



Guardianship Division Guideline

August 2017

Costs

What does this Guideline explain?

1. This Guideline explains:
 - a) The general principles about who pays a party's costs in the Guardianship Division
 - b) When the Tribunal can order someone else to pay a party's costs
 - c) Who can ask for costs
 - d) Who can be ordered to pay someone else's costs
 - e) What costs a party can ask for
 - f) How any order of costs is calculated
 - g) When to apply for costs
 - h) How to apply for costs
 - i) What the Tribunal does when it gets a costs application

Definitions

2. Definitions that explain words or concepts used in this Guideline are at the back of the Guideline.

What are the general principles about who pays for the costs of a case?

3. The primary rule under s 60(1) of the Act is that each party pays their own costs. This applies to matters in the Guardianship Division.
4. When cases are heard in the Guardianship Division, the Tribunal exercises a protective jurisdiction in relation to people with decision making disabilities. This means that when exercising functions under the Act or the *Guardianship Act*, it must consider the principles in section 4 of the *Guardianship Act* including the requirement to give paramount consideration to the welfare and interests of persons who have disabilities.
5. Anyone who is genuinely concerned about the welfare of a person may make an application to the Tribunal for an order to promote and protect that person's interests. Many applicants are family members, friends or carers of the person who is the subject of the application or their service providers such as social workers, health professionals or medical practitioners.
6. No fees are required to lodge an application. The majority of parties represent themselves in Guardianship Division proceedings. If a party wishes to have legal representation or to be represented by another person (such as a family member or friend), then the proposed representative may seek leave from the Tribunal. The Tribunal may, as its discretion grant or

refuse leave to a person to represent a party in proceedings and may revoke any leave that it has granted (section 45(3)).

7. The protective jurisdiction exercised by the Guardianship Division of the Tribunal means that people should not be discouraged from bringing well motivated applications to the Tribunal for fear of a costs order being made against them. Accordingly, costs orders have been rarely made in the Guardianship jurisdiction.
8. However, the Tribunal can order that someone else must pay a party's costs in special circumstances. For when this can happen, see paragraphs 9 and 10 below.

When can the Tribunal order someone else to pay a party's costs?

9. The Tribunal may order a party to pay another party's costs if it is satisfied that there are 'special circumstances' for doing so.
10. Section 60(3) of the Act explains the types of special circumstances the Tribunal can have regard to in order to decide whether a party should pay another party's costs. They are:
 - a) a party has conducted their case in a way that unnecessarily disadvantages another party
 - b) a party has been responsible for unreasonably making the case take longer
 - c) the relative strength of a party's case or whether the case was hopeless
 - d) the nature and complexity of the case
 - e) a party's case was frivolous, vexatious or misconceived
 - f) a party has not cooperated with the Tribunal in providing a just, quick and cheap resolution of the real issues in dispute
 - g) a party has not followed Tribunal orders or directions
 - h) any other matter the Tribunal thinks is relevant.

Who can ask for costs to be paid by someone else?

11. Any party who thinks their circumstances meets the requirements set out in paragraphs 9 and 10 can ask for their costs to be paid by another party.

Who can be ordered to pay someone else's costs?

12. If the Tribunal makes an order for costs it may order that :
 - a) another party pays costs
 - b) a party joined to the proceedings pays costs.

What costs can a party ask for?

13. A party can ask for the following costs:
 - a) the fees charged by the lawyer for preparing and/or running the case
 - b) the out of pocket 'disbursements' of their lawyer
 - c) the out of pocket 'disbursements' of a self-represented party.

14. A party *cannot* ask for any of these costs:

- a) their own travelling costs
- b) their own time spent in preparing or running the case, or lost earnings of a self-represented party.

How is an order for costs calculated?

15. If the Tribunal decides to make a costs order, it may:

- a) make an order for a fixed sum of money
- b) order that a person pay a fixed percentage of a party's costs
- c) order that costs are to be paid by one party, but leave it to the parties to agree on the actual amount. If the parties cannot agree, the Tribunal can order that costs be assessed by a costs assessor on a 'party and party' basis
- d) in exceptional circumstances make an order for 'indemnity' costs.

