



A GUIDE FOR LEGAL ADVOCATES

TO THE GUARDIANSHIP LIST

VICTORIAN CIVIL AND ADMINISTRATIVE
TRIBUNAL

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Foreword

As specialist community legal centres practising in the area of Guardianship and Administration, the Mental Health Legal Centre Inc. and Villamanta Disability Rights Legal Service Inc. are often called upon to provide secondary consultation to private legal practitioners, other community legal centre lawyers and rural Victoria Legal Aid lawyers.

We have found that many practitioners are bewildered by the process of appearing in the unfamiliar Guardianship and Administration jurisdiction at VCAT and report that they lack knowledge, particularly in relation to consent, informed decision making and taking instructions. The development of the *Guardianship and Administration Advocates' Guide* addresses this identified need for comprehensive and accessible information on the approach to advocacy and the law and procedure relevant to the jurisdiction.

The Advocates' Guide will, we hope, be beneficial not only to legal practitioners but also to the wider community of Victorians who have, or are labelled as having, a disability.

Mental Health Legal Centre Inc.

Villamanta Disability Rights Legal Service Inc.

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1. INTRODUCTION

The Guardianship List is located within the Human Rights Division of the Victorian Civil and Administrative Tribunal (VCAT). Among other functions, it conducts hearings to determine whether a person with a disability should have a guardian and/or administrator appointed. There is very little case law specific to this jurisdiction.

This publication is specifically written for advocates representing a person with an alleged disability. The focus is on representing the person who has a disability on their instructions and wishes.

The aim of this publication is, in part, to increase legal representation to people with alleged disabilities who are subject to an application before VCAT and to promote each person's right to an advocate of choice. It is crucial in this jurisdiction that the law is rigorously applied and tested and that VCAT is accountable and people's human rights are protected.

Although this publication is mainly for legal advocates, in many cases a non legal advocate or support person may assist the person with an alleged disability. The guide is written in an accessible style and will be widely available. The guide refers generally to 'advocate', meaning a legal advocate.

This chapter outlines relevant legislation, describes the tribunal where decisions are made and the issues involved in taking instructions. The following chapter details the law relating to guardianship and administration, and subsequent chapters describe procedures before, during and after hearings in the VCAT Guardianship List, with useful hints for advocates at each stage. Chapter 6 has information on the various enduring powers of attorney, which may offer less restrictive alternatives guardianship or administration orders. The final chapter lists organisations that provide services and assistance in this area.

THE LEGISLATION

The key legislation in this jurisdiction is the *Guardianship and Administration Act 1986* (GAA); however, the *Instruments Act 1958* and the *Medical Treatment Act 1988* also apply to this jurisdiction. Hearings by VCAT are governed primarily by the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act).¹ The Guardianship List is within the Human Rights Division of VCAT.

The purpose of the GAA is 'to enable persons with a disability to have a guardian or administrator appointed when they need a guardian or

¹ In the context of guardianship and administration orders, these provisions are varied by the Provisions of Schedule 1, Part 9 VCAT Act.¹ Also note the *Victorian Civil and Administrative Tribunal Rules 1998*; in particular Part 5, which is concerned with the Guardianship List.

administrator'.² Of particular importance, s. 4(2) states that Parliament's intention is that the GAA should be interpreted, and powers under the GAA exercised, so that:

- (a) the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted; and
- (b) the best interests of a person with a disability are promoted; and
- (c) the wishes of a person with a disability are wherever possible given effect to.

The GAA is discussed in more detail in Chapter 2, The Law Relating to Guardianship and Administration.

THE TRIBUNAL

The Guardianship List at VCAT makes guardianship and administration orders and reviews existing orders. It can suspend medical powers, and revoke or make other orders about enduring powers of attorney.

Typically, one VCAT member conducts a hearing. VCAT members are chosen from a wide variety of professions including law, medicine, social work, psychology etc. There are approximately 50 members, mostly sessional, who preside over hearings.

The main hearing venue for VCAT is in Melbourne. However, hearings are usually scheduled as close as possible to the place where the person lives. Cases are heard in Magistrates' Courts buildings, hospitals, nursing homes and other venues as required. The VCAT website outlines location, date and time of hearings. See www.vcat.vic.gov.au.

The VCAT member conducting the hearing has to be satisfied that the following criteria are met before submitting a person with an alleged disability to a guardianship and/or administration order:

- The person has a *disability*; and
- The person is unable by *reason of the disability* to make reasonable judgments in respect of all or any of the matters relating to their person or circumstances in relation to guardianship and in relation to administration is unable to make reasonable judgments in respect of the matters relating to all or part of their estate; and
- The person is in *need* of a guardian and/or administrator; and
- The order is in the *best interests* of the person; and
- The order must be made in a way which is the *least restrictive* of that person's freedom of decision and action as is possible in the circumstances.

² Section 1 (all references are to the GAA unless otherwise specified).

- The order must take into account the *wishes of the person* with a disability wherever possible.³

These criteria are discussed in more detail in Chapter 2, The Law Relating to Guardianship and Administration.

TAKING INSTRUCTIONS

The most important principle for you as an advocate is to promote the person's legal rights by acting according to their wishes and not according to what you perceive as their best interests. It is not your role as a lawyer/advocate to act in the perceived best interests of the person or to advocate for the best interests of the person as expressed by the guardian, administrator or family. As with every legal case, you should discuss the legal options with the person so they are able to instruct you according to their own needs.

When you have advised the person of the possible legal ramifications of their instructed course of action, it is important that you respect their right to make their own decision about their case. The obligation of the legal advocate is to act on the lawful instructions of their client. In order for the person to give instructions they must have good information and advice. Sometimes a person's disability may curtail their ability to provide fully informed and considered instructions. This is not unusual in this jurisdiction that involves an assertion that there is some level of incapacity. In other jurisdictions a failure to obtain such instructions would result in the appointment of a litigation guardian. This is not the case here, for two main reasons:

- First, the GAA requires that VCAT be informed of the views or wishes of the person. The role of the advocate is to make sure that such views or wishes are properly, fairly and well presented to VCAT.
- Second, a person has a right to equality before the law and to legal representation. To appoint a litigation guardian in a case where the very issue in dispute is capacity of the person is to pre-judge the case and to remove the person from engagement with the court process about this central issue.

CAPACITY

It would be rare that an advocate would not be able to represent a person's views and wishes. It may happen when the person is unconscious; it may happen where the person is unable to understand the nature of the proceedings. However, even in the latter case, the advocate is entitled to test the alleged lack of capacity and test the evidence. Without instructions, however, it is not possible to lead evidence or assert positive evidence. A

³ Sections 22, 46; also see s. 4, which sets out the objects of the GAA.

lawyer in such circumstances has a duty to the person and to the court. Lay advocates are not bound by this duty.

Capacity to instruct a lawyer is a different question than whether the person has capacity to manage their affairs. A person with an administrator appointed may be able to give clear instructions about this, the impact on their lives, the appropriateness of the order and viable alternatives.

One of the most frequent concerns of those on guardianship and administration orders is that the person's views are disregarded. Lawyers have a duty to ensure that the hearings are not a continuation of this experience.

It is up to the lawyer to optimise a person's opportunity to make an informed decision, and to ascertain:

- what information is necessary to assist the person to make an informed choice;
- whether the person is able to understand information relevant to the issue. Can they weigh up the risks and benefits of options? On this basis, are they able to make a decision?

The hearing can be very emotional for the person. It may be the first time they have been to a court room and they may presume they have done something wrong. Other people may have had previous unsettling experiences in court and may be apprehensive. Explain the process to the person and be considerate of their needs. Issues relating to their disability and capacity may be disturbing to the person and they may become very upset at allegations that are being made by trusted medical practitioners, family and friends.

It is important to inform VCAT in writing that you are acting on behalf of a person and request that notices are sent to you.

Many represented persons believe this jurisdiction has an air of inherent unfairness. People who are notified of a hearing (including family, friends, carers and clinicians) may have their own issues, and unfortunately their opinions may carry great weight at the hearing. With relative ease, it seems, an applicant can get an order, as the evidence is not tested. An application form may be simply accompanied by a medical report stating that there is a disability, but capacity is not addressed. However, to reverse a Tribunal decision a supportive specialist opinion may be required. Medical opinion is unduly weighted and hard to rebut.

The spirit of the Act is to move a person towards independence, and if there is a commitment from the guardian or administrator to assist the person towards this goal this can be a significant outcome of the hearing.

2. LAW RELATING TO GUARDIANSHIP AND ADMINISTRATION

BACKGROUND – A HUMAN RIGHTS PERSPECTIVE

The Guardianship and Administration Board was first established in 1986 under the *Guardianship and Administration Board Act 1986* (GABA) after a series of committees were set up to review the legal needs of people who had a disability. The catalyst for change was Australia becoming a signatory to the *U.N Declaration of the Rights of Mentally Retarded Persons* (1971) and the *U.N Declaration of Disabled Persons* (1977). 1981 was the *International Year of the Disabled Person* and provided the focus for the domestic implementation of this commitment. During the 1980s there was significant legislative reform, including the GABA, affecting the rights of people with a disability.

Issues and concerns expressed by the community and disability advocates led to the creation of the Ministers' Committee on Rights and Protective Legislation for Intellectually Handicapped Persons (known as the Cocks Committee) in 1982. Although the Committee was commissioned to look at the needs of people with intellectual disabilities, its terms of reference were later extended to cover other disabilities.

It was widely acknowledged that service delivery to people with an intellectual disability needed reform, as did guardianship law, with common law guardianship laws being inaccessible, expensive and restrictive.

From its presentation in December 1982, the Cocks Committee Report enjoyed ministerial, public and parliamentary support, and the GABA was passed by the Victorian Parliament in 1986. The disability advocacy sector embraced the legislation as acknowledging the rights of people with disabilities to equal participation, and as a significant reform in the move away from institutional care. The Act, as it emerged, embraced a functional, not a medical, test for when an order is needed.

The GABA was introduced in conjunction with the *Mental Health Act 1986* and the *Intellectually Disabled Persons' Services Act 1986*, and followed by the *State Trustees Corporation of Victoria Act 1987*. These four Acts represented a raft of legislation addressing the legal rights of people with disabilities. In addition, s. 118 of the *Instruments Act 1958* gave the Guardianship Board jurisdiction to revoke enduring powers of attorney.

In April 1990 the *Medical Treatment (Enduring Power of Attorney) Act 1990* was passed, amending the *Medical Treatment Act 1988* and providing for competent adults to appoint an agent to make decisions on behalf of the person if they became incompetent. Together, these reforms sought to meet existing and emerging social needs and to strike a balance between the ethical values of autonomy (choice) and paternalism (protection).

After a major review of tribunals in the late 1990s the Guardianship and Administration Board was abolished and its role conferred on VCAT in 1998.⁴ The renamed *Guardianship and Administration Act 1986* (GAA) governs this jurisdiction. The GAA created the Office of the Public Advocate and the VCAT Act created the Guardianship List. The Guardianship List sits within VCAT under the guidance of a Deputy President of VCAT with at least five years experience as a duly qualified lawyer, who is responsible for the day-to-day management of the list.

