A-Z OF VCAT APPOINTED ADMINISTRATION

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Introduction

In the past Australia was a relatively young country. The Australian Treasury reports that in 1970-71 some 31% of the population was aged 15 years or younger, but by 2001-02 this proportion had dropped to 22%. Over the same period, the proportion of Australia's population aged over 65 years grew from 8% to 13%. That proportion is predicted to double to around 25% in the next four years.

As we all live longer, that cohort of the population who suffer disability in old age only increases. As a consequence, there is an increasing number of people who by virtue of age or infirmity become incapable of looking after their financial affairs.

Whilst theoretically it should be possible for most people to anticipate the onset of disability and make arrangements for the appointment of a trusted person or persons, in reality there are many reasons why that just does not occur or the planning fails. Those reasons include but are not limited to:

- Failure to plan;
- Sudden onset of incapacity;
- The chosen attorney dying, becoming disabled or refusing to act;
- The chosen attorney acting inappropriately and needing to be removed;
- The complexity of the financial affairs being beyond the ability of the attorney to manage;
- Problems associated with a second or subsequent marriage and children from prior relationships;
- Elder abuse;
- There being no obvious person available to act so that no-one is appointed; or
- Disharmony between the appointed attorneys.

It is in such circumstances that the jurisdiction of VCAT may be called on with a view to appoint an Administrator under the Act.

Burke & Associates Lawyers

For over a decade, employees of Burke & Associates Lawyers have been appointed by VCAT to be independent Administrators. The Administrators are supported by the team of lawyers at Burke & Associates Lawyers to assist and consult across various areas of law including property, estates and litigation.

Further to this, Burke & Associates Lawyers are experienced in making applications to VCAT for Administrators and/or Guardians to be appointed and have been active in consulting on proposed changes within the Guardianship List.

As a consequence, we have developed considerable experience and expertise in this rather unique and challenging area of law.

The purpose of this publication is to provide a brief overview of some of the key areas in VCAT appointed Administration in the hope that it is of use to those persons who may need to consider the appointment of an Administrator either for themselves or for a loved one.

To be clear, this publication is not intended to be legal advice and should not be relied on for that purpose. It should be treated as a guide and not a substitute for detailed legal advice. Every situation is different and the legal position can vary greatly from one case to the next.

Further, at the time of writing change to the legislation is imminent. Several years ago the Victorian Law Reform Commission conducted a review and reported on the legislation. It recommended significant change. At the time of writing, a draft amending Bill is before the Victorian Parliament. The new legislation will make this area of law ever more complex. The noble aspiration of seeking to give effect to the wishes of persons with disabilities will inevitably make the task of Guardians and Administrators more challenging and give rise to greater demand for specialist legal assistance in this growing area.

Definitions

The Act

The *Guardianship and Administration Act* 1986 is the legislation under which Guardians and Administrators can be appointed. Part 5 deals with the appointment of an Administrator including the powers and duties of an Administrator.

The Administrator

In this document we refer to 'the Administrator' as the person appointed by VCAT to make a person's financial decisions on their behalf. If more than one person is appointed (for example under a joint or joint and several appointment) they are together the Administrators.

Administration Order

A VCAT Order by which a Member of VCAT appoints an Administrator for a Represented Person.

Attorney

A person appointed to act on behalf of another person under an Enduring Power of Attorney.

Estate

For the purposes of administration, a Represented Person's Estate is their collective financial wealth and resources. This is not to be confused with the "estate" a person leaves when they die.

Guardian

A Guardian can make personal and lifestyle decisions on behalf of a person with a disability, including decisions regarding living and work arrangements, medical treatment and access to people and services.

Enduring Power of Attorney

A document by which a person appoints another person or persons to make personal and/or financial decisions on their behalf.

Represented Person

The term for the person who is subject to an Administration Order. When there is a pending Administration Order, we refer to that person as a Proposed Represented Person.

VCAT / the Tribunal

The Victorian Civil and Administrative Tribunal. The Guardianship List at VCAT is dedicated to hearing issues relating to a person's financial and personal matters.

VCAT Order

An order made by a VCAT Member to give direction to parties, Represented Persons and Proposed Represented Persons. An Administration Order is a VCAT Order by which an Administrator and/or Guardian is formally appointed.

A

A.1 Accommodation

Decisions as to where a Represented Person is to live fall to either:

- The Attorney appointed for personal matters; or
- The Guardian.

The proposed accommodation must be within the financial means of the Represented Person. As such, the Administrator should be involved in conversations with the Attorney or Guardian so the Administrator can advise whether the proposed accommodation is appropriate for the Represented Person and whether the Represented Person can afford it.

Further, as the Administrator is responsible to pay the accommodation fees, the Administrator will inevitably become involved and should be kept informed at various stages of this decision making process.

Depending upon the nature of their disability and the extent of the financial resources available to the Represented Person, accommodation options may include:

- In home care with the support of full-time or part-time carers. At the time of writing, full-time care can cost us much as $10,000.00 a week. Unless the Represented Person is quite wealthy, that cost will very rapidly deplete funds otherwise available to meet the needs of the Represented Person;
- A supported accommodation facility such as a retirement village where the right of occupancy may be based on the acquisition of a freehold or leasehold title. The options available vary enormously. Further, some degree of in-home care within the chosen facility may be required; or
- A nursing home where the arrangements are subject to quite strict Commonwealth Government oversight (see Nursing Homes).

A.2 Account by Administrator

Each year during the term of an administration the Administrator must complete and lodge with VCAT a document known as an Account by Administrator (ABA).

The ABA provides an up-to-date snapshot of the assets and liabilities and the income and expenditure of the Represented Person as at 30 June each year. The ABA is submitted online to VCAT. It is then independently assessed by State

Trustees Limited. This comprises an audit of the Administrator's actions for the relevant financial year and a determination as to whether the Administrator has acted in accordance with the Represented Person's best interests.

VCAT levies a fee for the processing of the ABAs which fee is paid from the account of the Represented Person. At the time of writing, the annual fee for an ABA is $128.00 unless the Represented Person has fortnightly income from all sources that is less than $844.00, in which event no fee is payable.

Depending on the wording of the relevant Administration Order, the Administrator may be required to provide a copy of the ABA to the Represented Person's family. If there is no such Administration Order, an interested party may apply to VCAT to have a copy released to them.

A.3 Acts of Parliament

In this publication we cover a wide territory and refer to several pieces of legislation. The most relevant statute in Victoria is the *Guardianship and Administration Act* 1986 (Victoria).

Respective legislation in other States and Territories of Australia varies considerably but has a similar purpose.

We refer to the *Guardianship and Administration Act* 1986 (Victoria) as the Act. When we refer to other acts of Parliament we name them by their full title.

As noted in the Introduction there is a Bill before the Victorian Parliament to substantially amend the Act. If enacted the amended legislation could make administration of the financial affairs of disabled persons somewhat more complicated. It seems unlikely the proposed amended legislation will deal sufficiently with more complex estates, the administration of which is increasingly coming before VCAT. For example, the proposed amended legislation appears to be silent on company structures, superannuation and like matters which make it difficult to manage a person's estate.

The full text of the Act is on several websites, including AustLII.

- www.austlii.edu.au
- www.legislation.vic.gov.au

A.4 Administration

What is administration?

The term is not defined in the Act. To understand what we mean by administration the best starting place is Section 46 of the Act. It reads as follows:

> *S46 Appointment of Administrator*
>
> *46.1 If the Tribunal is satisfied that:*
>
> *(a) the person in respect of whom an application for an order appointing an Administrator is made:*

(i) is a person with a disability; and

(ii) is unable to make reasonable judgments in respect of the matters relating to all or any part of her or his estate by reason of the disability; and

(iii) is in need of an Administrator of her or his estate; and

(b) in the case of an application in respect of a person who does not reside in Victoria, State Trustees has not been authorised under section 12 of the State Trustee (State Owned Company) Act *1994 to collect, manage, sell or otherwise dispose of or administer any property in Victoria which forms part of the estate of the person in respect of whom the application is made:*

(i) the Tribunal may make an order appointing an Administrator of that person's estate.

