justice Palmer in *FA* v *Protective Commissioner & Ors* [2009] NSWSC 415 at [11].
[84] See s.38(2) of the CAT Act.

papers served upon them and should be taken through the substance of such material, where appropriate.

Practitioners should be aware of the limited utility of the Mini-Mental State Examination (MMSE) or the Montreal Cognitive Assessment (MoCA) or other screening tools in assessing the degree of a person's dementia. However, it is helpful to gain an understanding of what score might indicate significant impairment. For example, a score of 13-20 on a MMSE might indicate moderate dementia. Similarly, CT Brain scans will not necessarily be clear evidence as to the cognitive functioning of the person but may show some brain changes which might indicate cognitive decline. The most in-depth type of assessment of cognitive functioning is an assessment by a neuropsychologist.

Dynamics of power and control

In cases involving a high degree of conflict it can be the case that parties seek to pressure the subject person or begin to believe that the subject person's views are the same as their own views. A person with impaired decision-making might align with different sides of a conflict depending who they are with. This can be complicated in cases where the subject person does not wish to go into aged care or where a relative, such as an adult child, takes the person to live with them and restricts the access of the opposing siblings to the parent.[85]

6. Guardianship work

Many practitioners may be unfamiliar with the operation of the Guardianship Division. It is hoped that this paper sparks interest but also equips practitioners to advise and, where appropriate, seek leave to represent clients in this challenging but rewarding jurisdiction.

[85] His Honour Justice Lindsay used an interesting phrase in *C* v *W* [2015] NSWSC 1774 at [97], when His Honour referred to "*an almost universal tendency…to view the needs of an incapable person through the prism of self-interest.*"

7. Some helpful resources

Textbooks

O'Neill, N. and Peisah, C. (2019 edn) *Capacity and the Law*, available free online at: http://austlii.community/foswiki/Books/CapacityAndTheLaw/WebHome. This is the only up to date textbook that specifically deals with NSW guardianship law.

Robinson SC, M., and Lucy, J. (2020) (2nd edn) *NCAT – Practice and Procedure*, Lawbook Company, Thomson Reuters. Note the new edition is hot off the press! Pack it in the bag to take to hearings. A very handy book with the NCAT legislation and key cases in it.

Dal Pont, G.E. (2019)(3rd edn) *Powers of Attorney*, Lexis Nexis. Note there is a new (3rd) edition.

Key legislation

Civil and Administrative Tribunal Act 2013 - including Schedule 6.
Guardianship Act 1987
Powers of Attorney Act 2003
NSW Trustee and Guardian Act 2009

Cases

If you read one case, read: *P* v *NSW Trustee and Guardian* [2015] NSWSC 579. This case is an important judgement of His Honour Justice Lindsay concerning the protective jurisdiction and the considerations for the making of financial management orders.

Published decisions of the Guardianship Division are available on NSW Caselaw: https://www.caselaw.nsw.gov.au/

Alerts to sign up for through the NCAT website:

- the brand new Guardianship Division Case Digest – two issues so far
- Appeal Panel Decisions Digest
- NCAT Legal Bulletin

Guardianship Division Guidelines

There are four Guardianship Division Guidelines that have been issued:

- 'Adjournments'
- 'Confidentiality, privacy and publication'
- 'Costs'
- 'Representation'

Written papers

Justice Lindsay has written a number of papers about the protective jurisdiction which are available on the Supreme Court website under 'Speeches by current judicial officers'. One of the most helpful is a

very detailed and comprehensive paper delivered to the NSW Bar Association Personal Injury and Common Law Conference in 2017:
http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2017%20Speeches/LINDSAY_20170311.pdf

Selected speeches and papers written by Deputy President Schyvens and other Members about the work of the Guardianship Division are available on the NCAT website at:
https://www.ncat.nsw.gov.au/ncat/about-ncat/what-is-ncat/speeches-and-conference-papers.html

Law Society resources (available for Law Society Members)
The following useful guides can be found in the 'Practice Resources' section of the Law Society website under 'Elder Law':

- *Best practice guide for practitioners in relation to elder abuse*
- *Elder Abuse of Clients: What support can solicitors offer?*
- *Powers of Attorney Act 2003: A Commentary*
- *Questions to consider when preparing an Enduring Power of Attorney*
- *When a Client's Mental Capacity is in Doubt: A Practical Guide for Solicitors'* (2016)

Other books that may be of interest:
Field, S., Williams, K. and Sappideen, C. (eds)(2018) *Elder Law: A Guide to Working with Older Australians*, The Federation Press.

McCullagh, R.F. (2018) *Australian Elder Law: Accommodation, Agency and Remedies*, Lawbook Co., Thomson Reuters.

Lewis, R. (2012) (2nd edn) *Elder Law in Australia*, Lexis Nexis Butterworths.

NSWLRC Report
The NSW Law Reform Commission produced a report into the *Guardianship Act* in 2018:
https://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Guardianship/Report-145.aspx. The Report addressed a number of issues including whether there should be a shift from substitute decision-making to supported decision-making. As at the time of writing there has been no formal response from the NSW Government to this report.