WHAT IS A GUARDIAN? WHAT IS AN ADMINISTRATOR?

Guardians: Guardians make decisions about lifestyle issues. Typical decisions which may be made by guardians include decisions relating to health care, accommodation, employment and access to services and people.⁵

Administrators: Administrators make decisions in relation to legal and financial matters – including access by the person to their money, the management of investments, sale of property or paying of bills.⁶

LEGAL THRESHOLD

Before appointing a guardian and/or administrator VCAT must be satisfied that:

- the person has a *disability*; and
- they are *unable by reason of this disability to make reasonable judgments* about their person or circumstances or in relation to an administration order, their estate; and
- they *need* a guardian and/or administrator; and
- it is in the person's *best interest* that a guardian and/or administrator is appointed; and
- the order is made in a way which is the *least restrictive* of that person's freedom of decision and action as is possible in the circumstances; and
- the order takes into account the *wishes of the person* wherever possible.⁷

⁴ *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998*.

⁵ See generally *Good Guardianship: A guide for guardians appointed under the Guardianship and Administration Act*, OPA 2005.

⁶ See generally *Administration: A guide for people appointed as administrators under the Guardianship and Administration Act 1986*, OPA 2002. Administration orders are regulated by Part 5 of the GAA.

⁷ Sections 22, 46; also see s. 4, which sets out the objects of the GAA.

DISABILITY

'Disability' is defined to mean intellectual impairment, mental disorder, brain injury, physical disability or dementia.⁸ Note that the person's inability to make reasonable judgments must be by reason of the disability. Medical reports have to be provided to VCAT as evidence of a disability.

It is prudent for you as the advocate to check the date of the medical report submitted to VCAT in relation to disability. A report written, for example, in relation to a person's mental illness five years ago may no longer be relevant or applicable to their current mental state.

Disability can also be developmental and periodic. For example, a person with a mental illness may only have a disability for a certain period of time.

CASE EXAMPLE

Mr A has a mental illness. In 1995 he was admitted to a psychiatric facility. While he was in hospital concerns were raised about his ability to manage his finances. An application was made by the hospital social worker requesting the appointment of an administrator. An administrator was appointed. Annual reassessments were heard at the 3, 6 and 9 year mark. Shortly after the reappointment of the administrator for the third time Mr A contacted a lawyer. He did not believe he required the assistance of an administrator. A copy of his file was requested in writing. The file showed that save for the original 1995 medical report no additional information was on the file relating to his medical condition and ability to manage his finances. The first step was to obtain up-to-date medical information confirming stability of mental illness and ability to manage finances. A reassessment was scheduled on the bases of the person having failed to attend the previous reassessment and the new medical evidence. The administration order was revoked on the grounds of the new medical evidence that showed Mr A's mental illness had stabilised and he was now able to manage his affairs.

IS UNABLE TO MAKE REASONABLE JUDGMENTS

A decision on whether the person is unable by reason of the disability to make reasonable decisions requires VCAT to assess the impact of the disability on the person's capacity to make decisions. VCAT will rely on professional assessments and evidence from family and friends. These are subjective views and may be based on hearsay and speculation.

To rebut these assessments, tangible evidence will assist. Explore with the person what they can and cannot do, how they manage daily life, what assistance they require and how they organise this. What evidence is relevant will depend to some extent on the type of application being heard. Obtain an independent report that assesses the person's ability to manage different

⁸ Section 3(1).

tasks. For example, as stated above, an occupational therapist can assess the person's ability to manage all activities of daily living. A financial counsellor can offer support and assist the person to work out ways to pay bills, while a speech pathologist can assist with comprehension and devise ways to communicate. Neighbours, friends, family and home help workers can provide background as to how the person manages various tasks. Ask the person about anyone they think may be supportive and if you can speak to them to see how they may assist.

It is also important to remember that the person who is the subject of the hearing can be a very persuasive witness and they can themselves produce evidence to show what they have done to manage their affairs.

It should not be presumed that because a person has a disability, they are unable to make reasonable judgments because of the disability.

WHAT IS REASONABLE?

It is helpful to ask: what would be a reasonable judgment for a person who does not have a disability in the same situation? Why is it different for this person? Is it a problem for them? If not for them, whose problem is it? What steps have been taken to resolve the problem? What steps ought to be taken?

Incapacity to make decisions must be related to disability. VCAT is not a vehicle for interference in the affairs of people who simply make errors of judgment or are unwise decision makers. Service providers and family members might apply for an administrator, in order to limit the person's income, to stop them drinking, using drugs or gambling. Such applications are not appropriate unless the person by reason of their alleged disability is making unreasonable decisions. Lawyers will need instructions about the person's lifestyle and choices. It is helpful to know of their lifestyle and activities prior to the alleged disability so that it can be argued that the person's disability is not relevant to these choices.

Reasonableness will have different meanings to people of different generations, gender and background. It must allow for eccentricity, cultural diversity and a range of ethical viewpoints. Again, you will be assisted by obtaining independent assessments of these issues.

The precise test for whether a person is 'unable' to make reasonable judgments is unclear, and the Supreme Court has stated that it would be desirable for VCAT to consider to what extent the person must be 'unable to make reasonable judgments' and what may amount to a 'reasonable judgment'.⁹ The test does not require total and complete 'incapacity', or something similar. On the other hand, whether the disability affects or 'diminishes' the person's capacity to make reasonable decisions would be

⁹ *XYZ v State Trustees Limited & Anor* [2006] VSC 444 at [71] per Cavanough J. Note: The matter was remitted to VCAT. At the rehearing [*XYZ (Guardianship)* [2007] VCAT 1196 (29 June 2007)], VCAT ordered that the administration order be revoked.

setting the standard too low.¹⁰ There is *obiter dicta* that the appropriate test may be whether the person's capacity is 'lacking or severely impaired'.¹¹

CASE EXAMPLE

Mr B has a history of encounters with the mental health system and the police. Because of his diagnosis of depression anxiety and personality disorder he is supported and treated by the local Mental Health Service; the police attend him when he self harms, which happens frequently. Mr B has alcohol dependence, largely because he self medicates. His case manager formed the view that his drinking exacerbates self harm. Mr B is on the disability support pension; at times he had fallen behind with his rent and bills. However, he arranged to see a financial counsellor, who assisted him with budgeting, paying off his debts and direct crediting phone and utilities. His case manager applied to have State Trustees Ltd appointed as Mr B's administrator and stated on the application form that Mr B had money problems and spent his savings on alcohol instead of bills. The financial counsellor provided evidence that he was managing well, resolving outstanding debt issues and budgeting carefully. At the hearing it was apparent that the case manager was concerned about his use of alcohol and wanted an administrator to limit his spending money to prevent him from drinking. The financial counsellor provided a lengthy report of his involvement with Mr B over 2 years. However, this evidence was not regarded by VCAT as significant and a greater weight was placed on the evidence of the doctor and case manager. An advocate attended and the matter was adjourned pending an independent assessment of Mr B's budgeting and self help skills, to assure VCAT that he could manage his own financial affairs. Much of the hearing focused on Mr B's drinking and the advocate made submissions that the Act was not to control behaviour and that there was no evidence that Mr B's disability affected his choice to drink, which is his right. VCAT dismissed the application.

IS THERE A NEED FOR A GUARDIAN OR ADMINISTRATOR?

Guardian:

In determining whether or not a person is in need of a guardian VCAT must consider:

- (a) whether the needs of the person in respect of whom the application is made could be met by other means less restrictive of the person's freedom of decision and action; and
- (b) the wishes of any nearest relatives or other family members of the proposed represented person; and
- (c) the desirability of preserving existing family relationships.¹²

¹⁰ XYZ at [42] per Cavanough J.

¹¹ XYZ at [72] per Cavanough J, citing *Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982).

Administrator:

In determining whether or not a person is in need of an administrator VCAT must consider:

- (a) whether the needs of the person in respect of whom the application is made could be met by other means less restrictive of the person's freedom of decision and action.¹³

There is no presumption that a person is in need of a guardian only because they have a disability and by reason of that disability are unable to make reasonable judgments. The question is whether there is a *need* for a guardian or administrator to be appointed.¹⁴ Relevant to this question is whether other arrangements, such as an enduring power of attorney (medical treatment), or informal arrangements between family members and service providers, may be sufficient.¹⁵

The question of need usually concerns what the applicant sees as going wrong in the person's life. It may be that the person is at risk living at home because they forget to turn the gas stove off. It may be that the person fails to pay the rent and so is at risk of eviction. It may be that the person cannot resist a bargain and has a huge credit card debt with little means to meet the payments. If the applicant cannot establish that there is a need, then an order cannot be made. However, these examples may not result in an order if there is evidence of a less restrictive way of ensuring that the person or their estate is protected.

CASE EXAMPLE

Mr C is a person with a mental illness who had lived in a large Melbourne institution until it was closed; he then moved into supported accommodation in the community. The Public Trustee had managed his money and when he moved to the community State Trustees Limited managed his money. The hospital social worker gave a report to VCAT that Mr C had no money skills, and he was unaware of the nature and extent of his estate. Mr C formed a friendship with a neighbour and together they would shop and cook. At a review of the administration order a medical report supporting that he could manage his money was presented to the Tribunal. Mr C's friend also attended and gave evidence that Mr C was managing his own money for shopping well. The Tribunal adjourned for further evidence of his money management skills and was then satisfied that the order was no longer needed and dismissed the application. VCAT was assisted by a medical report and a report from a case manager both of whom stated that they knew of the relationship and commented on its benefits.

¹² Section 22(2).

¹³ Section 46(2).

¹⁴ *Moore v Guardianship and Administration Board* [1990] VR 902 at 916 per Gobbo J.

¹⁵ *Public Advocate and RCS (Guardianship)* [2004] VCAT 1880 at [9] per Morris J.

WHAT IS IN THE PERSON'S BEST INTERESTS?

'Best interests' is a concept that is layered with value judgments about how the person should be living their life. Because VCAT will make value judgments about the person's lifestyle you have the opportunity to tell VCAT about their values, goals and world view. This may assist VCAT to understand if there are reasons for the person being in the difficulties alleged by the applicant. VCAT may also take into account the value of preserving family relationships when making a decision as to what is in the person's best interests.