46.2 In determining whether or not a person is in need of an Administrator of her or his estate, the Tribunal 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 the person in respect of whom the application is made, so far as they can be ascertained.

46.3 The Tribunal cannot make an order under subsection (1) unless it is satisfied that the order would be in the best interests of the person in respect of whom the application is made.

46.4 Where the Tribunal makes an order appointing an Administrator of a person's estate, the order made must be that which is the least restrictive of that person's freedom of decision and action as is possible in the circumstances.

So those are the circumstances in which VCAT can appoint an Administrator.

But what can an Administrator do? The Act does not scope out the exact powers of an Administrator which can make it difficult to explain exactly what an Administrator is required to do.

For practical purposes, the Administrator "steps into the shoes" of the Represented Person with authority to make decisions about financial matters.

It is fairly common for VCAT to craft an Administration Order to the particular circumstances of the Represented Person detailing any conditions of the Administrator's appointment. Common conditions include a limitation on selling the Represented Person's property and requiring communication with family members.

Section 48 of the Act provides that an Administrator has the powers and duties conferred under the Act and such other powers and duties as a Tribunal may specify.

Matters relating to guardianship or medical treatment are dealt with separate from administration, save to the extent that decisions regarding these matters give rise to financial consequences and the need for decision making about financial matters. Often the demarcation between the separate areas can be unclear.

Other aspects of VCAT appointed administration are addressed throughout this publication.

B

B.1 Banking

An Administrator must protect the Represented Person's property.

Following appointment, one of the most pressing matters is to identify bank accounts, notify the banks of the Administration Order and deal with each separate bank to meet its protocols for operating bank accounts. This is particularly important and urgent in circumstances where there has been actual or alleged financial abuse of the Represented Person.

This process is not as straightforward as it might seem. Each bank operates in a slightly different way to each other bank and the processes are not uniform. In each instance the Administrator must provide evidence of their identity and of their authority to act.

At the time of appointment it is usual for the Administrator to cancel any subsisting third party account authorisations. This ensures that only those parties who have been duly authorised by the Administrator can access the Represented Person's funds. The Administrator will also identify any direct debit and direct credit arrangements to ensure these are appropriate and to determine if they should be on-going.

The advent of online banking has made management of bank accounts easier. Administrators can achieve higher levels of transparency with family members with online banking access as the Administrator may elect to invite authorised persons (such as other family members) to have read-only access of accounts. This will enable those persons to monitor the status of account.

Wherever possible and appropriate, Burke & Associates Lawyers promote and provide transparency. This can help allay concern about the administration and provides an additional measure of protection for the Represented Person.

In the financial climate following the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry it is becoming increasingly difficult to deal with banks as their regulations for third parties transacting on accounts tighten. An innovative Administrator will seek the most efficient banking arrangements which usually involve consolidating the Represented Person's funds into fewer accounts and reducing the need for the Administrator to attend a bank in person.

B.2 Budget

VCAT generally orders the Administrator to prepare and submit a Financial Statement and Plan detailing the assets, undertakings and the income and the expenditure of the Represented Person within weeks of being appointed. (see Financial Statement and Plan).

Coinciding with this collation of information is the necessity to prepare a budget for the Represented Person. The reality of financial planning for the elderly is the degree of uncertainty given life expectancy is uncertain.

Changing circumstances also cause difficulties for budget matters. It is possible and in fact common that during the incumbency of the Administrator the Represented Person may transition from supported in-home residence to semi-independence in a supported accommodation environment and, ultimately, to a nursing home. Each has a different cost structure and different budgetary considerations.

The net consequence is that the Administrator must budget for some degree of uncertainty and change at little notice (or even at no notice) and must be sure to establish a substantial contingency fund.

Invariably the Administrator will take advice from an independent financial planner. That person will bring to the exercise appropriate expertise and access to actuarial advice about life expectancy and related issues. They will make a recommendation taking into account the various contingencies and factors affecting the Represented Person.

C

C.1 Capacity

Probably the most vexed issue in this area of law is that of capacity.

The concept is simple. A person either has legal capacity or they do not. However the reality is much different.

A person may have legal capacity in the morning after a good night's rest but may not have legal capacity in the afternoon as the day continues. A person may not have capacity to enter into a contract or agreement pertaining to their finances but may retain capacity to make decisions regarding their person.

Further while a Represented Person does not have capacity to manage their finances it is possible that they may have testamentary capacity and can validly execute a Will. This is the subject of much legal commentary and great care should be taken in such circumstances. It may be necessary to obtain expert evidence about testamentary capacity.

Because of the complexity in this area and the subtlety in the ephemeral nature of capacity it is often prudent for expert evidence to be obtained from a Neuropsychologist (see Neuropsychologist).

As noted above, a precondition for VCAT to appoint an Administrator is that VCAT must be satisfied that the Proposed Represented Person is under a disability, and because of that disability is not able to make reasonable judgments in relation to their estate.

In the aptly titled case of *XYZ versus State Trustees Limited and Another* [2006] VSC 444 the Supreme Court had cause to review certain proceedings at VCAT concerning a man who had suffered a stroke some years earlier. There was no dispute that at the time of the Administration Order the man could not manage his financial and legal affairs and that he needed an Administrator. However, in the intervening period his condition had improved to the point where he was now strongly opposed to the involvement of an Administrator. Essentially, the Supreme Court remitted the matter to VCAT with guidelines for VCAT to consider.

Justice Cavanough said that proceedings under the Act can give rise to "matters of difficult and sensitive judgment" but went on to caution against paternalism or protection at the expense of individual autonomy. His Honour referred in particular to Section 4(2) of the Act which reads as follows:

S42 Special Medical Procedure without consent of Tribunal an Offence

(2) It is the intention of Parliament that the provisions of this Act be interpreted and that every function, power, authority, discretion, jurisdiction and duty conferred or imposed by this Act is to be exercised or performed 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.*

When the case was remitted to VCAT the Tribunal noted that when the statutory definition of "disability" is considered the disability can be mild, moderate or severe. Likewise, the impact of disability on the cognition or decision making of a person can be mild, moderate or severe and the disability (and with it capacity) can fluctuate over time. That this is so is expressly contemplated by Section 49(2)(a) of the Act which reads as follows:

S49 Exercise of Power by Administrator

(2) Without limiting subsection (1) an administrator acts in the best interests of the represented person if the administrator acts as far as possible:

(a) in such a way as to encourage and assist the represented person to become capable of administering the estate; and

It is clear from the XYZ decision referred to above that Section 46 of the Act does not require total and complete incapacity or something similar to be established.

The Law Institute of Victoria publish and maintain a helpful guide as to capacity. The most current version as at the time of writing can be found at: https://www.liv.asn.au/PDF/For-Lawyers/Submissions-and-LIV-Projects/2054_LPP_CapacityGuidelines_FINAL_WEB.aspx

C.2 Carers

Whilst most nursing homes provide a high level of care for their residents, few people are in a rush to go to a nursing home. Given the choice, those who are physically capable and can afford it much prefer to maintain their independence and autonomy. As such, it is often appropriate for an Administrator to consider the affordability of in-home care arrangements for the Represented Person.

It is not the role of the Administrator to make lifestyle decisions for the Represented Person. However if the Represented Person's lifestyle cannot be maintained some intervention would be required by the Administrator (for example if the Represented Person can no longer afford in-home care).

At the time of publishing, the cost of in-home care for 24 hours a day and seven days a week can be in excess of $10,000.00 per week. Such expenditure can rapidly

deplete the financial resources of the Represented Person. Further, this may not include cleaning, shopping, cooking or nursing care.

A veteran or the spouse of a deceased veteran may be entitled to subsidised care through the Department of Veteran's Affairs.

Municipal Councils may provide some care services but such services are limited in scope.

An Administrator will liaise with a team of people to explore the variable services, form a view as to what is affordable and then negotiate a package of arrangements that is affordable, sustainable and supportive of independence. That team might comprise representatives from the in-home care service provider, the Guardian, the Represented Person's doctor, family members etc.

Sadly, for many Represented Persons, independent living is just not a viable option.

C.3 Case Management

Many Courts and Tribunals in Victoria utilise a case management system to manage the progression of matters. Typically, this will involve the allocation of matters into various case types, categorising them as simple or complex etc. Cases may be allocated to a specific judicial officer who will then have responsibility to supervise the conduct of the matter during all its stages.