When should a party apply for costs?

16. A party who wishes to apply for costs should make the application preferably before the end of the final hearing or immediately after a decision is made.

17. Although the Act does not set out time limits, generally costs applications should be made no later than 28 days after delivery of reasons for decision. Delay in making costs applications may raise issues of procedural fairness and administrative difficulties and expense for the parties and for the Tribunal.

How should a party apply for costs?

18. Preferably applications for costs should be made in writing but may also be made orally at the hearing.

19. A party who wishes to apply for costs should:

- a) apply by letter addressed to the Registrar (there is no prescribed application form); and
- b) send a copy of the application to all the parties (including the person who is the subject of the application) and the representatives of any of the parties (if any).

20. The costs application, whether made in writing or orally at the hearing, should:

- a) identify the party from whom the payment of costs is sought (including whether the costs are sought to be paid from the subject person's estate);
- b) set out the special circumstances that the party seeking costs believes should warrant an award of costs against another party and why the usual rule should not apply (that each party pays their own costs);
- c) identify the attempts that have been made to resolve any costs issues;
- d) provide a precise statement of the amount of costs sought;
- e) identify the basis on which costs are sought (such as party/party, solicitor/client, or indemnity);

- f) provide documentary evidence of the costs incurred, including any bills, accounts, invoices, receipts and/or costs agreements.

What does the Tribunal do when it gets a costs application?

21. The Tribunal may:
 - a) determine the costs application during the substantive hearing; or
 - b) adjourn the costs application and list it for a separate hearing; or
 - c) adjourn the costs application and determine it 'on the papers' (that is without requiring the attendance of the parties or their legal representatives).
22. The Tribunal may make directions with respect to an application for costs.
23. The Tribunal may decide not to award costs and may dismiss the costs application.

Resources

24. Published decisions of the Tribunal are available on the [NSW Caselaw website](#) and [AustLII website](#).

What do some of the words in this Guideline mean?

- **Act:** *Civil and Administrative Tribunal Act 2013 (NSW)*
- **Assessment of costs:** The way the precise amount of costs payable by one party to another party is calculated if the amount cannot be agreed. An assessment is conducted by a specially qualified costs assessor in accordance with the *Legal Profession Uniform Law Application Act 2014 (NSW)*.
- **Costs:** Costs are the monies charged by lawyers for their fees. Costs also include 'out of pocket' expenses (disbursements) such as Tribunal filing fees, photocopying, barrister's fees and witness expenses.
- **Guardianship Act:** *Guardianship Act 1987*
- **Indemnity costs:** Costs that are actually incurred by one party. The Tribunal will only order indemnity costs in exceptional circumstances.
- **Party or parties:** A person is a party to proceedings in the Guardianship Division if they are:
 - Identified as a party in section 3F of the *Guardianship Act*
 - Identified as a party in section 35(2) of the *Powers of Attorney Act 2003 (NSW)*
 - Identified as a party in rule 27 of the Rules
 - Joined by the Tribunal as a party under section 44 of the Act

For more information refer to the fact sheet - [Who is a party to proceedings in the Guardianship Division \[PDF, 88kB\]](#)

- **Registrar:** The Principal Registrar or any other person employed as a Registrar of the Tribunal

- **Rules:** Civil and Administrative Tribunal Rules 2014.

This Guideline applies to:

Proceedings in the Guardianship Division of the Tribunal.

Effective Date

1 August 2017

Notes

You must use the latest version of this Guideline. The latest version of this Guideline is on the [NCAT website](#).

The law about the information in this Guideline is mainly in:

- Sections 60 of the *Civil and Administrative Tribunal Act 2013*
- Section 4 of the *Guardianship Act 1987* (NSW).

There is a copy of this Act on the [NSW Legislation website](#).

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