CASE EXAMPLE

Mrs H lives at home and is keen to stay there. Her family are concerned that she can no longer live at home because she has had a few falls, her mobility is poor, she has memory deficits and is visually impaired. Services have been organised by her son and she has managed at home with assistance from home help, meals on wheels and RDNs who visit daily. Despite the constancy of visitors Mrs H is very lonely and seeks company, often by chatting to people in the street; on more than one occasion she has asked strangers in for a cup of tea. On one such occasion a man went through her belongings and took all her cash and some precious belongings, and also frightened and threatened Mrs H. The family approached the ACAT team who assessed Mrs H as no longer able to live at home. The social worker made application for a guardian to place her in a hostel or nursing home. Mrs H told VCAT that she trusted her son to make a decision about where she should live. However, her son was keen that someone else make that decision as he did not want to upset his relationship with his mother. In this case, contrary to Mrs H's wishes, VCAT decided to appoint a guardian on the basis that this was in her best interests. Further, and again contrary to Mrs H's wishes, the Tribunal appointed an independent guardian on the basis that this was in her best interests as it protected her relationship with her son.

WHAT IS LEAST RESTRICTIVE IN THE CIRCUMSTANCES?

It is important for lawyers to explore least restrictive alternatives with their clients. A person may be able to manage their day-to-day activities but not a large estate.

CASE EXAMPLE

Mr M has an intellectual disability. A social worker made an application to VCAT for an administration order because Mr M was having difficulty managing his estate and shares that had been left to him in a will. The lawyers submitted to the Tribunal that, as Mr M was able to manage his day-to-day finances in relation to paying rent and utility bills, a least restrictive alternative was to allow him to continue to do this. If an administrator was to be appointed then their role would be to manage the rest of his estate. VCAT allowed the application with the least restrictive option of allowing him to manage his day-to-day affairs.

WISHES OF THE PERSON

VCAT, in determining whether or not a person is in need of a guardian/administrator must take into account the wishes of the person, so far as they can be ascertained¹⁶ and the wishes of the person should be given effect to, wherever possible.¹⁷

It is important to obtain instructions on the person's interests and life choices. Even if the person is opposing the application, you should establish with them whom they would prefer to have appointed if VCAT makes an order. See also Chapter 2: Who Can Become an Administrator.

REASONS FOR DECISIONS

VCAT must give reasons for making an order. The reasons for an order, whether oral or written, form part of the order.¹⁸ In the majority of cases, the decision and oral reasons are given at the hearing.¹⁹

It may be that the represented person is not aware that the member is giving oral reasons but may believe that they are merely summing up. Where VCAT gives oral reasons, a party has 14 days to request written reasons,²⁰ so it's important to apply quickly in case there were oral reasons. If VCAT does not give reasons at the time of the hearing, reasons must be given within 60 days of the making of the order, or in such other period as is specified by the rules or the President.²¹

¹⁶ Sections 22(2)(ab) and 46(2)(b).

¹⁷ Section 4(2).

¹⁸ Section 117(6) VCAT Act.

¹⁹ J Billings, 'Protective Orders and the Operation of the Guardianship List', LIV Professional Development Legal Update, 23 August 2006, at 11.

²⁰ Section 117(2) VCAT Act.

²¹ Section 117(1) VCAT Act.

Reasons must be given within 45 days after receiving the request, unless the time limit is extended by the President.²² Written reasons must include the Tribunal's findings on material questions of fact.²³

COSTS

The award of costs is governed by Division 8 of the VCAT Act. In general, each party is to bear their own costs,²⁴ but VCAT may, at any time, order that a party pay all or a specified part of the costs of another party in a proceeding.²⁵ Costs orders are rarely sought and rarely granted in the Guardianship List.²⁶ Thus, there is no financial disincentive to anyone making an application.²⁷

TYPES OF GUARDIANSHIP ORDERS

There are two types of guardian under the Act: 'plenary' and 'limited'. In applying the principles of the Act, the least restrictive alternative means that orders must be limited to decisions that need to be made, so VCAT is required to tailor-make orders and minimise the person's loss of decision making power.

PLENARY GUARDIAN

A plenary guardian has 'all the powers and duties which the plenary guardian would have if they were a parent and the represented person their child.'²⁸

Duties may relate solely to making decisions about:

- (a) where and with whom the represented person is to live, whether permanently or temporarily; and
- (b) whether the represented person should or should not be permitted to work and, if so, related matters such as the nature or type of work and for whom the represented person is to work; and
- (c) whether to consent to any health care that is in the best interests of the represented person; and
- (d) whether to restrict visits to a represented person to such extent as may be necessary in their best interests and to prohibit visits by any person if the

²² Section 117(3)(4) VCAT Act.

²³ Section 117(5) VCAT Act.

²⁴ Section 109(1) VCAT Act.

²⁵ Section 109(2) VCAT Act..

²⁶ Billings, above n 19, at 10.

²⁷ Billings, above n 19, at 1.

²⁸ Section 24(1), (2).

guardian reasonably believes that they would have an adverse effect on the represented person.

Because the appointment of a plenary guardian ‘officially and formally removes the whole of a person’s legal rights over person and circumstances’, it is to be made only as a last resort.²⁹

LIMITED GUARDIAN

A limited guardian’s powers and duties are limited to those powers and duties of a plenary guardian which are specified by VCAT in its order.³⁰ For example, the guardian’s powers and duties may relate solely to making decisions about appropriate accommodation³¹ or to medical, dental or other health care.³² They ought also to contemplate appropriate time lines. An order must not be speculative. For example, if a woman with an intellectual disability is likely to need a guardian to sign consent for a pap smear in 18 months time, an application would need to be made at that time. Consistent with the principle of least restrictive alternative, guardians should bring matters back for an early review when the decision is made and the order no longer necessary.

TEMPORARY ORDERS

An urgent application can be made and the matter listed as soon as possible. These matters are referred to the Office of the Public Advocate (OPA), which will assess the urgency and if necessary assist in the preparation of the case.

For example, in relation to accommodation for an elderly person who is unable to consent to an immediate move when a bed is available, it is possible for a person to apply for a temporary guardianship order.³³ Such applications are subject to the same notice and eligibility requirements,³⁴ and the same criteria are applied as under s. 22(1).³⁵ A temporary order is effective for a specified period not exceeding 21 days, and may be renewed for a further period not exceeding 21 days.³⁶ A hearing to determine whether a guardianship order should be made under s. 22 must be held as soon as practicable but within 42 days of the making of the temporary order.³⁷

For urgent matters in relation to temporary orders contact the Office of the Public Advocate on tel: (03) 9603 9500; 1300 309 337.

²⁹ *McDonald v Guardianship and Administration Board* [1993] 1 VR 521 at 531 per the Court, citing *Re M and R and Guardianship and Administration Board* (1988) 2 VAR 213 at 219-21; and cited with apparent approval in *XYZ*, above n 9, at [27] per Cavanough J.

³⁰ Section 25(1).

³¹ *Re Technau and Secretary, Department of Social Security* (1987) 13 ALD 641 at [14].

³² *Daynes v The Public Advocate* [2005] VSC 485 at [2] per Smith J.

³³ Section 32(1), (2).

³⁴ Sections.32(3) and 33(1).

³⁵ Section 22(1).

³⁶ Section 33(2).

³⁷ Section 33(3).

SPECIAL PROCEDURES

Defined under s. 3(1) of the Act, special procedures include procedures that will result in infertility, termination of pregnancy or the removal of tissue for transplantation to another person. Only VCAT can consent to a special procedure. Only a person who is the 'person responsible' for the patient,³⁸ or any person who in the opinion of the Tribunal has a special interest in the affairs of the person, can make an application to the Tribunal for consent to a special procedure.³⁹

OPA will investigate these matters thoroughly to ensure that all less restrictive options have been explored.

CASE EXAMPLE

The parents of Ms J, a young woman with cerebral palsy, an intellectual disability and limited communication, made an application to VCAT for a sterilisation procedure. The evidence from the family and her GP was that she was experiencing difficulty with her periods, that she seemed to be experiencing pain and that the blood caused her distress. The family were also concerned that their daughter was vulnerable to sexual abuse. The matter was adjourned and OPA worked with the young woman and her family in an advocacy role. They arranged an assessment and ongoing counselling from Family Planning, who with the family developed a plan for menstrual management and commenced sex education for Ms J; they also conducted some sessions with the family. A gynaecologist was able to assist with the management of Ms J's pain. Some months later the application was withdrawn by the family.

WHO CAN BECOME A GUARDIAN?

Any person 18 years of age or over may become a guardian if:

- VCAT is satisfied they will act in the best interests of the person; and
- they are not in a position of conflict; and
- they are a suitable person.⁴⁰

VCAT will first consider if there are any family members or relatives/friends that are suitable to be the guardian. If no other person is suitable, VCAT may appoint the Public Advocate. In some cases the Public Advocate may delegate powers to a community guardian.

THE PUBLIC ADVOCATE

In many cases the Public Advocate is appointed as a person's guardian. The Office of the Public Advocate (OPA) is an independent statutory body which

³⁸ Section 37.

³⁹ Section 42B.

⁴⁰ Section 23.

aims to promote the rights and dignity of people with disabilities, and to strengthen their position in society.⁴¹

OPA is located at 436 Lonsdale Street, Melbourne. Experienced OPA staff are located at VCAT and can assist you with inquiries in relation to any aspect of guardianship and the OPA role in guardianship.

The OPA Advice line is 1300 309 337.

OPA also produces guidelines for guardians and administrators (see website: www.publicadvocate.vic.gov.au).

JOINT AND ALTERNATIVE GUARDIANS

VCAT may also appoint persons (including the Public Advocate) as joint guardians.⁴² Reasons for making a joint guardianship order may include conflict in relation to a decision that has to be made, to ensure that decision making is shared, or to preserve family relationships.

An alternative guardian can be appointed by VCAT if the original guardian dies, or is absent or does not have capacity. The appointment is effective on the death of the original guardian or during a period of absence or incapacity of the original guardian.⁴³

WHO CAN BECOME AN ADMINISTRATOR?

Any person 18 years of age or over may become an administrator as long as VCAT is satisfied that the person will act in the best interests of the person; is not in a position of actual or potential conflict; is a suitable person and has sufficient expertise.⁴⁴ Very often family members are appointed as administrators. However, an independent person may be appointed by VCAT because of conflict in the family. In many cases State Trustees Limited is appointed the administrator.

A person proposing to be an administrator should prepare for the hearing and provide a plan for the financial management of the person's estate. The plan should cover investment and expenditure, including short, medium and long term financial goals.

Even if the person is opposed to an administration order you should obtain instructions from them as to who they want as an administrator if one is appointed, and how they would like their estate managed.

See www.vcat.vic.gov.au for financial management plan.

⁴¹ Around 25 percent of VCAT applications are referred to OPA for investigation and report. In 2006, guardianship services were provided for 1,145 persons with a disability. At the end of the year there were 637 Victorians for who the Public Advocate was a guardian and 413 with a private guardian. See www.publicadvocate.vic.gov.au.

⁴² Section 23(5).

⁴³ Sections 34, 35(1), (3).

⁴⁴ Section 47.

STATE TRUSTEES LIMITED

State Trustees was first established by the Victorian government in 1939 as the Public Trustee. It became a state owned company under the *State Trustees (State Owned Company) Act 1994*. State Trustees is the administrator to over 8,600 people on administration orders. They account for over 50 percent of administration orders in the state.