At the time of publishing, VCAT has not adopted such a case management system.

The progress of each individual matter varies depending on the relevant circumstances. However, the usual process for having an Administrator appointed is as follows:

- The Applicant completes the "Application for Order – Appointment of and Administrator and/or Guardian" form (available from VCAT's website);
- The Applicant must provide VCAT with a copy of the Proposed Represented Person's medical reports. VCAT require the medical report to assist them in establishing the relevant disability and inability of the Proposed Represented Person to make reasoned decisions.

  If there are difficulties obtaining the requisite medical evidence, VCAT may order a medical assessment.
- VCAT will set down a hearing to consider the application. Commonly the first hearing will be an opportunity for the parties to receive directions from the VCAT Member which serve to provide the parties with guidance as to the additional information VCAT require to adequately hear this matter.
- Depending on the circumstances, there may be several further hearings before an administrator is appointed. This will be determined by a variety of factors, such as:
  - Whether there are current Enduring Powers of Attorney;
  - Whether the application is contested; and

- Who the proposed Administrator and/or Guardian is.

Family and interested persons may find it difficult to go through this new and confusing system, particularly if there are several hearings before an Administration Order is made. However, it is important to remember that at the crux of the matter is a vulnerable person who VCAT is required to protect and due process must be observed to ensure a suitable outcome.

C.4 Cases

Decisions made in the Guardianship List at VCAT are sometimes reported and available for public review. In each instance VCAT takes care to anonymize the name of the Represented Person so as to protect privacy.

The cases can be found online on the website www.austlii.edu.au.

To find the Guardianship Reports follow these steps on the homepage:

- Select Victoria;
- Select Victorian Case Law;
- Select Victorian Civil and Administrative Tribunal (1998-to date);
- On the right-hand side, select Guardianship List.

The cases published by VCAT can give valuable insight as to the various issues of contention that arise during administrations.

C.5 Cash

Dealing with cash presents a unique set of problems.

If the Represented Person is still living independently then that person will need access to cash to meet day-to-day living expenses. It is not cost efficient or practical for the Administrator to deal with minor day-to-day transactions such as the purchase of groceries and clothing.

Accordingly, a practical regime invariably allows some limited access by the Represented Person to cash to meet reasonable day-to-day living expenses.

Usually, this is done by establishing a separate account for the Represented Person with an associated direct debit card. This enables the Represented Person to pay for minor expenses. The account is then replenished by the Administrator from the Represented Person's funds on a weekly or fortnightly basis.

The amount of money available to the Represented Person will be considered carefully taking into account their personal circumstances.

With online banking it is possible for the Administrator to get some sense as to how the Represented Person is applying the available funds. It is not perfect, but it is practical.

C.6 Companies

Increasingly Administrators are being appointed into situations where the Represented Person holds a controlling position in one or more companies. The companies may operate in their own right or as trustees for discretionary family trusts and/or superannuation fund.

As a matter of law, the Represented Person as director cannot delegate his or her power as a director to another person. As a consequence, an Attorney or Administrator cannot "step into the shoes" of the Represented Person and act as a director of the companies on the Represented Person's behalf.

Under the *Corporations Act 2001* it is possible for a director to appoint an alternate director. However, this is rarely done as the process is somewhat convoluted.

If the Represented Person does hold a controlling position in a company, that person's estate will typically include shares in the relevant company. When appointed the Administrator has control of the entirety of the Represented Person's estate, including the shares. Pursuant to the *Corporations Act 2001* the Administrator can effectively exercise the role of a controlling shareholder to remove the Represented Person as a director of the company and to appoint another person as a director. This will likely be the Administrator who can then control the Represented Person's personal and corporate estate.

This is a benefit for the Represented Person but creates risk for the Administrator and exposes the Administrator to harm. It is often difficult to know precisely what activities and undertakings the companies have been previously involved in. Regardless the Administrator is now the responsible person for that activity. Further, nowadays directors of companies can be exposed to personal liability in multiple circumstances, but most commonly with respect to taxation and superannuation obligations and trading whilst insolvent.

So, before taking on a role as a director of the Represented Person's companies a prudent Administrator will conduct a due diligence investigation about the affairs of the company, get access to financial and banking records, consult with the accountant of the companies and arrange through the company for directors and officers' insurance.

At Burke & Associates Lawyers we have an extensive history in commercial litigation and close networks with a number of insolvency practitioners. In many respects, the task of an Administrator in such circumstances is directly analogous to that of an insolvency practitioner appointed as a liquidator, administrator or receiver of a distressed company. The significant difference is that insolvency practitioners have the benefit of extensive and detailed provisions and protections under the *Corporation Act 2001* whereas, for practical purposes, the Act is entirely silent in relation to companies.

C.7 Consultation

The Act expressly contemplates that the Administrator will consult with the Represented Person. Section 49 of the Act reads as follows:

S49 Exercise of power by Administrator

(1) An Administrator must act in the best interests of the represented person.

(2) Without limiting subsection (1) an Administrator acts in the best interests of the represented person if the Administrator acts as far as possible—

(a) in such a way as to encourage and assist the represented person to become capable of administering the estate; and

(b) in consultation with the represented person, taking into account as far as possible the wishes of the represented person.

Consultation has little or no benefit if the Represented Person is so disabled as to be unable to communicate or to maintain a conversation, as is sadly often the case. However, there are other situations where robust consultation is possible.

Sometimes, VCAT finds it necessary to appoint an Administrator for a Represented Person in circumstances where the cognitive impairment is relatively mild but the financial circumstances of the Represented Person are so complex that the mild cognitive impairment represents a significant risk. In such circumstances it is often possible, prudent and indeed helpful for the Administrator to have regular consultation with the Represented Person.

At Burke & Associates Lawyers, we have had a number of situations where we have been greatly assisted in the administration task by wise advice from the Represented Person. In one instance it was possible for us to establish a quasi-board-type structure so that on a regular basis we brought together the Represented Person with a range of trusted advisors. This showed respect for the Represented Person and involving that person in detailed discussions about complex matters about which the Represented Person was passionate and had a great deal of historical knowledge.

This highlights how capacity can be ephemeral, context specific and fluctuating. In other words, we all have our good days and not so good days.

D

D.1 Death

The death of the Represented Person brings the administration of his or her estate to an end.

Specifically, Section 48(4) of the Act reads as follows:

> *S48 Power of Administrator*
>
> *(4) Upon the death of the Represented Person any order appointing an Administrator of that person's estate under this Act lapses in the law relating to the administration of a deceased person's estate applies accordingly.*

At that juncture, assuming there is a Will, responsibility of the Represented Person's estate passes to the executor or executors appointed in the Will of the Represented Person.

If there is no Will then some person having an interest in the estate can apply to the Supreme Court for a grant of letters of administration of the intestate estate of the Represented Person.

Just as there may be family difficulties that give rise to the appointment of an Administrator, there can be great animosity between family that erupts on the death of the Represented Person and results in delay and difficulty in administering the Represented Person's estate.

At Burke & Associate Lawyers we have dealt with a number of situations where a Represented Person has died and it has taken as long as a year for someone else to have authority to deal with the deceased estate. In the meantime, the former Administrator has no authority but is often left having to deal with banks, financial institutions, tenants and a range of other parties and related issues.

Unfortunately, the Act says little about the consequences of the death of a Represented Person. Specifically, the Act does not establish orderly protocols for approval of final accounts by an Administrator and does not establish a satisfactory interregnum for the orderly handling of accounts and financial transactions during the period leading up to the appointment of executors by a Grant of Probate of the Will or a Grant of Letters of Administration if there is no Will.

D.2 Disputes

Sadly, Represented Persons are not immune from disputes. Family members, advisors and interested parties may agitate disputes about a range of issues, including property dealings, relationships and financial transactions.

A consequence of the finding by VCAT that a Represented Person lacks capacity is that the Represented Person cannot conduct litigation in the Courts or Tribunals other than through his or her Administrator or by a court appointed litigation guardian. In most Courts and Tribunals there are protocols that require that the Administrator first obtain leave to commence or to continue a Court proceeding in the name of the person who is known to be suffering a disability. Likewise, most Courts and Tribunals exercise some supervisory jurisdiction in order to be satisfied that any proposed settlement of a dispute that involves a person suffering a disability is appropriate, in all the circumstances.

