



The role of guardians and attorneys in criminal law proceedings

Date: Sunday August 29, 2021

Important changes to the law surrounding guardians and attorneys were introduced in November 2020. Amongst other things, the *Guardianship and Administration and Other Legislation Amendment Act 2019* now expressly provides that a guardian or an attorney cannot enter a plea in a [criminal proceeding](#) on behalf of another individual.

What's the difference between a guardian and an attorney?

Both a guardian and an attorney can be appointed to make financial, personal and health decisions on behalf of an adult who no longer has the capacity to make those decisions themselves.

A guardian is given this legal authority under Queensland's guardianship system, following an adult's loss of capacity. A family member, close friend, professional or anyone with sufficient and general concern for the rights and interests of the adult can apply.

However, an attorney is often chosen by the adult themselves, with the attorneyship only becoming effective if and when they lose capacity.

How and why are guardians and attorneys appointed?

The guardianship of another can be formally appointed by the Queensland Civil and Administrative Tribunal (QCAT). The applicant must demonstrate the following:

- A need for the appointment;
- Ensure that the adult concerned is aware of the application;

- Be 18 years or older; and
- Not be a paid carer or health provider for the adult.

An attorney can be appointed under an Enduring Power of Attorney or Advance Health Directive document under the *Powers of Attorney Act 1998*. If an individual, without appointment (that is, without a Power of Attorney or Advance Health Directive), makes a decision on behalf of an adult with impaired capacity, the decision can be ratified or approved by QCAT. However, the decision-maker must have acted honestly and with reasonable diligence and not in relation to a *special personal matter* (detailed below) or a *health matter*.

The new amendment also clarifies and reiterates that each adult is presumed to have capacity until the contrary is proven.

What is capacity?

Capacity is the ability to do the following:

- Understand the nature and effect of the decision;
- Freely and voluntarily make the decision;
- Communicate that decision in some way.

Capacity is specific to each type of decision, meaning, if someone has capacity to make personal decisions, it does not imply they have the capacity to understand and communicate financial decisions.

New 'Capacity Assessment Guidelines' have been introduced as of 30 November 2020. Importantly, they provide that an adult cannot be found to lack capacity unless all practical steps have been taken to provide the adult with the support and information needed to make the decision.

Special personal matters - what decisions are guardians and attorneys not permitted to make?

Attorneys and guardians are not permitted to make decisions in relation to *special personal matters*. This includes the following:

- Making or revoking the adult's Will, Power of Attorney or Advance Health Directive;
- Consenting to marriage;
- Consenting to the adult entering or terminating a civil partnership;
- Voting on their behalf; and
- Entering, or agreeing to enter into a surrogacy arrangement.

Specifically, a guardian or attorney cannot enter a plea on criminal charges

An important amendment from 30 November 2020, is that a *special personal matter* expressly includes, 'Entering a plea on a criminal charge for the adult.'

This amendment came after the Queensland Law Reform Commission's review of Queensland's Guardianship Laws.

During the course of that review, Legal Aid submitted:

"Under our system of law, a decision to enter a plea should be a decision taken voluntarily by the person who is the subject of a criminal charge. It is an

intrinsically personal decision made on the basis that a person understands the nature of the charge, the legal proceedings and consequences of the plea. It is also a decision that must be made by the person who has personal knowledge of what occurred and their state of mind at the time of the alleged offence."

The amendment removes any confusion as to whether a guardian or attorney can enter a plea in a criminal proceeding. Despite the amendment, a guardian or attorney can still exercise other powers and decisions in respect of an adult's legal matter.

What decisions can a guardian and attorney make in relation to an adult's legal matter?

The guardianship of another and an attorney can make decisions in relation to the following:

- Use of legal services to obtain information about an adult's legal rights;
- Use of legal services to undertake a transaction;
- Use of legal services to bring or defend a proceeding before a court, tribunal or other entity; and
- Bringing or defending a proceeding, including settling a claim whether before or after the start of a proceeding.

What does this mean?

There is no longer ambiguity surrounding a guardian or attorney's ability to enter a plea in a criminal proceeding on an adult's behalf. Even if a client lacks the capacity to make a decision, a plea cannot be entered by them, nor by any guardian or attorney on their behalf.

All legal practitioners, guardians and attorneys should familiarise themselves with the [Capacity Assessment Guidelines](#), as these new laws will be very relevant to the conduct of criminal matters involving those without legal capacity.

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