The other trustee companies and individuals that make up the remaining 50 percent of administrators include FTL Judge and Papaleo Pty Ltd, Equity Trustees, private solicitors and accountants, and family members of the person with a disability.

State Trustees Limited has a presence at VCAT. Staff are located at this office and can assist you with inquiries in relation to any aspect of administration orders and State Trustees' role in administration. They will also be able to inform you about the fee structure for administering a person's affairs. State Trustees Limited is located at 168 Exhibition Street, Melbourne 3000. Phone: (03) 9667 6444 Website: www.statetrustees.com.au

State Trustees Limited and other trustee companies should make an assessment of the person's estate and plan for a progressive move towards independence. In some cases a person may be able to sign an enduring financial power of attorney. This is a less restrictive option than administration, as the person is making an autonomous decision about who will run their affairs. It will involve costs and the person should be aware of such costs and that there is no oversight of the operation of the power of attorney by the Tribunal as there is with an administrator. (See Chapter 6, Enduring Powers of Attorney, for more information on this and other enduring powers of attorney.)

ADMINISTRATION FEES

A person who is not a professional administrator cannot receive any fee, remuneration or other reward from the estate of a represented person for acting as administrator unless VCAT otherwise specifies in the administration order.⁴⁵ The power of courts and tribunals to order that the costs of administration be paid or reimbursed from the estate is addressed in s. 47B. The remuneration of a professional administrator is to be approved by VCAT.⁴⁶

State Trustee Limited clients with less than \$3,000 in cash assets under management receive a Department of Human Services funded fee reimbursement. Speak with State Trustees Limited for more details about this.

It is recommended that you speak to the proposed administrator in relation to the cost of administering the person's affairs and how they will act in the person's best interest. A person on Commonwealth benefits will be charged

⁴⁵ Section 47A(1).

⁴⁶ Section .47A(2).

3.3 percent of their benefit per annum, and 6.6 percent of any interest earned on other income (for example if they have money in the bank and it earns interest the administrator will charge 6.6 percent of the interest gained) and an annual capital fee of 1.1 percent of any money earned from capital investments.

FUNDS IN COURT

The Senior Master's Office of the Supreme Court administers funds on behalf of people with awards for compensation by the Court. These people can also have an administrator appointed by VCAT for the management of income support. Estates with the Master's Office are managed quite separately. If acting for a person with money with the court there is no accountability for the expenditure of these funds to VCAT or any other body. An approach on behalf of a person for funds must be made to the Senior Master or the trust manager in charge of their estate. The appointment of an administrator under an administration order at VCAT in no way affects the funds held at the Senior Master's Office in the Supreme Court.

In order to assist VCAT to understand a person's finances it may be necessary to ask the Senior Master to report to the Tribunal about the person's estate and how their money is spent. The provision of such a report is voluntary.

WHAT IS A LITIGATION GUARDIAN?

A litigation guardian essentially stands in the position of a person with a disability in legal proceedings in order to give instructions in those proceedings.⁴⁷ The concept applies only in civil, not criminal, proceedings.

Although an administrator is able to 'bring and defend' legal actions on behalf of the represented person⁴⁸ there is no equivalent provision in relation to guardians. A guardian may therefore have to be appointed litigation guardian⁴⁹ in order to act for the represented person in legal proceedings.⁵⁰

⁴⁷ OPA Practice Guidelines No.15, *Litigation Guardian* 2.1.

⁴⁸ Section 58B(2)(1).

⁴⁹ The power to appoint a litigation guardian is found in Order 15 of the *Supreme Court (General Civil Procedure) Rules* 2005 (effectively reproduced in Order 15 of the *County Court Rules of Procedure in Civil Proceedings* 1999), which is concerned with persons under a disability. Under rule 15.01 a 'handicapped person' is defined to mean 'a person who is incapable by reason of injury, disease, senility, illness or physical or mental infirmity of managing his or her affairs in relation to the proceeding'. Under rule 15.02(1), except where otherwise provided, a 'person under disability' shall commence or defend a proceeding by his litigation guardian. If a party becomes a 'handicapped person' after proceedings commence, the Court shall appoint a litigation guardian of that party. A party can only have one litigation guardian, unless the Court otherwise orders. However, the Court may appoint, remove or substitute a litigation guardian if the interests of the party so require.

⁵⁰ OPA Practice Guidelines No.15, *Litigation Guardian* 2.1.

Any person may be a litigation guardian if they are not ‘a person under disability’ and have ‘no interest in the proceeding adverse to that of the person under disability’.⁵¹ The litigation guardian must consent to act as such. The litigation guardian may, for example, be a friend or relative of the represented person or the Public Advocate.⁵² However, appointment as litigation guardian carries significant responsibilities and may place the litigation guardian at risk of an order of costs.⁵³

Where an administrator has been appointed, they have power to ‘bring and defend actions and other legal proceedings in the name of the represented person’.⁵⁴ OPA is of the view that these powers are limited to matters relating to a person’s finances and estate and do not extend to litigation related to ‘lifestyle’ issues such as family law or discrimination cases.⁵⁵

A guardian, without being a litigation guardian, can also initiate proceedings in the Magistrates’ Court – for example, apply for an intervention order on behalf of the represented person.

For more information see Office of the Public Advocate, Practice Guidelines No. 15, *Litigation Guardian*.

⁵¹ Rule 15.03(1).

⁵² As to the role of OPA as litigation guardian, see generally OPA Practice Guidelines No.15, *Litigation Guardian*.

⁵³ *Clarey v Permanent Trustee Co Ltd* [2005] VSCA 128 at [49] per the Court.

⁵⁴ Section 58B(2)(1). There is apparently some debate as to whether in some jurisdictions, such as the Victorian Supreme Court, an administrator cannot institute legal proceedings for a person with a disability as of right but must be appointed litigation guardian: OPA Practice Guidelines No.15, *Litigation Guardian* 2.2.

⁵⁵ OPA Practice Guidelines No.15, *Litigation Guardian* 3.2.

3. BEFORE THE HEARING

MAKING AN APPLICATION

Any person can lodge an application for a guardianship and/or administration order. Applications are usually lodged by health professionals and family members. Reassessments are automatic, and occur just prior to the expiry of the order. Reviews and rehearings are initiated by the person subject to the order, or their lawyer. (See www.vcat.vic.gov.au for forms.)

There is a standard application form for both types of orders. Amongst other things, it requires the applicant to:

...briefly outline the issues or problems faced by the person you are applying about which have prompted your application. If you wish VCAT to appoint an administrator or guardian, please explain why they are needed.⁵⁶

TYPES OF HEARINGS

There are different sorts of applications before VCAT in the Guardianship List. You need to know what the issue is before VCAT. Is the issue about a guardianship order or an administration order? If it is a guardianship order, is it about a plenary guardianship order or a limited guardianship order?

Broadly speaking each order has the potential to cover the following:

Guardianship: issues about lifestyle – where a person lives and with whom; whether they can work and if so where and for whom; what health care they are to receive; who they may associate with etc.

Administration: issues relating to a person’s legal and financial affairs.

By far the majority of hearings before the Guardianship List relate to administration orders. In 2005–06, 66 percent of cases related to administration orders or administration reassessments. In the same period only 17 percent of applications related to an initial hearing for guardianship orders and 26 percent to initial hearings in relation to administration orders.

REHEARING

A rehearing is a *de novo* hearing.⁵⁷ A person has a right to a rehearing if they were unaware of the hearing that made the order or there is new evidence.

⁵⁶ VCAT Application to Guardianship List.

⁵⁷ *RL (Guardianship)* [2002] VCAT 12.

Generally, a rehearing is conducted by a VCAT member more senior than the original member who heard the case.⁵⁸

Where an application is made VCAT must rehear the matter and has all the functions and powers that it had with respect to the matter at first instance. VCAT may in respect of the order made at first instance:

- (a) affirm the order;
- (b) vary the order; or
- (c) set aside the order and make another order in substitution.⁵⁹

An application for rehearing or for leave to apply for rehearing must be done within 28 days after the date of the order. The application should be made in writing stating the reasons for a rehearing.

An application for a rehearing does not affect the operation of any order or prevent the taking of action to enforce the order, unless VCAT makes an order staying the operation of an order pending the determination of the rehearing.⁶⁰

REVIEW

A person in respect of whom an order is made may apply to VCAT for a review of the order if the person did not appear and was not represented at the hearing at which the order was made.⁶¹ VCAT may:

- (a) hear and determine the application if it is satisfied that the applicant had a reasonable excuse for not attending or being represented at the hearing; and
- (b) if it thinks fit, order that the order be revoked or varied.⁶²

There may be a limit to the number of times a person can apply on these grounds.

There is a slight difference between a rehearing and a review. A review is appropriate if a decision was made in the person's absence. A rehearing is appropriate for non attendance or if there is new evidence, and means that the matter is heard by a more senior member.

REASSESSMENT

Section 61 of the *Guardianship and Administration Act* sets out the requirements for the Tribunal conducting a reassessment hearing:

61 (1) The Tribunal must conduct a reassessment of a guardianship order or an administration order –

⁵⁸ XYZ, above n 9, at [10] per Cavanough J.

⁵⁹ Section 60C.

⁶⁰ Section 60D.

⁶¹ Section 120(1) VCAT Act.

⁶² Section 120(4) VCAT Act.

- (a) within 12 months after making the order, unless the Tribunal orders otherwise; and
 - (b) in any case, at least once within each 3 year period after making the order unless the Tribunal orders otherwise.
- (2) The Tribunal may at any time conduct a reassessment of any order made by it under this Act.
- (3) A reassessment under this section may be conducted –
- (a) on the Tribunal’s own initiative; or
 - (b) on the application any person.

The reassessment of orders is important because the represented person’s condition and circumstances may change. Without new evidence of the person’s alleged disability, ability and capacity, the hearing may proceed on the basis of existing reports. It is important for the advocate to ensure that new and current reports are obtained for the hearing. Reports ought to address the person’s management of daily living and if possible how they have progressed towards independence since the last hearing.

A reassessment hearing upon the application by a person (as distinct from an ‘automatic’ reassessment or on the Tribunal’s own initiative) is by leave of VCAT. In the period 2005–06, guardianship orders were generally reassessed within one year and administration orders within three years.⁶³

If there is no longer a need for a guardian or administrator then an application for reassessment should be made.

In addition to any other parties, the represented person and the guardian or administrator (as the case may be) are parties to a reassessment.⁶⁴

Upon completing a reassessment VCAT may, by order, amend, vary, continue or replace the order subject to any conditions or requirements it considers necessary, or revoke the order.⁶⁵

PARTIES TO THE HEARING

The person subject to a hearing and any person proposed as a guardian or an administrator are parties to the proceedings.⁶⁶

ENTITLEMENT TO NOTICE OF HEARING

As a person subject to a hearing is a party to the proceeding, they *must* be served a notice (VCAT Act). The notices are difficult to open and may seem cryptic to some people. They need to be explained carefully. Notices do not encourage the proposed represented person to appear. If they do not appear,

⁶³ VCAT Annual Report 2005/06, p.26.