The conduct by an Administrator of a Court proceeding on behalf of a person suffering a disability has other challenges. To the extent that there is a requirement for evidence from the Represented Person the very fact of the incapacity may render the Represented Person incompetent to give evidence in his or her own interest.

An Administrator who is a legal practitioner has separate obligations as an officer of the Court. These include the obligation not to pursue a claim unless there is a substantive basis for it.

The net consequence is that there are some occasions when it would be simply wrong for an Administrator to commence or to continue a Court or Tribunal proceeding on behalf of the Represented Person, even though on a superficial analysis it might appear that the Represented Person has a legitimate grievance.

The powers of an Administrator when conducting investigation into potential disputes can be quite broad. It may be that an initial review is conducted but, for some reason, the investigation is not pursued in formal litigation. In other instances, litigation can commence with the appropriate remedy being sought.

The paramount consideration is always the best interests of the Represented Person.

D.3 Divorce

The role of an Administrator appointed by VCAT is to deal with financial matters. Some might argue that divorce and its consequences are highly relevant to financial matters.

It would be a very rare circumstance in which it could be said that a Represented Person could or should seek to have a marriage dissolved. However, it is entirely plausible that a marriage might break down as a consequence of the disability of the Represented Person with the effect that the spouse of the Represented Person makes application for a divorce. In that circumstance the Represented Person would need to be represented.

It is not the role of this publication to provide a detailed analysis of issues under the Family Law Act. However, it is pertinent to note that in the high profile case of Stanford v Stanford [2012] HCA 52 the High Court of Australia had occasion to address property settlement in circumstances that may be pertinent for Represented Persons generally.

Stanford was a case in which the marriage was said (by the husband) to be "intact" in the sense that the separation was an involuntary one and brought about by reason of the fact that the wife had suffered a stroke, followed by dementia, causing her to require residential high level care outside the home. The husband still emotionally and practically cared for the wife in many ways. Despite that, the wife's daughter from a previous marriage brought property settlement proceedings against the husband as the wife's case guardian, the wife no longer being capable of managing her own affairs.

The husband raised an argument that the wife's case must fail as there was a requirement that the marital relationship break down in some way before the Court would have jurisdiction to deal with a property settlement proceeding under the Family Law Act.

The High Court rejected this argument. In doing do, the Court held:

> *First, the husband submitted that s 79, when read with s 43(1), did not permit the making of a property settlement order when, as here, the marriage between the parties was "intact". Section 43(1) states the principles that a court exercising jurisdiction under the Act must apply in exercising that jurisdiction. Those principles include "the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life". This provision was said to reflect a long-standing assumption by the Parliament that a property settlement order should not be made in subsisting, or "intact", marriages. It followed, so the husband submitted, that s 79 should not be read "to extend beyond alteration of the interest in the property of one of the parties to the marriage in the context of the breakdown of the relationship".*
>
> *This submission must be rejected. Section 43(1) identifies a number of principles that a court shall "have regard to". The statement of one among several guiding principles for the exercise of jurisdiction is not apt to limit the conferral of jurisdiction in the way that the husband urged. Particularly is that so when the power in s 79 is understood in the way explained later in these reasons. So understood, s 79 has an operation that is entirely consistent with s 43(1).*

The High Court went on to say, in connection with the notion of an "intact" marriage:

> *The expressions "intact marriage" and "breakdown" of the relationship or marriage were evidently used in the husband's submissions as expressions of opposing meaning. But beyond that opposition, the content of neither was spelled out. In particular, the marriage in this case was described as "intact" even though the husband and wife lived apart with no prospect of resuming cohabitation and even though the wife's dementia would inevitably affect the*

mutuality of the marital bonds between them. The expression "intact marriage" appeared to be used in a way that gave definitive significance to the fact that the separation of the parties was not voluntary, but the legal significance of this fact for the husband's proposition about lack of power was not identified. Nor was its legal significance explored for the husband's second argument about the exercise of power by the magistrate and by the Full Court (if, contrary to the husband's principal argument, they had power to make a property settlement order in this case). Yet it is in this second context that the involuntary nature of their separation is significant. To explain why that is so, it is necessary to examine the operation of s 79.

There are time limits under the *Family Law Act* for dealing with issues of property division and spousal maintenance. Even if the marriage remains intact there may also be issues arising under the *Family Law Act* regarding spousal maintenance.

E

E.1 Ending Administration

The appointment by VCAT of an Administrator for a Represented Person may not be forever. An Administration Order will come to an when one of the following occurs:

- When the Represented Person recovers capacity, perhaps following recuperation from a disabling illness or injury, and makes application for the Administration Order to be revoked; or
- On the death of the Represented Person.

Section 58D of the Act deals with the consequences of a person ceasing to be a Represented Person. It reads as follows:

> *S58D Action Upon a Person Ceasing to be a Represented Person*
>
> *(1) If an Administrator has received notice from the Tribunal that a represented person has ceased to be a represented person or has died, the Administrator must—*
>
> *(a) pay or cause to be paid to that person or to that person's personal representative (as the case requires) all money standing to his or her credit with the Administrator; and*
>
> *(b) Deliver to that person or to that person's personal representative (as the case requires) all property forming part of his or her estate and any documents relating to the estate.*
>
> *(2) Any payment made under subsection (1) is subject to the satisfaction of any amount due to the Administrator and all costs, expenses and liabilities incurred by the Administrator in respect of the administration of that person's estate.*
>
> *(3) The receipt of a person who has ceased to be a represented person or of that person's personal representative is an absolute discharge to an Administrator despite any informality in the discharge or certification.*

One of the consequences of a Represented Person dying is that VCAT ceases to have jurisdiction (see Death).

In circumstances where a Represented Person as regained capacity it may be appropriate for the Administration Order to be revoked. This goes back to the basic principal that only persons under a disability are to be under an Administration Order. Where a person has a current Administration Order, they can make an application to VCAT seeking the Administration Order be overturned. As with

making application to appoint an administrator in the first place, medical evidence is crucial to the removal of an Administration Order that is in place.

E.2 Estate

In the Act the expression "Estate" is not defined. However, the term is used throughout the Act. For example, Section 49 of the Act requires the Administrator to act "in such a way as to encourage and assist the Represented Person to become capable of administrating the Estate".

Following appointment one of the first tasks for the Administrator is to establish precisely what the Estate comprises. The task is similar in concept to that of a trustee in bankruptcy, a liquidator of a company or a receiver of a partnership business. It is a process of identifying just what the Represented Person owns and owes.

Typically the Administrator begins with virtually no background information at all. It is rare for the Administrator to have been present at any hearing leading up to the appointment. VCAT will rarely be able to provide a comprehensive briefing. VCAT may not provide a copy of all documents filed in the course of the application.

So, in broad outline, the first challenge for the Administrator is to scope the extent of the Estate and to make enquiries such as the following:

1. Obtain identification documents for the Represented Person and consider the possibility of alternate rendering of names. It is common for older people to have been imprecise in dealings with the Land Titles Office, banks and so on. This is particularly so in the case of migrants who have adopted anglicized versions of their correct legal names;
2. Request information and documentation from relatives, friends and known business and professional associates;
3. Gradually compile a compendium of assets and liabilities in the name of the Represented Person or their associated entities;
4. Carry out index searches at the Land Titles Office to identify any property holdings and seek to locate titles;
5. In the case of property held with others, identify and make contact with co-owners (see Jointly Owned Property);
6. If there is reason to believe that the Represented Person may be involved in one or more companies, conduct a series of searches to identify directorships, offices held and shareholdings and then search the relevant companies through ASIC;
7. If documents are held in safe custody, arrange to inspect them and obtain copies; and
8. Obtain copies of recent tax returns which should reveal the source of income and thus point in the direction of other enquiries regarding banks, trusts, shareholdings and so on.

The process is iterative. Little by little the fog clears and the true extent of the Estate is revealed.