⁶⁴ Sections 61, 17, 43.

⁶⁵ Section 63.

⁶⁶ Sections 17, 43.

and fail to provide a reasonable excuse that would justify an adjournment, VCAT will proceed without them.

Other parties entitled to notices are as follows:⁶⁷

- **Person proposed as guardian or administrator:**
They are also considered a party to the proceedings and entitled to receive notices.
- **Applicant:**
The applicant will be notified of the hearing.
- **Nearest relative:**
The nearest relative (who is not the applicant or proposed guardian or administrator) of the person to whom a hearing relates is entitled to notice of the application, notice of the hearing and notice of any order.
- **Primary carer:**
The primary carer of the person to whom a hearing relates is entitled to notice of the application, notice of the hearing and notice of any order.
- **Public Advocate:**
The Public Advocate is entitled to notice of the application, notice of the hearing and notice of any order.
- **Administrator:**
If the application is for a guardianship order and there already exists an administration order, then any administrator of the estate of the person in respect of whom the order is made is entitled to notice of the application, notice of the hearing and notice of any order.
- **Guardian:**
If the application is for an administration order and there already exists a guardianship order, then any guardian of the person in respect of whom the application is made is entitled to notice of the application, notice of the hearing and notice of any order.
- **Other interested parties:**
If the application is for an administration order, any person who has advised the Tribunal of an interest in the person in respect of whom the application is made or in their estate is entitled to notice of the application, notice of the hearing and notice of any order.

⁶⁷ Section 20 refers to notice regarding guardianship orders; s. 44 refers to notice regarding administration orders; s. 60B(2) refers to notice of rehearing of any order; and s. 62 refers to notice of reassessment of any order.

PLACE OF HEARING

Most hearings take place at VCAT. However, a number of cases are heard in Magistrates' Court buildings, nursing homes and locations closest to the proposed represented person. Hearing location and times are posted on the VCAT website the afternoon before the hearing (see www.vcat.vic.gov.au).

TIME OF HEARING

The hearing program usually commences at 10.00am. The hearing notice will state what time the hearing is listed for.

It can be very difficult for a person to present at VCAT after a lengthy wait. If you call the VCAT listing co-ordinator and give them enough notice, you can arrange for a particular hearing to be listed at a time convenient for the person. Some people taking medication may prefer the hearing to be in the morning as they may get tired in the afternoon. Some older persons may prefer the hearing to be in the morning because they are more alert than in the afternoon. Seek instructions from the person about the times that would suit them according to their medical or other needs.

NOTIFICATION OF REPRESENTATION

Telephone the VCAT hearing co-ordinator as soon as you know you are representing someone and if you can, advise them of an estimate of the length of the hearing. Confirm in writing. The usual time allocated for a hearing is 45 minutes. The case may be rescheduled if the case is going to be contested and if the hearing will take longer than 45 minutes.

ADJOURNMENT OF HEARING

You may be able to have a hearing adjourned, for example to allow for a person to be represented, to allow time for written or more complex submissions to be made, to allow time for medical reports or other supporting material to be obtained, or witnesses to be available, or to allow for consideration of material which you have not had sufficient time to read before the hearing and on which VCAT will rely. There is an adjournment form on the VCAT website (see www.vcat.vic.gov.au).

Give VCAT as much notice as you can of the request for an adjournment. It will also be easier to get an adjournment if you have the consent of the other parties. Phone the VCAT hearing co-ordinator to request an adjournment and then fax confirmation of this in writing. If an adjournment cannot be requested until the day of the hearing, put the request to VCAT as early as possible on the day of the hearing, either in person, or by fax. The request should state reasons and your contact details.

An adjournment will not necessarily be granted and is particularly unlikely to be granted at short notice.

ARRANGING FOR AN INTERPRETER

If an interpreter is required and you cannot obtain one through your own organisation or Victoria Legal Aid, it is also possible that the hospital or other institution that initiated the order might arrange one for you. VCAT will arrange an interpreter to be present at the hearing. The organisation initiating the proceeding will usually advise VCAT if an interpreter is required, but it is a good idea for you to contact the VCAT hearing co-ordinator yourself to confirm that an interpreter has been arranged.

ACCESSING THE VCAT FILE

The VCAT file contains all documents lodged in the proceeding in relation to the guardianship and/or administration orders.⁶⁸ This may include a statement by the applicant, medical and other expert reports and submissions by interested parties.⁶⁹ With a signed authority from the person subject to the application a lawyer can inspect the file or request VCAT to fax or mail a copy of the application form and supporting documents. There is a fee for copying.⁷⁰ Requests should be made at the earliest opportunity but it should be remembered that further documents may be filed subsequently.⁷¹

If the matter is a guardianship application and VCAT has asked the Office of the Public Advocate (OPA) to investigate and provide a report, the lawyer does not automatically gain access to this report. The lawyer should contact OPA to discuss the contents of the report and also formally request the report from VCAT. Generally, OPA investigators welcome such discussions.

The proceeding file will usually contain:

- the application
- medical and other professional reports
- OPA report (if involved)
- any submissions/letters from interested parties
- all notices issued by VCAT relating to the application.

⁶⁸ Section 146(1) VCAT Act.

⁶⁹ Billings, above n 19, at 10.

⁷⁰ Section 146(2), (3).

⁷¹ Billings, above n 19, at 10.

DISCUSSIONS WITH OTHER INTERESTED PARTIES

With the person's permission, contact the guardian and/or administrator or person who has lodged the application, or OPA if that office is involved in providing a report, before the hearing to clarify any matter that might be helpful for the case. It is not appropriate to contact the applicant if they are a family member, unless you have instructions from the person to do so. It may be a situation where the applicant is a family member and there is conflict and the person does not want you to discuss the case with them before the hearing.

Discussions and negotiations with any guardian, administrator or applicant or interested party or OPA investigator may result in a positive outcome for the person at the hearing. You may be able to discuss whether there is a need for a guardian or administrator and propose less restrictive alternatives. In some cases this process may lead to the withdrawal of the application. It will also provide valuable information about the issues involved and assist in preparing for the hearing.

Even if the person remains subject to a guardianship and/or administration order these discussions may result in a less restrictive order. For example, a person on an administration order may be given more freedom with their money in relation to shopping for household items, or be given the opportunity to pay their own rent. In relation to guardianship they may be able to have more say about where they would like to live or in relation to access to persons.

WITNESS SUMMONS

The Principal Registrar has discretion to issue a summons at the request of a party.⁷² Payment of fees may be required. You may also need to identify any documents that you wish to have produced.

The Tribunal may also direct the Principal Registrar to issue a summons.⁷³

OBTAINING SECOND OPINIONS

When presenting a case to VCAT disputing disability, i.e. arguing that the person is able to make reasonable decisions for themselves and there is no need for a guardian and/or administrator, it is important to have a second medical opinion. Reports from a general practitioner are often brief and do not explore the person's ability to manage in all aspects of their lives; further exploration of the impact of the disability is essential. Many matters have a simple report from a GP and the Tribunal relies on these reports.

⁷² Section 104, VCAT Act.

⁷³ Section 104, VCAT Act.

If you are not able to provide a second medical opinion disputing disability, the Tribunal will almost certainly accept the medical evidence before it, that the person does have a disability.

For detailed assessments in relation to:

- **age related disabilities** – contact ACAT (aged care assessment team);
- **intellectual disability** – obtain a functional assessment from an occupational therapist, speech therapist or neuropsychologist ;
- **acquired brain injury** – obtain a report from a neuropsychologist or an allied health assessment ;
- **mental illness** – the Victorian Mental Illness Awareness Council (VMIAC) has a list of psychiatrists who will bulk bill to provide a report.

See Chapter 7, Useful Contact Details, for information on how to contact these organisations.

Allied health professionals are attached to many hospitals and they may provide a report. Reports can also be provided by private practitioners.

When seeking a report make sure you are clear about the cost and who will pay for it. A neuropsychologist's report may cost around \$700. Legal aid may be available to pay for a report.

If the person is already known to the health professional, talk to them first to assess whether they will give a supportive report before you make a request. Also, ensure that you inform the person providing the report exactly what you want tested and let them know that they may be required to give evidence in addition to their report to VCAT. This does not mean that they will have to attend in person. VCAT may wish to speak with them on the telephone.

LEGAL FEES

LEGAL AID FUNDING

Victoria Legal Aid (VLA) provides free legal advice. VLA can pay for medical reports and a lawyer or barrister if:

- there is a reasonable prospect of removing or preventing the appointment or reappointment of a guardian or administrator and;
- the person cannot, in accordance with the VLA guidelines, afford a private lawyer.

Victoria Legal Aid also runs a duty lawyer service daily at VCAT and has an office at VCAT. The duty lawyer service provides advice on the day and may be able to assist the person, or you can contact VLA beforehand to discuss the person's appearance, and they may be able to assist on the day.

See the Victoria Legal Aid website for more information on funding guidelines: www.legalaid.vic.gov.au.

NON LEGAL AID

In a case where a person is on an administration order, it is necessary for the lawyer to consult with the administrator in relation to payment of legal fees. The administrator has the authority to determine whether your legal fees will be paid. Section 52 of the GAA makes any contract between the person and the lawyer void unless it is agreed to by the administrator.

If you believe that the administrator is not acting in the best interests of the person by disallowing the payment of legal fees you can apply to VCAT for a determination on the matter.⁷⁴

HANDY HINTS BEFORE THE HEARING

- Notify VCAT in writing that you are acting for the person.
- Act on instructions and do not presume that what a person is telling you is incorrect, regardless of the content.
- Your role is to act on the person's instructions, not in their best interests.
- Be clear about the fact that you are representing the proposed represented person, not their family.
- Be patient – it may take time to gain full instructions from a person with a disability. This may mean additional appointments with the person to get full instructions. Some people may be on medication that tires them.
- Persons may never have been to a court or tribunal before. Inform them of the process and, if required, assure them that they are not at the Tribunal because they have done something wrong
- Remember that this jurisdiction can be very emotional for the person. Trusted family members, friends and medical practitioners may state issues relating to a person's disability and functioning capacity that may be confronting and offensive to the person. The person may become emotional and upset and it is the role of the advocate not to judge or deny the person the right to express their feelings.
- Apply for legal aid funding or check with the administrator if they will cover your legal fees.
- Explore least restrictive options.
- Obtain all necessary paperwork from VCAT before the case. You can call and ask to view the file or pay a fee for copying and ask VCAT to send the information to you.

⁷⁴ Section 56.

- If a person's disability is in dispute, seek an independent medical report. You may be able to obtain legal aid for this report.
- In relation to the diagnosis of a disability check the medical report provided to VCAT by the applicant, to see if it is up to date. VCAT may be relying on old medical reports. If it is an old report and you do not believe that the person has a disability at the time of the hearing, obtain a new and appropriate medical report.
- Where relevant request a copy of the OPA investigation report. OPA writes the report but only VCAT can release it, therefore the request should be in writing to VCAT, with a signed authority from the person. It may be that VCAT will not give you the report. If so you will need to seek release at the commencement of the hearing and adjourn for instructions. You may also make an application and argue the case at VCAT to see the report. You can always call OPA and ask to speak to the report writer for information in relation to the report.
- Inform the Registrar at VCAT if the matter is going to be contested and likely to take longer than 45 minutes. It may be that they will set down a directions hearing before the actual hearing itself.
- Request a time and location which will best suit the person.
- Where relevant and the person agrees, speak with the applicant, family members and carers, State Trustees Ltd (or other administrator) or OPA in relation to the case before the hearing. This will help you prepare the case more fully before the day.
- Check on the VCAT website the night before hearings for your hearing time and location.

4. AT THE HEARING

REPRESENTATION

Representation at a hearing is in accordance with the VCAT Act. Section 62(1) states that parties:

- (c) may be represented by any person (including a professional advocate) permitted or specified by the Tribunal.

So you need to seek leave from VCAT to appear.

WHO WILL HEAR THE CASE?

Usually one VCAT member will hear the case. Members of VCAT come from a wide variety of backgrounds including law, psychology, medicine, social work etc. Each member will have their own style and way of asking questions of both lawyers and clients and the formalities and procedures will vary. However, it can be assumed that VCAT will conduct the hearing in an inquisitorial manner where the rules of natural justice apply and the rules of evidence do not apply.

If the person has been before VCAT previously with the same member, they can request a different member. The request ought be made in writing and directed to the Deputy President of the Guardianship List. This request may not necessarily be granted.

SHOULD THE PERSON ATTEND THE HEARING?

Some persons may be unwilling to attend the hearing. However, they should be made aware that, except in the most unusual cases, failing to participate in the hearing will significantly reduce their chances of having the application dismissed or an order revoked.

However, if VCAT thinks it appropriate, proceedings may be conducted, in whole or in part, by means of a telephone or video conference or other system of telecommunication.⁷⁵ If the parties agree, the proceeding may be conducted entirely on the basis of documents.⁷⁶

⁷⁵ Section 100(1) VCAT Act.

⁷⁶ Section 100(2) VCAT Act.

WHO CAN ATTEND THE HEARING?

Unless otherwise provided, hearings are public. VCAT may, on application or its own initiative, direct that a hearing or any part of it be held in private.⁷⁷ The Tribunal will generally want all parties present during the hearing; however, you can request that witnesses be excluded from parts of the hearing. You may request that witnesses be sworn before giving evidence; however, it would be wise to forewarn the Tribunal of your request, with written reasons for the request.

CAN THE HEARING OUTCOME BE MADE PUBLIC?

In specified circumstances, VCAT may also impose restrictions on publication of evidence or other information arising during the proceedings.⁷⁸ Unless VCAT orders otherwise, a person must not publish or broadcast or cause to be published or broadcast any report of a proceeding under the Act that identifies, or could reasonably lead to the identification of, a party to the proceeding.⁷⁹ VCAT may only order otherwise if it considers that it would be in the public interest to do so,⁸⁰ and such an order must specify that pictures are not to be taken of any party to the proceeding.⁸¹ (See 'Decisions', in Chapter 2, The Law Relating to Guardianship and Administration.)

THE PROCEDURE AT VCAT

Hearings are conducted as informally as possible, often with the parties seated around a table.⁸² Family members and other interested persons are invited to participate, but it is rarely necessary for medical practitioners and other experts who have assessed the person and made a written report to attend. If issues such as disability or capacity are disputed, is it then important that you have expert witnesses. The Tribunal is able to take evidence from practitioners over the telephone and may on occasion spontaneously ring a doctor or service provider.

The hearing usually commences with introductions by the VCAT member and a request for those present to identify themselves. The VCAT member will explain the purpose of the hearing and seek contributions from those present. The proceeding is intended to be inclusive and is inquisitorial in nature.⁸³ The conduct of the hearing is up to the individual member; however, there is usually an opportunity for the lawyer to present opening and closing submissions and cross-examine witnesses.

⁷⁷ Section 101(1)(2) VCAT Act.

⁷⁸ Section 101(3)(4) VCAT Act.

⁷⁹ VCAT Act Sch 1, Part 9, s. 37(1). Penalty: 20 penalty units.

⁸⁰ VCAT Act Sch 1, Part 9, s. 37(2).

⁸¹ VCAT Act Sch 1, Part 9, s. 37(3).

⁸² *Lawyers Practice Manual*, Lawbook Co [8.2.602].

⁸³ *Lawyers Practice Manual*, above n 76, [8.2.602].

DURATION OF HEARINGS

Non-contentious hearings are usually scheduled for 45 minutes. More time may be required for more complex issues or where significant issues are in dispute, particularly where there is legal representation.

RULES OF NATURAL JUSTICE

A non-adversarial approach is generally adopted. However, this is not uniformly the case and will depend on the circumstances. For example,

...where there is a challenge to the guardianship order and a conflict of expert opinion, it becomes difficult to maintain a non-adversarial approach to the matter while ensuring that the statutory procedural requirements, including natural justice, are met.⁸⁴

Although VCAT has the power to decide the way in which a proceeding will be conducted, the principles of natural justice must be observed.

The Supreme Court has stated:

It must not be forgotten that the jurisdiction, while protective, is one which can result in the life and liberty of an individual being placed in the control of another.⁸⁵

...the protective role requires the Tribunal to be vigilant to protect persons subject to such orders from attempts by third parties to gain control of their lives and assets.⁸⁶

Under s. 97 of the VCAT Act, VCAT must act fairly and according to the substantial merits of the case in all proceedings. VCAT is bound by the rules of natural justice;⁸⁷ is not bound by the rules of evidence,⁸⁸ may inform itself on any matter as it sees fit; and must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as possible.⁸⁹

⁸⁴ Ibid.

⁸⁵ *Daynes v The Public Advocate* [2005] VSC 485 at [33] per Smith J.

⁸⁶ *Daynes* at [38] per Smith J.

⁸⁷ Section 98(4) VCAT Act.

⁸⁸ This includes admitting into evidence the contents of any document despite non-compliance with any time limit or other requirement specified in the rules in relation to that document or service of it:

s. 98(2) VCAT Act.

⁸⁹ Section 98(1) VCAT Act.

HANDY HINTS AT THE HEARING

- Seek leave to appear.
- Request that the person be addressed as they wish; e.g. 'Mrs H' not 'Sally'.
- The general rule is that this jurisdiction is not adversarial.
- Do not stand up in hearings.
- Do not run the proceedings.
- Do not speak until the VCAT member speaks to you first, unless it is necessary.
- It is likely that the VCAT member will speak directly to the person. If there is a moment when the person wants to speak to VCAT directly and not through you, advise VCAT of this. Consider if this should happen at the beginning of the hearing, which may be easier for the person, or at the end when the person has settled and may want to respond to others' remarks. The person may want to do both.
- It may be appropriate for the person to speak to VCAT without anyone else present. You may want to suggest this as a possibility to the person and to VCAT if that is wanted – in which case you would remain.
- If you want to examine professionals such as doctors and neuropsychologists, make sure this will happen easily through advance notice to VCAT. Arrange for your witnesses to attend the hearing or request that the party relying on them arrange for them to attend the hearing. See also 'Witness summons', in Chapter 3: Before the Hearing.
- The legal issues before VCAT are disability, incapacity and need for a guardian and/or administrator. The issues for the person may be about the quality of the guardian's and/or administrator's work. Make sure that VCAT is made aware of the person's concerns even if they do not bear on the legal issues. These issues may help VCAT understand the person's distress and allow the member to address any concerns.
- Ask for the person to speak first if their attention might lapse. It also signals to other parties that the person is the most important voice at the hearing.
- If the person wants to be kept informed, request that reports, particularly financial reports, be made available to the person. These can be 3, 6 or 12 monthly reports.
- Raise with VCAT the person's interests and activities. For example, a person may have attended the opera all of their life and now has dementia. The person may still wish to attend the opera and an administrator should be made aware of this as an interest that should be continued, regardless of whether the person will 'remember' the event.
- Arrange a time for the person to meet with the guardian or administrator. This may even be after the hearing. There ought to be rooms available so you can assist.
- At the end of the hearing spend some time going through what has happened to make sure the person understands what has transpired.

5. AFTER THE HEARING

VCAT will usually determine the outcome of a hearing on the same day. It is important to communicate the outcome of the hearing to the person both verbally and in writing. It is recommended that you seek instructions from the person to obtain a written statement of reasons, as this may assist with any future hearings.

If the matter relates to a guardianship order you should speak with the guardian, or the Office of the Public Advocate if they have been appointed guardian, in relation to the next steps they will take with the person. If the matter relates to an administration order speak with State Trustees Limited or the administrator about the person's needs and wishes.

Sometime in the future call or write to the person in relation to the order and seek instructions from them as to whether the guardianship and/or administration order is still required. It may be that their disability has stabilised and they are able to make reasonable decisions for themselves in relation to, for example, accommodation or the payment of bills.

APPEALING THE DECISION

(See 'Types of hearings', in Chapter 2, Law Relating to Guardianship and Administration.)

Appeals from VCAT generally are governed by Part 5 of the VCAT Act. Under s. 148(1) a party to a proceeding may appeal, on a question of law, from an order of the Tribunal in the proceeding:

- (a) to the Court of Appeal, if the Tribunal was constituted for the purpose of making the order by the President or a Vice President, whether with or without others; or
- (b) to the Trial Division of the Supreme Court in any other case.

On a question of fact, there is no appeal, but a review can be sought from VCAT on the basis of new facts and circumstances.

The court must also grant leave to appeal. The application for leave to appeal must be made within 28 days after the day of the order of the Tribunal and in accordance with the rules of the Supreme Court.⁹⁰ Where leave is granted, the appeal must be instituted within 14 days after the day on which leave is granted.⁹¹

⁹⁰ Section 148(2) VCAT Act. Where oral reasons are given and a party then requests written reasons the day on which the written reasons are given to the party is deemed to be the day of the order for these purposes: s. 148(4) VCAT Act.

⁹¹ Section 148(3) VCAT Act.