Sometimes it can take months to get a complete picture of the Estate. At Burke & Associates Lawyers we have had a number of instances where long after an appointment a hitherto undiscovered asset or income source comes to light, such as a foreign pension, trust or estate entitlement or a long dormant bank account balance.

F

F.1 Family

Sadly, the need for the appointment of an independent Administrator often arises as a consequence of a family not being able to reach agreement about the needs of the Proposed Represented Person. Increasingly there are media reports of family members trying to accelerate access to their expected ultimate inheritance from the Proposed Represented Person.

Once appointed, it is quite common for the Administrator to be importuned with requests for loans to family members or for gifts to be made of various items or for arguments to arise about household contents when a Represented Person transitions to a nursing home.

Sometimes family members will be legally represented and the hostility can be intense.

However, the Administrator is statute bound to act in the best interest of the Represented Person and to seek to preserve his or her Estate. If there is to be a loan, it should be on commercial terms with adequate security and capable of being enforced. The Act deals expressly with the issue of gifts (see Gifts).

F.2 Family Agreement

Sometimes the Represented Person's affairs are intertwined with that of a partner (whether a marriage partner, de facto partner or a business partner). This is frequently the case if the Represented Person is married or in business with a family member. The partner who is not a person suffering a disability is not subject to the Administration Order and does not want to be restricted by the intervention of the Administrator.

Sometimes special arrangements need to be made about the management of the Represented Person's affairs while not interfering with the dignity and rights of the other person.

Such arrangements require the co-operation and support of the relevant partner and the Administration to ensure they work together to avoid dispute and to facilitate future dealings.

A Family Agreement might assist in:

- minimising the risk of litigation in multiple jurisdictions (eg family law, VCAT, commercial courts etc);

- establishing a sound financial basis for the Represented Person (represented by the Administrator) and the partner to plan the future;
- reducing complexity in the administration of the Represented Person's affairs;
- establishing a sustainable and respectful regime that respects and supports the relationship of the Represented Person with the partner and others;
- averting disputes that may arise following the passing of the Represented Person.

See Jointly Owned Property.

F.3 Fees

When appointing a professional Administrator the matter of fees needs to be considered. VCAT typically sets out the basis of fees in the Administration Order which provides certainty for the Administrator, the Represented Person and interested persons.

The most common approach by VCAT is to order that the fees of the Administrator be calculated by reference to a scale of costs published by the Supreme Court of Victoria known as the Practitioner Remuneration Order and that those fees be independently assessed by a cost consultant.

The Practitioner Remuneration Order is a statutory scale of costs that relates to non-contentious legal work. It is a regulation made under the *Legal Profession Uniform Law Application Act* 2014 following deliberations of the Legal Costs Committee established under that Act. This committee comprises various Supreme Court officials, a number of senior barristers and senior solicitors.

Cost consultants are lawyers whose specialist area of practice is in the application of such statutory scales of costs to the work undertaken on a file.

The Cost consultant will review the file and advise the appropriate fee based on the proper application of the Practitioners Remuneration Order. An invoice is then prepared and submitted to VCAT for approval before it is paid from the Estate of the Represented Person.

Essentially, this fee structure is intended to ensure that there is independent scrutiny of the fees paid to an independent Administrator.

Further, VCAT usually orders a billing cycle. That cycle might be quarterly, biannually or annually, depending upon the complexity of the administration.

So, in effect, the fees payable from the Estate of the Represented Person to an independent Administrator are subject to independent review first by an independent cost consultant and then by a Member of VCAT. Beyond that oversight, an Administrator will also be typically subject to overview by means of the annual audit role of State Trustees Limited, the law firm's own external auditor and also auditors and investigators of the Legal Services Commission.

Our experience at Burke & Associates Lawyers is that in the early stages of an Administration the process can be quite time consuming and fees reflect that. However, once data is gathered and orderly systems implemented the

administration should become much more streamlined and less time consuming with the consequence that the legal fees of the administration reduce. In some situations, it may be possible for some part of the administration fees to be claimed by the Represented Person as a deduction against income, to the extent the work of the Administrator deals with gaining assessable income for taxation purposes.

There are additional fees payable in the course of an administration. These fees include:

- A VCAT filing fee;
- Annual ordered fee payable to State Trustees Limited; and
- Filing fee on Account by Administrator.

Here is the link to the VCAT website where you can find information about the fees www.vcat.vic.gov.au/resources/guardianship-and-administration-fees

Anyone can apply for fee relief if paying the VCAT fee would cause financial hardship. There is an application for fee relief on the VCAT website.

F.4 Financial Statement and Plan

The Administrator is required to lodge a Financial Statement and Plan for approval by VCAT not more than six weeks after the date of the appointment. Known as an 'FSP', this document provides to VCAT a snapshot of the Represented Person's assets and liabilities and their anticipated income and expenditure. It also asks a series of questions as to the Administrator's intentions to manage the Represented Person's financial matters.

It is generally a lengthy and time-consuming process to collate all of the required information to complete an FSP. Assistance from family and professional advisors is often required. Burke & Associates Lawyers routinely liaise with the family and advisors to complete the FSP and form an appropriate plan for ongoing management of the Represented Person's affairs. It is not unusual for the information required to complete the FSP to be unavailable, outdated or hidden in a confusing paper-based filing system.

Given the short amount of time available to complete the FSP, it is common that the first ABA (usually submitted many months after the FSP) will be a more accurate representation of the Represented Person's Estate (see Account by Administrator).

Once complete, the FSP is submitted to VCAT for approval by a Member. Burke & Associates Lawyers have consistently received approval for the FSPs submitted to VCAT demonstrating our commitment to ensure we have considered the Represented Person's financial needs appropriately and seeking specialised advice when required. Our general practice is to provide VCAT with an additional letter of information along with the FSP to ensure that the Member reviewing the FSP has a clear and accurate picture of the financial position and future needs of the Represented Person. If there are additional needs, such as specialised financial advice, we refer to this.

More specifically, the Powers of Investment of an Administrator are set out at Section 51 of the Act which reads as follows:

S51 Powers of Investment

(1) Except as provided in section 53 or any order of the Tribunal, an administrator other than State Trustees in respect of any part of the estate of the represented person of which the administrator is the administrator—

a. may for such period as the administrator thinks fit allow any part of the estate to remain invested in the manner in which it has been invested by the represented person; and

b. may in the case of money deposited in an authorised deposit-taking institution within the meaning of the Banking Act 1959 of the Commonwealth re-deposit it after it becomes payable; and

c. has and may exercise in relation to any part of the estate the same powers as the administrator would have if the administrator were a trustee of that part of the estate under the Trustee Act 1958 .

G

G.1 Gifts

Administrators are permitted to make gifts on behalf of the Represented Person. At Burke & Associates Lawyers we work with the Represented Person to ensure that any gifts are made appropriately and in accordance with their wishes. These gifts are generally made in celebration of special occasions such as birthdays or weddings or to celebrate religious holidays.

In making gifts, the Administrator considers the reasonableness of gifting in light of the Represented Person's financial position and the past practice of gift giving. Section 50A of the Act deals with gifts as follows:

S50A Power to make gifts

(1) An administrator may make a gift of the represented person's property only if—

a. the gift's value is not more than what is reasonable in all the circumstances and, in particular, the represented person's financial circumstances; and

b. the gift is—

(i) to a relative or close friend of the represented person and is of a seasonal nature or for a special event (including, for example, a birth or marriage); or

(ii) a type of donation that the represented person made when he or she had the capacity to do so or might reasonably be expected to make.

(2) The administrator or a charity with which the administrator has a connection is not precluded from receiving such a gift.

(3) The administrator must notify (in writing) the Tribunal if the value of the gift, or total value of the gifts, of the represented person's property to the administrator, or a charity with which the administrator has a connection, is $100 or more.

See Philanthropy for further information on charitable donations.

G.2 Guardianship

While often appointed concurrently, Administrators and Guardians have quite distinct responsibilities to a Represented Person.

- An Administrator is appointed to manage the financial and legal affairs of the Represented Person.
- A Guardian is appointed to make personal and lifestyle decisions, which include, but of course are not limited to, living arrangements, work arrangements, medical treatment and access to people and services.