VCAT, either on application or its own initiative, may stay the operation of any order it makes pending the determination of any appeal, subject to any conditions it considers appropriate.⁹²

On appeal, the court may make any of the following orders:

- (a) an order affirming, varying or setting aside the order of the Tribunal;
- (b) an order that the Tribunal could have made in the proceeding;
- (c) an order remitting the proceeding to be heard and decided again, either with or without the hearing of further evidence, by the Tribunal in accordance with the directions of the court;
- (d) any other order the court thinks appropriate.⁹³

The proceeding is by way of judicial review rather than by way of appeal in the usual sense.⁹⁴ Generally speaking, the court should not substitute a new decision for VCAT's decision unless it was the only decision open to VCAT as a matter of law.⁹⁵

COMPLAINTS

No review or appeal process exists under the GAA in relation to decisions made by a guardian or administrator. However, application can be made to VCAT in relation to the delivery of those services within the parameters of the guardianship and/or administration order. If a person is unhappy about the way they are being treated by the guardian or administrator they can apply for a review of their order and may be successful in having the guardian or administrator replaced. A person can also bring an application in relation to the decision of an administrator.⁹⁶

If a person is dissatisfied with the conduct of the hearing and how they have been treated by the VCAT member a complaint can be made to the Deputy President of VCAT.

The Office of the Public Advocate has a range of functions and duties, including the power to make representations or act on behalf of a person with a disability, and to investigate complaints of neglect, exploitation or abuse.

If the complaint is against the Office of the Public Advocate or State Trustees, it is prudent to use the internal complaints mechanism first. Contact the relevant office and ask for details of their complaints procedure. The Office of the Public Advocate is not subject to the *Freedom of Information Act*.

⁹² Section 149. There is some authority that under s. 149 the Tribunal may stay not only an order the subject of an appeal, but any order which it makes, although it seems that the circumstances in which this would occur are exceptional: *MD (Guardianship)* [2005] VCAT 2597.

⁹³ Section 148(7) VCAT Act.

⁹⁴ XYZ, above n 9, at [63] per Cavanough J.

⁹⁵ XYZ, at [64].

⁹⁶ Section 56.

If a complaint against the Office of the Public Advocate or State Trustees is not resolved by the internal complaints procedure, or it is not prudent to use the internal complaints mechanism for various reasons, the complaint can be lodged with the Health Services Commissioner.

The Health Services Commissioner can investigate, conciliate and propose appropriate remedies. The Commissioner reports to Parliament, and where required will refer the complaint to an appropriate registration board.

Complaints can also be made to the Ombudsman regarding the Office of the Public Advocate and State Trustees Limited:

For details of how to contact the Health Services Commissioner and the Ombudsman, see Chapter 7, Useful Contact Details.

There will be times when aspects of service delivery or decision making are open to legal action in negligence, breach of statutory duty, disability discrimination etc. Lawyers will need to think laterally on behalf of persons seeking redress.

HANDY HINTS AFTER THE HEARING

- Discuss with the person the benefits of a statement of reasons. If instructed to do so, make a request for a statement of reasons in writing. This will assist the person in further hearings at VCAT.
- Speak with the person first about the outcome of the case, not the family or any other interested parties.
- Speak to the person about their appeal rights if they want to appeal.
- Provide a letter to the person with the outcome of the hearing.
- If the matter is an administration matter, find out the fees and charges for the service and inform the person.
- If the matter is a guardianship matter and OPA is appointed, find out when the person will be contacted for an interview (or next appointment) and inform the person. If possible organise a meeting when you are available, even straight after the hearing.
- Contact the person some time in the future to see if their situation has changed and if the guardianship and/or administration order is still necessary.

6. ENDURING POWERS OF ATTORNEY

A person may appoint an alternative decision maker (an attorney) to manage their affairs in the event that they lose the capacity to do so, which may avoid the need to appoint a guardian or administrator in the event of incapacity. This may be done by enduring power of attorney. There are three types of enduring power of attorney (explained in more detail below):

- enduring power of attorney (financial);
- enduring power of attorney (medical treatment); and
- enduring power of guardianship.

The main difference between the powers of attorney is that a *general* power only applies when a person has capacity, and ceases to operate in the event of the person losing the capacity to make decisions, whereas the *enduring* powers only become operable when a person loses capacity.

Take Control: A Guide to Powers of Attorney and Guardianship, produced by the Office of the Public Advocate and Victoria Legal Aid, is an excellent guide to the law in Victoria and relevant *pro formas*.⁹⁷

As an advocate taking instructions from a person signing powers of attorney you should document details of circumstances of the instructions in case the signing of the document is questioned in the future.

GENERAL POWER OF ATTORNEY

A person can appoint someone under a general power of attorney, usually for a specific period of time, to make financial or legal decisions on their behalf – for example, if they have restricted mobility due to an accident or surgery, or are travelling overseas for an extended period. The power of attorney terminates if the person loses capacity to make decisions for themselves.

ENDURING POWER OF ATTORNEY (FINANCIAL)

A person can appoint an attorney to make financial or legal decisions for them in the event that they lose capacity to make those decisions.

An enduring power of attorney (financial) may be appointed under Part XIA of the *Instruments Act 1958*. Such a person cannot make decisions in relation to

⁹⁷ Self help and information kits and advice on powers of attorney are available from the Office of the Public Advocate.

medical treatment or guardianship; the power is limited to financial and legal matters.⁹⁸

The enduring power of attorney must comply with the formal requirements of the *Instruments Act* 1958.⁹⁹ The attorney's powers are exercisable once the enduring power of attorney is made, unless the donor has specified an alternative time.¹⁰⁰ The attorney must be at least 18 years old,¹⁰¹ and there may be one or more attorneys.¹⁰² A donor may also appoint an alternative attorney to act in the event of the death, absence or legal incapacity of the attorney.¹⁰³

A donor may only make an enduring power of attorney if they understand its nature and effect. This means that they must understand:

- (a) that the donor may specify conditions or limitations on, or instructions about, the exercise of the power to be given to the attorney;
- (b) when the power is exercisable;
- (c) that once the power is exercisable, the attorney has the same powers as the donor had (when not under a legal incapacity) to do anything for which the power is given subject to any limitations or restrictions on exercising the power included in the enduring power of attorney;
- (d) that the donor may revoke the enduring power of attorney at any time if they are capable of making an enduring power of attorney;
- (e) that the power the attorney is given continues even if the donor subsequently ceases to have legal capacity;
- (f) that at any time that the donor is not capable of revoking the enduring power of attorney, the donor is unable to effectively oversee the use of the power.¹⁰⁴

An enduring power of attorney is not revoked by the subsequent legal incapacity of the donor.¹⁰⁵

Where there is a conflict between the decision made by the attorney and a decision made by a guardian, the decision of the guardian prevails.¹⁰⁶ Where an administration order has been made in respect of the donor of an enduring power of attorney, the attorney may exercise power under the enduring power of attorney only to the extent authorised by VCAT.¹⁰⁷

⁹⁸ *Take Control: A Guide to Powers of Attorney and Guardianship*, Office of the Public Advocate and Victoria Legal Aid 2006 at 21.

⁹⁹ See, in particular, ss. 123–125C.

¹⁰⁰ Section 117 *Instruments Act*.

¹⁰¹ Section 119(4) *Instruments Act*.

¹⁰² Section 119(1)–(3) *Instruments Act*.

¹⁰³ Section 120 *Instruments Act*.

¹⁰⁴ Section 118(2) *Instruments Act*.

¹⁰⁵ Section 115(2) *Instruments Act*.

¹⁰⁶ Section 125F(2) *Instruments Act*.

¹⁰⁷ Section 125G *Instruments Act*.

In addition to other forms of revocation listed in Division 4, an enduring power of attorney may be revoked by VCAT under Division 6.¹⁰⁸ Under s. 125V(1), an application may be made to VCAT for a declaration, order, direction or recommendation about the scope of an attorney's powers, the exercise of those powers or any other thing in or related to Part XIA. Such an application may be made by the Public Advocate, the donor, an attorney or another person whom the Tribunal is satisfied has a special interest in the affairs of the donor.¹⁰⁹

Either on application or its own initiative, VCAT may revoke the appointment of an attorney if satisfied that it is in the best interests of the donor to do so. Before making this decision, VCAT must be satisfied that the donor lacks the capacity to make an enduring power of attorney.¹¹⁰ VCAT may also declare an enduring power of attorney to be invalid if it is satisfied that the donor lacked capacity at the time it was made, it does not comply with the requirements of the Act or is invalid for another reason; for example, the donor was induced to make it by dishonesty or undue influence.¹¹¹ If VCAT declares an enduring power of attorney invalid, the power is void from the start.¹¹²

In addition, VCAT may:

- (a) make a declaration or make recommendations or give any directions it considers necessary in relation to an enduring power of attorney;
- (b) vary the effect of an enduring power of attorney;
- (c) suspend for a specified period an enduring power of attorney, either generally or in respect of a specific matter;
- (d) make any order it considers necessary in relation to an enduring power of attorney.¹¹³ Without limiting the above, the Tribunal may, on its own initiative, give directions to an attorney in respect of any matter.¹¹⁴

ENDURING POWER OF ATTORNEY (MEDICAL TREATMENT)

A person can appoint someone to make medical treatment decisions for them in the event they lose capacity to make those decisions.

An 'agent' may be appointed to make decisions about the medical treatment of a person by an enduring power of attorney (medical treatment) under s. 5A *Medical Treatment Act* 1988. 'Medical treatment' means an operation, the administration of a drug or other like substance or any other medical

¹⁰⁸ Section 125Q *Instruments Act*. As to the constitution of the Tribunal in such proceedings, see Schedule 1, Part 12, s. 40F VCAT Act.

¹⁰⁹ Section 125V(2) *Instruments Act*.

¹¹⁰ Section 125X *Instruments Act*.

¹¹¹ Section 125Y(1) *Instruments Act*.

¹¹² Section 125Y(2) *Instruments Act*.

¹¹³ Section 125Z(1) *Instruments Act*.

¹¹⁴ Section 125Z(2) *Instruments Act*.

procedure but does not include palliative care.¹¹⁵ 'Palliative care' includes the provision of reasonable medical procedures for the relief of pain, suffering and discomfort or the reasonable provision of food and water.¹¹⁶ The *Medical Treatment Act* does not apply to palliative care.¹¹⁷

An agent or alternative agent¹¹⁸ (there is no provision for joint agents) is appointed under an enduring power of attorney in the form set out in Schedule 2. It takes effect only if the person giving the power becomes incompetent. An enduring power of attorney (medical treatment) is not revoked by the subsequent incapacity of the donor of the power or on the donor of the power becoming a 'protected person'¹¹⁹ or a represented person. It may be revoked in the same way as a general power of attorney is revoked.¹²⁰

If a registered medical practitioner and another person are each satisfied that the patient's agent or guardian has been informed about the nature of the patient's current condition to an extent that would be reasonably sufficient to enable the patient, if competent, to make a decision about whether or not to refuse medical treatment, and that the agent or guardian understands that information, then the agent or guardian, on behalf of the patient, may refuse medical treatment generally or medical treatment of a particular kind.¹²¹ The agent or guardian may only refuse treatment if it would cause unreasonable distress to the patient; or there are reasonable grounds for believing that the patient, if competent and after giving serious consideration to their health and well-being, would consider that the medical treatment is unwarranted.¹²² A refusal of treatment certificate must be completed in the form of Schedule 3.¹²³

An NFR (not for resuscitation) directive is effectively a refusal of treatment. A 'person responsible' cannot refuse treatment; they are only empowered to consent to medical treatment. Although consent may be withheld, this cannot be done for treatment which is hypothetical, which is the case with an NFR directive.¹²⁴ Whether a guardian can refuse treatment depends on the order as discussed above.