When fulfilling the role of Guardian of a Represented Person, the Guardian must act as the Represented Person's advocate and make decisions that would be in the Represented Person's best interests. The Guardian should converse with the Represented Person to discuss what their personal wishes are and should as far as possible encourage the Represented Person to make decisions and act in accordance with their personal feelings. However, ultimately, the Guardian retains the final decision making ability.

If appropriate, VCAT will appoint a trusted friend or family member as Guardian. Such people are generally familiar with the wishes of the Represented Person.

However, for various reasons, there may not be a personal friend or family member suitable to fulfil this role. In these situations, the Office of the Public Advocate may be appointed as Guardian. A case manager is then assigned to the Represented Person and the case manager will continue to make decisions for the Represented Person for as long as necessary.

The extent of a Guardian's role varies depending on the needs of the Represented Person. Guardians can be appointed to make one off decisions, such as where a Represented Person is to live, or they can be appointed to manage more regular requirements of a Represented Person.

Regardless of the reason for appointment of a Guardian or the extent of the Guardian's responsibilities it is very important that the Administrator and the Guardian work closely together during the course of the Administration and Guardianship to ensure that the personal and financial needs of the Represented Person are met.

At Burke & Associates Lawyers we work with family members who have been appointed as Guardian for Represented Persons as well as Guardians who work for the Office of the Public Advocate. We work to establish good levels of communication between our office and the Guardian.

H

H.1 Handover

Handover is an alternative to "Ending Administration". It refers to the process wherein the current Administrator hands the administration of the Represented Person to another person (as approved by VCAT).

There are various reasons an administration may be handed over.

At Burke & Associates Lawyers our aim is to quickly and efficiently streamline and modernise the Represented Person's financial affairs. After streamlining the Estate, it may be appropriate for the family to take over as Administrators. This can reduce the ongoing costs of an independent Administrator and may be in the best interests of the Represented Person.

In other circumstances, there may have been a breakdown of communication between the Represented Person's family and the Administrator that begins to impact on the best interests of the Represented Person. While this is difficult for those involved it is usually in the best interests of the Represented Person to have a new Administrator appointed and a handover arranged.

H.2 Hearings at VCAT

It is little surprise that the processes at VCAT are somewhat different to the processes in other Courts and Tribunals. It has to be that way when dealing with the interests of persons suffering a disability.

To begin with, VCAT adopts a less formal approach. There are no application or hearing fees for Guardianship and Administration cases. Each hearing is conducted by a Member or Senior Member who is a trained lawyer and experienced in the conduct of such cases.

Usually, all the parties present are invited to sit at the bar table. VCAT encourages the Represented Person to attend on appropriate occasions. On occasions the Member will meet privately with the Represented Person if it is clear that, notwithstanding the disability, the Represented Person is still capable of expressing clear views about relevant issues.

To assist in the orderly conduct of hearings, VCAT has published a Practice Note. The link is set out below. For those contemplating an application in the Guardianship List at VCAT, this is a useful starting point.

The Practice Note can be found on VCAT's website: https://www.vcat.vic.gov.au/

https://www.vcat.vic.gov.au/resources/practice-note-png1-guardianship-list-general-procedures

H.3 Housing

There are many housing options available to a Represented Person. They include:

- Independent living in the Represented Person's home. On that subject, see Carers which talks about cost;
- Independent living in a retirement village. See Retirement Villages;
- Independent living in rented premises;
- Independent living in a supported residence facility; and
- Nursing home accommodation. See Nursing Home.

I

I.1 Identity

It is hardly surprising that the majority of disabled people who are subject to a Administration Order are elderly. Many have also migrated to Victoria, Australia, which is one of the most multicultural places on earth.

It is likewise unsurprising that many people who are subject to an Administration Order have surrendered their drivers' licenses and allowed their passports to expire.

A lack of photo identification makes for particular difficulties on the part of an Administrator when establishing new banking and investment arrangements or, on occasions, when dealing with Centrelink.

In an environment where banks and financial institutions are required by legislation to be vigilant about identity fraud, it can be extremely difficult for an Administrator to gather together sufficient identification documentation for the Represented Person as will satisfy the banks and financial institutions.

At Burke & Associates Lawyers we have several situations where a Represented Person simply does not have current photo identification documentation. This may cause difficulties in managing their financial affairs and, in some instances, may limit investment options.

I.2 Indemnity

It is long settled in law that an executor of a deceased estate is entitled to be indemnified out of the assets of the estate for any costs or expenses incurred in the performance of the role as executor, provided that the executor acts reasonably and for a proper purpose. The same principle is usually applied in relation to trusts.

The Act is silent on the issue of an Administrator being indemnified out of the estate of a Represented Person. Section 47A of the Act deals only with the issue of remuneration of professional administrators but does not go so far as to provide general indemnity.

That Section reads as follows:

> *S47A Remuneration of professional administrator*
>
> *(1) An administrator other than an administrator who carries on a business of, or including, the administration of estates is not entitled to receive any fee, remuneration or other reward from the estate of a represented*

person for acting as administrator unless the Tribunal otherwise specifies in the administration order.

(2) The remuneration to which an administrator who carries on a business of, or including, the administration of estates is entitled is to be approved by the Tribunal.

(3) Despite subsection (2), the remuneration approved by the Tribunal in respect of a licensed trustee company must not exceed the limit on fees that may be charged by a licensed trustee company under Chapter 5D of the Corporations Act.

(4) For the purposes of this section— "licensed trustee company" has the same meaning as in section 601RAA of the Corporations Act.

It is usual practice when a professional Administrator consents to being appointed as Administrator that this is done on the basis that VCAT make orders as to remuneration of the Administrator.

I.3 Insurance

We sometimes find that the Represented Person has under-insured their property or does not have any insurance cover at all. To protect themselves and the Represented Person, one of the early tasks undertaken by the Administrator is to establish appropriate insurance.

A prudent Administrator will also set in place the relevant insurance to protect against any claims arising from negligence by the Administrator. Lawyer Administrators must have professional indemnity insurance in order to carry on practice on as a legal practitioner.

However that insurance does not extend to provide cover for a lawyer Administrator who takes on separate responsibilities as a company director or an employer. Accordingly, it may be necessary for a lawyer Administrator to arrange supplementary insurance.

See Companies.

I.4 Investigations

Commonly VCAT will appoint an Administrator to deal generally with the ongoing financial affairs of the Represented Person. However, in circumstances where there have been complaints about inappropriate conduct in the past by family members, an attorney or a previous Administrator, VCAT sometimes appoints an Administrator for the sole purpose of investigating and reporting on that past behaviour.

In such circumstances the Administrator performs a task somewhat akin to a forensic accountant. Bank records are investigated and other financial documents scrutinised. Calculations must be done as to reasonable and other expenses in order to form a view as to the extent of any inappropriate spending. The

Administrator then reports back to VCAT and seeks guidance as to further action that might be taken.

The investigating Administrator may commission the advice of Counsel as to whether the past conduct might have given a cause of action in law that might be pursued for the benefit of the Represented Person and the cost-benefit considerations of any such court processes.

At Burke & Associates Lawyers we have had several situations where as a VCAT appointed administrator we have been required to investigate past financial dealings by an attorney or to otherwise enquire about transactions which occurred prior to the appointment that might have been prejudicial to the interests of the Represented Person.

Forming a view about the merits of pursuing past misconduct is not a straight forward task. There are particular challenges in pursuing any litigation in the name of the Represented Person. The very finding by VCAT of incapacity provides a significant procedural impediment to the pursuit of such claims.

I.5 Investments

The range of possible investments available to a Represented Person is wide. However, a prudent Administrator is not free to take risks and to engage in speculative investment in a way that the Represented Person may have done in the past.