¹¹⁵ Section 3 *Medical Treatment Act*.

¹¹⁶ Section 3. In *Re BWV, ex parte Gardner* (2003) 7 VR 487 it was held that palliative care is care not to treat or cure a patient but to alleviate pain or suffering when a patient is dying. The provision of food and water refers to oral intake and the provision of fluid, nutrition and medicines via percutaneous endoscopic gastrostomy (PEG) to a woman who had been unconscious for 3 years with no cognitive capacity or conscious perception due to a fatal form of dementia, was medical treatment and not palliative care within the meaning of the Act. (Also see *BWV* [2003] VCAT 121.)

¹¹⁷ Section 4(2).

¹¹⁸ An alternate agent can only act if after enquiries the alternate agent believes that the agent is dead, incompetent or cannot be contacted or that the agent's whereabouts are unknown, and the alternate agent complies with the requirements of s. 5AA.

¹¹⁹ Defined in the *Public Trustee Act* 1958.

¹²⁰ Section 5A(4) *Medical Treatment Act*.

¹²¹ Section 5B(1) *Medical Treatment Act*.

¹²² Section 5B(2) *Medical Treatment Act*.

¹²³ Section 5B(3) *Medical Treatment Act*.

¹²⁴ OPA Practice Guidelines 12, *Not for Resuscitation (NFR)* 2004 at 12.2–12.3.

The test of reasonable grounds for believing that the patient would consider that the medical treatment is 'unwarranted' is of course hypothetical. There need not be specific evidence of the patient's wishes in the particular circumstances. Relevant factors might include general evidence about the patient's values or beliefs. For example, a devout Catholic may have particular views about refusing treatment. In the absence of such evidence, there is no presumption that the patient would wish to refuse medical treatment. However, it is open to infer that the patient would consider continued treatment unwarranted.¹²⁵

The decision may be based on the existing and likely future health and well-being of the patient. For example, if the medical evidence were that there was no prospect of recovery or improvement

...it may be enough to establish that a reasonable person would, after giving serious consideration to his or her existing and likely future health and well-being, consider that medical treatment, or particular medical treatment, is unwarranted. This is because, in the absence of particular evidence of the wishes of the patient in the hypothetical circumstances, an inference could be drawn that the patient would form the belief of a reasonable person.¹²⁶

Equally, there is no presumption that it is always in a person's best interests to live on:

When death stares one in the face, or when life is futile, the person concerned, or the trusted agent or guardian of that person, may conclude that it is in the best interests of the person to refuse medical treatment and to allow the person to pass away.¹²⁷

On application, VCAT may suspend or revoke an enduring power of attorney (medical treatment) (s. 5C(3), (4), (4A) or (4B)); determine whether an enduring power of attorney (medical treatment) given to an alternate agent does or does not authorise the making of a particular decision by the alternate agent (s. 5C(4A)); or determine any question arising out of a conflict between a decision made about a person's medical treatment by the person's agent and alternate agents (s. 5C(4B)). Application may be made by the Public Advocate, a person who has a special interest in the affairs of the donor of the power or the agent or alternate agent.¹²⁸ If an enduring power of attorney (medical treatment) or guardianship order is revoked, any refusal of treatment certificate completed by the agent, alternate agent or guardian is also revoked.¹²⁹

The Public Advocate may intervene at any time and is entitled to be joined as a party to proceedings under s. 5C.¹³⁰ VCAT may refer any matter to a

¹²⁵ *Public Advocate and RCS (Guardianship)* [2004] VCAT 1880 at [15].

¹²⁶ *Public Advocate and RCS (Guardianship)* [2004] VCAT 1880 at [18].

¹²⁷ *Public Advocate and RCS (Guardianship)* [2004] VCAT 1880 at [28]. Also see *Korp (Guardianship)* [2005] VCAT 779.

¹²⁸ Section 5C(2) *Medical Treatment Act*.

¹²⁹ Section 5D(1) *Medical Treatment Act*.

¹³⁰ Schedule 1, Part 14, s. 47 VCAT Act.

government department, public authority, service provider, the Public Advocate or a guardian or administrator appointed under the *Medical Treatment Act* 1988 for investigation and report.¹³¹ It has also been stated that the existence of safeguards against the abuse of the power of an agent or guardian to refuse medical treatment to a represented person means it is not necessary to read down the provisions to protect a person who has a disability who is represented by a guardian.¹³²

ENDURING POWER OF GUARDIANSHIP

A person can appoint someone to make lifestyle decisions for them in relation to, for example, where they will live, in the event that they lose capacity to make decisions.

A person who is over 18 years of age may appoint a person to be their enduring guardian, and may also appoint an alternate enduring guardian.¹³³ To be eligible, the enduring guardian must be over 18 years of age and must not be, in a professional or administrative capacity, directly or indirectly responsible for, or involved in, the care or treatment of the person, or in provision of accommodation to the person.¹³⁴

The instrument appointing an enduring guardian must comply with the requirements set out in s. 35A(2)(2A) *Instruments Act*. To the extent specified in the instrument, the guardian has all the powers and duties of a parent as if the appointor was their child.¹³⁵ This authority must be exercised in accordance with s. 28 (see above).¹³⁶ If the instrument does not specify particular matters, then the guardian is authorised to act only to the extent that the appointor subsequently becomes unable by reason of a disability to make reasonable judgments in respect of any of the matters relating to their person or circumstances.¹³⁷ Where the instrument specifies particular matters, then the guardian's authority is limited to the extent that the appointor subsequently becomes unable to make reasonable judgments in those matters.¹³⁸ An enduring guardian cannot consent to any special procedure on behalf of the appointor.¹³⁹

¹³¹ Schedule 1, Part 14, s. 48 VCAT Act.

¹³² *Public Advocate and RCS (Guardianship)* [2004] VCAT 1880 at [19].

¹³³ Section 35A(1)–(1B), (3).

¹³⁴ Section 35A(3)(4).

¹³⁵ Section 35B(3).

¹³⁶ Section 35B(5).

¹³⁷ Section 35B(2).

¹³⁸ Section 35B(1).

¹³⁹ Section 35B(4). A 'special procedure' is any procedure intended or reasonably likely to render the person permanently infertile, termination of pregnancy, removal of tissue for the purposes of transplantation, or any other medical or dental treatment prescribed by the regulations to be a special procedure: s.3(1). Authorisation of such procedures is governed by Division 4.

An enduring guardian may apply to VCAT for an advisory opinion or directions on any matter or question relating to the scope of their appointment or the exercise of their powers.¹⁴⁰ VCAT may:

- (a) give an advisory opinion or any directions it considers necessary;
- (b) vary the effect of the instrument appointing the enduring guardian;
- (c) suspend for a specified period the authority, either generally or in respect of a specific matter, of an enduring guardian under an instrument of appointment;
- (d) make any order it considers necessary.¹⁴¹

VCAT may also, of its own motion, direct, or give an advisory opinion to, an enduring guardian in respect of any matter.¹⁴²

No action lies against an enduring guardian for anything done or omitted to be done under any order or on the advice of VCAT unless there has been fraud, wilful concealment or misrepresentation of the facts to VCAT.¹⁴³

Appointment of an enduring guardian may be revoked either by the appointor¹⁴⁴ or VCAT.¹⁴⁵ Application to VCAT to revoke the appointment of an enduring guardian or alternative enduring guardian may be made by:

- (a) the Public Advocate;
- (b) the enduring guardian or alternate enduring guardian;
- (c) the administrator (if any);
- (d) any other person who VCAT is satisfied has an interest in the person or in the estate of the person in respect of whom the application is made.¹⁴⁶

Following a hearing, VCAT may revoke the appointment of the guardian if:

- (a) the enduring guardian or alternate enduring guardian seeks revocation of the appointment; or
- (b) VCAT is satisfied that the enduring guardian or alternate enduring guardian is not able or willing to act in that capacity or has not acted in the best interests of the appointer or has acted in an incompetent or negligent manner.¹⁴⁷

The appointment of an enduring guardian or alternate enduring guardian is not revoked if the appointer becomes a represented person.¹⁴⁸

¹⁴⁰ Section 35E(1).

¹⁴¹ Section 35E(2).

¹⁴² Section 35E(3).

¹⁴³ Section 35E(4).

¹⁴⁴ Section 35C.

¹⁴⁵ Section 35D.

¹⁴⁶ Section 35D(2).

¹⁴⁷ Section 35D(1).

¹⁴⁸ Section 35D(3).

6. USEFUL CONTACT DETAILS

Aged Care Assessment Teams (ACATs)

Website: www.health.gov.au

(Search: Aged Care Assessment Victoria)

ARBIAS

27 Hope Street

Brunswick VIC 3056

Ph: (03) 8388 1222

Email: arbias@arbias.com.au

Guardianship List: *see* VCAT

Health Services Commissioner

30th Floor, 570 Bourke Street

Melbourne VIC 3000

Ph: (03) 8601 5200

Toll Free: 1800 136 066

Fax: (03) 8601 5219

TTY: 1300 550 275

Email: hsc@dhs.vic.gov.au

Mental Health Legal Centre

Level 4 / 520 Collins Street

Melbourne VIC 3000

Ph: (03) 9629 4422

Website: www.communitylaw.org.au/mentalhealth

Office of the Public Advocate

Level 5, 436 Lonsdale Street

Melbourne VIC 3000

Ph: (03) 9603 9500; 1300 309 337

Website: www.publicadvocate.vic.gov.au

Ombudsman Victoria

Level 9, 459 Collins Street (North Tower)

Melbourne VIC 3000

Telephone: (03) 9613 6222
Toll Free: 1800 806 314
Fax: (03) 9614 0246
Email: ombudvic@ombudsman.vic.gov.au

State Trustees Limited

168 Exhibition Street
Melbourne VIC 3000
Ph: (03) 9667 6444
Website: www.statetrustees.com.au

Villamanta Disability Rights Legal Service Inc.

44 Bellerine Street
Geelong VIC 3220
Ph: (03) 5229 2925
Website: www.villamanta.org.au

VCAT

55 King Street
Melbourne VIC 3000
Ph: (03) 9628 9755
Guardianship List:
Ph: (03) 9628 9911
Fax: (03) 9628 9932
Website: www.vcat.vic.gov.au

Victoria Legal Aid

350 Queen St
Melbourne VIC 3000
Ph: (03) 9269 0234
Website: www.legalaid.vic.gov.au

Victorian Mental Illness Awareness Council (VMIAAC)

23 Weston Street
Brunswick VIC 3056
Ph: (03) 9387 8317
Website: www.vmiac.com.au
Email: info@vmiac.com.au