Section 51 of the Act provides some protection for the Administrator in maintaining the same investments that were established by the Represented Person. That Section reads as follows:

> *S51 Powers of investment*
>
> *(1) Except as provided in section 53 or any order of the Tribunal, an administrator other than State Trustees in respect of any part of the estate of the represented person of which the administrator is the administrator—*
>
> *a) may for such period as the administrator thinks fit allow any part of the estate to remain invested in the manner in which it has been invested by the represented person; and*
>
> *b) may in the case of money deposited in an authorised deposit-taking institution within the meaning of the* Banking Act *1959 of the Commonwealth re-deposit it after it becomes payable; and*
>
> *c) has and may exercise in relation to any part of the estate the same powers as the administrator would have if the administrator were a trustee of that part of the estate under the* Trustee Act *1958 .*

That said, the obligation of an Administrator to always act in the best interest of the Represented Person means that an investment strategy must incline towards the cautious and prudential. So in effect, the Administrator should incline in the direction of the standard required of a trustee under the Trustee Act. Essentially

that requires the Administrator to invest money on behalf of the Represented Person and in so doing exercise the care, diligence and skill that a prudent person engaged in the profession, business or employment will exercise in managing the affairs of other persons.

There are similar constraints on the investment of funds held by Self-Managed Superannuation Funds by virtue of the governing legislation.

The net consequence is that it is usually prudent for an Administrator who has available substantial funds of a Represented Person for investment to commission advice from an independent financial planner. That provides an additional degree of protection to the Represented Person because financial planners are regulated and required to be insured.

On some occasions, however, a lack of photographic identification may impede investing the funds of a Represented Person in a new way (see Identification).

J

J.1 Joinder of Parties

VCAT adopts a relatively flexible approach to the involvement of third parties in hearings concerning persons with a disability. It appears to operate on the basis that it is best to err on the side of allowing anyone with an interest to attend the hearing.

Therefore it may transpire that numerous family friends, family members, spouses of family and sometimes their children along with lawyers, accountants and care providers are added to a mailing list concerning the Represented Person.

Active steps should be taken to cull the list if all such persons should not be routinely advised of every subsequent hearing.

J.2 Jointly Owned Property

Disability and disease does not discriminate. It afflicts people of all ages and in all circumstances.

So it is only to be expected that there will be occasions when the Represented Person will own property jointly with one or more other person who is not suffering a disability and who is not subject to an Administration Order.

As a matter of law, jointly owned property is different to property owned in common and in defined shares.

At law, when an owner of jointly owned property dies it is as if at the moment of death that person's interest in the jointly owned property has ceased to exist. It passes automatically to the surviving owner/s by operation of what is known as the Law of Survivorship. In other words, it is an automatic process in law.

When an Administrator is appointed to look after the financial affairs of a Represented Person dealing with jointly owned property can be a significant challenge. Until the jointly owned property is disentangled the Administrator cannot be clear as to the extent of the estate to be administered. It often becomes necessary to deal early on with jointly owned property.

The problem is particularly complex when the jointly owned property has been acquired later in life and in circumstances where there is an otherwise intact marriage or relationship. There can be children on both sides from previous relationships and disagreement as to what should happen.

At Burke & Associates Lawyers we have had a number of situations where it was necessary to embark on a legal process to separate jointly owned property in the early stages of an administration. This raises issues under the *Family Law Act* even though the marriage or the relationship may still be intact. It can be highly stressful for the other party in the marriage or the relationship, but it is an often unavoidable consequence of an Administration Order.

The problems become even more challenging when it seems likely that the Represented Person will live for many years, may transition from one form of accommodation to another and when future needs are uncertain. The Represented Person may also have ongoing obligations to provide financial support for a spouse or a former spouse.

J.3 Joint Administrators

On the face of it, having more than one Administrator may seem like overkill. However, in our experience, it is usually in the best interest of a Represented Person for VCAT to appoint more than one person as Administrator for a Represented Person but as joint and several Administrators rather than as just joint Administrators.

In large corporate insolvency undertakings it is commonplace for the Courts to appoint two or more insolvency practitioners as joint and several Liquidators, joint and several Administrators and so on. That is because it allows for a rational allocation of resources and builds in some degree of redundant capacity. When one Liquidator or Administrator is not available there is always another available to act, so as to allow for continuity of performance. That way, if one of the Liquidators or Administrators is on leave, incapacitated or just unavailable the administration of the company can continue.

The same principles apply with VCAT appointed administrations. In our view, it is in the interest of Represented Person that there be constancy of availability so that when issues arise unexpectedly there is always someone available to deal with the banking, make decisions, attend VCAT hearings and generally keep things moving.

And of course, no one can be sure how long an Administration Order will continue. There is a possibility that the Represented Person could outlive the Administrator or at least outlive the Administrator's life as a lawyer in the case of a lawyer being appointed as an independent Administrator.

J.4 Jurisdictional Limit

The Act is an act of the Parliament of Victoria and essentially limited in its operation to:

- persons in Victoria; or
- property in Victoria of Represented Person in other jurisdictions.

Section 63 of the Act allows for the registration of interstate orders and there are reciprocal provisions in most Australian States and Territories.

At Burke & Associates Lawyers on many occasions we have had cause to deal with property of a Represented Person outside of Australia. There is no consistency of approach and often Administration Orders are not recognised in foreign jurisdictions. This can mean that a fresh application must be made in a foreign jurisdiction for an order akin to an Administration Order from VCAT. This can be expensive, slow and frustrating. It can also result in potential dispute if the representatives of the Represented Person in a foreign jurisdiction disagree with the local Administrator regarding issues for consideration.

Sometimes issues arise merely on the basis of the way an Administration Order is presented. An Administration Order may be provided as an A4 sheet of paper folded to produce a flap sealed envelope with tear off flaps. It does not have the look, feel and official imprimatur of, for example, a Grant of Probate. The Administration Order may be imbedded amongst numerous other orders relating to the Represented Person and so may be hard to discern. Some Courts have difficulty accepting that such a document is satisfactory evidence that the Administrator has been validly appointed.

K

K.1 Keys

The first responsibility for an Administrator is to secure the property of the Represented Person.

One of the first tasks for a VCAT appointed Administrator is to change locks and arrange new keys and security devices for any home and property of the Represented Person.

Commonly the health of the Represented Person will have caused multiple people to have access to the Represented Person's home. Those people can include family members, friends, neighbours, carers and health service providers. Duplicate keys will commonly have been disseminated far and wide.

A typical domestic contents insurance policy provides no protection if household contents are stolen by a person who unlawfully accesses the house with a key. A burglary insurance claim will likely fail unless it can be established that there was forced entry.

So, to protect the valuables and the insurance rights of the Represented Person it is good practice to change locks or update security devices as soon as possible after the Administrator becomes aware of the appointment.

If an Administrator fails to change keys and security devices and later on there is a theft from the home of the Represented Person but no insurance cover is available, the Administrator may be personally responsible.

These days with sophisticated electronic key devices it is possible to remotely monitor use of locks, change codes and provide a unique and time limited access for approved visitors and contractors.

K.2 Kith and Kin

The expression "kith and kin" is an old English expression meaning people you are connected with, especially by family relationship. The title for the celebrated comedy series "Kath and Kim" is almost certainly a play on this expression.

VCAT appointed Administrators often need to deal with the kith and kin of the Represented Person in relation to a broad range of issues.

Prior to the VCAT appointment it is common that one or more family members will have been involved in managing the financial affairs of the Represented Person and there may have been inappropriate conduct that needs to be addressed. Other

family members may be vociferous in asserting a view as to what they believe to be in the best interest of the Represented Person and may not hold back in expressing it.

At Burke & Associates Lawyers we have dealt with situations where the extended family of the Represented Person has effectively constituted itself as a group of warring factions. There may be accusations which range from minor inconsistencies to serious allegations of wrong including plans to take advantage of the Represented Person.

By contrast, we have had situations where the administration of the financial affairs of the Represented Person has progressed to the point where the financial management has become very simple. After transition to a nursing home and after the sale of principal assets, the financial affairs of the Represented Person can progress quite quickly to a "set and forget" regime where recurrent payments are addressed by direct debit facilities and the number of annual transactions reduced to the bare minimum. At that juncture it may be difficult to justify the continuing involvement of a professional Administrator and so it is appropriate to recommend to the kith and kin that the time is right for family members to step forward and take over the Administration.

Despite it being in the financial best interest of the family that there be no further administration expense, we have had numerous situations where, for a wide range of reasons VCAT or the family themselves decide to continue with the appointment of a professional Administrator.

L

L.1 Legal Costs

The appointment of an Administrator will often occur in acrimonious circumstances where various family members are legally represented at VCAT. If the legal process culminates in the appointment of the Administrator, one or more of those parties may seek to have their legal costs paid from the estate of the Represented Person.

Usually the appropriate course is for the Administrator to encourage parties seeking payment of costs to seek an order from the Tribunal. Such applications are possible under s56 of the Act which provides:

> *S56 Application to the Tribunal by a Creditor etc*
>
> *(1) Any person interested as a creditor, beneficiary, next of kin, guardian, nearest relative, primary carer or the Public Advocate or otherwise in any estate administered by an administrator may apply to the Tribunal upon any matter arising out of the administration of the estate by the administrator.*
>
> *(2) In subsection (1), "next of kin" in relation to a represented person means any person who would be entitled to the property of the represented person or to any share of that property under any law for the distribution of the property of intestates if the represented person had died intestate.*
>
> *(3) The Tribunal may make such order in relation to the application as the circumstances of the case may require.*

The most practical way of dealing with such applications, if approved by the Tribunal, is for costs to be assessed by an independent costs consultant and for the Administrator to be authorised to pay those costs from the estate of the Represented Person.

L.2 Litigation

Just because someone is disabled does not mean that disputes become impossible. In our experience at Burke & Associate Lawyers it is quite common for there to be issues arising in the administration of a Represented Person's affairs that require pursuing claims in the Court. Here are some examples:

- In the case of jointly owned property (see Jointly Owned Property) there may be the need to sever a joint tenancy or otherwise seek orders under the Family Law Act;
- A Represented Person may be a beneficiary of a deceased estate that is beset by dispute;
- Occasionally, a former attorney may have dealt inappropriately with the property of a Represented Person with the consequence that the Administrator must seek restitution;
- A Represented Person may have been involved in a business and there may be business related disputes; or
- A Represented Person may have one or more investment properties with issues arising from time to time with tenants, suppliers and estate agents.

Of course, the choice of Court or Tribunal will vary according to the nature of the dispute. However, in each instance the effect of the Administration Order is that the Represented Person cannot prosecute or defend any such claim other than through a representative, usually the Administrator. This means that the Administrator must commence or defend the claim in the name of the Represented Person as his or her litigation guardian or next friend. The terminology varies from one Court and Tribunal to another.

Further, there is usually a requirement that no settlement of any such dispute can be agreed without the relevant Court or Tribunal approving it. That is because, as a general rule, Courts and Tribunals exercise a protective overview of disabled persons and want to be satisfied that any proposed settlement is in the best interest of that person.

Of course, VCAT has a general supervisory role in overseeing the conduct of the Administrator. So, on occasions, there can be doubling up in a supervisory requirement for any settlement.

If the disability of the Represented Person is a disability that impacts upon memory or cognitive function then the very fact of that disability may give rise to problems in the litigation. That is particularly so if the success of any claim or defence to a claim depends upon the evidence of the Represented Person. It is easy to see how the opponent could challenge the evidence in such circumstances.

Because of these practical and evidentiary constraints an Administrator needs to be very careful before embarking upon any claim in a Court or Tribunal in the name of Represented Person. The obstacles to be overcome are much greater and the degree of difficulty is much higher than in the case of someone who is not disabled and not needing a separate level of representation.

L.3 Loans

An Administrator must act in the best interest of the Represented Person. The starting point must be to ensure that the estate of the Represented Person is carefully protected so as to ensure that there is capacity to meet all likely future expenses.

This makes it particularly problematic for a Represented Person to enter into a loan with a friend or family member, even if the Represented Person has been in the habit of making such arrangements before the onset of the disability.

A prudent Administrator will always seek the approval of VCAT for any substantial loan and require it be on commercial terms evidenced in writing.

As a general principle, a loan by a Represented Person should not be made except in the most exceptional circumstances and then only with VCAT approval.

M

M.1 Mail Redirection

In most situations it is necessary for the Administrator to put in place a mail redirection in place. Over time, this will ensure that the Administrator becomes fully informed of financial transactions relating to the Represented Person.

The Administrator must complete the relevant paperwork, attend at a branch of Australia Post, provide evidence of identity, produce the Administration Order and pay the relevant fee.

As the administration progresses and the Administrator puts in place more streamlined arrangements (such as direct debit payment of utility expenses, more effective use of email and so on) the amount of mail will usually decrease. However, the Administrator will consider whether it is necessary to extend the mail redirection order on a case by case basis.

A regrettable consequence of this process is that personal mail also comes to the Administrator. There is just no way of avoiding that. But that personal mail is quickly identified and redirected (usually by hand delivery) to the Represented Person.

M.2 Marriage

As a matter of law, a marriage is a contract. However whether such a contract can be properly construed as a financial contract is debatable.

Section 52 of the Act restricts the powers of a Represented Person to enter into a contract. It reads as follows:

> *S52 Restriction on powers of represented person to enter into contracts etc.*
>
> 1. *Where the Tribunal has made an administration order the represented person whilst a represented person or until the Tribunal revokes that order is, to the extent that the represented person's estate is under the control of the administrator, deemed incapable of dealing with, transferring, alienating or charging her or his money or property or any part thereof or becoming liable under any contract without the order of the Tribunal or the written consent of the administrator.*
> 2. *Every dealing, transfer, alienation or charge by any represented person in respect of any part of the estate which is under the control of the administrator is void and of no effect, and the money or property the*

subject of the dealing, transfer, alienation or charge is recoverable by the administrator in any court of competent jurisdiction.

3. *This section does not render invalid any dealing, transfer, alienation or charge by any represented person made for adequate consideration with or to or in favour of any other person who proves that she or he acted in good faith and did not know or could not reasonably have known that the person was a represented person.*

4. *For the purpose of this section the acceptance of payment of the whole or any part of a debt is deemed to be a dealing with property.*

To date we have not encountered a situation where a Represented Person has sought to marry. However, we have come across a number of situations where the Represented Person has been involved in an intact marriage with a person who is not disabled and not the subject of an Administration Order. As a consequence we have had to deal with the tricky situation of separating property that is jointly owned. See Jointly Owned Property and Divorce.

M.3 Medical Decisions

It is well known that medical practitioners require a patient's consent before administering treatment. Given that medical treatment in the absence of consent could constitute an assault, great care needs to be taken to ensure that appropriate consent is obtained before medical treatment is given.

An Administrator is not able to make medical treatment decisions for the Represented Person.

A Represented Person may lack the requisite capacity to manage their financial affairs but still maintain the ability to make their own medical treatment decisions. While a Represented Person has capacity to make medical treatment decisions there is no restriction on them doing so. However, when they no longer have capacity, who provides consent?

In emergency situations consent is not needed where there are reasonable grounds that emergency treatment is necessary to:

- Save the patient's life;
- Prevent serious damage to the patient's health;
- Prevent suffering from significant pain or distress.

Any treatment beyond this scope requires the Represented Person's consent.

Medical treatment decisions may be required in hurried circumstances. In some circumstances, practitioners reach out to the Administrator for consent or approval of treatment. However, unless there is an emergency situation such as those set out above, it is beyond the Administrator's authority to provide that consent.

The Administrator, who controls the Represented Person's finances, will, however, work closely with the Represented Person or their medical treatment decision

maker in relation to the provision of services and treatment for the Represented Person.

N

N.1 Neuropsychologists

The assessment of capacity in a legal sense can be extremely complicated (see Capacity).

Neuropsychologists are the experts in this area of diagnosing capacity. Most neuropsychologists have an undergraduate Degree in Science or Psychology and post-graduate qualifications in Neuropsychology.

The usual process adopted by neuropsychologists involves the assessment of a person using a range of psychological tools or tests. These are sophisticated analytical tools to assess memory, cognitive function and a range of other intellectual attributes.

In our experience at Burke& Associates Lawyers, a neuropsychological assessment usually takes several hours. On occasions interview sessions are spread over two days as the process can be very draining for elderly and frail people. If English is not the first language of the person being assessed, it may be necessary to have an independent interpreter assist.

A neuropsychologist preparing a report for VCAT performs the role as an independent expert assisting the Tribunal rather than as an advocate for a particular party in the dispute. VCAT has published a practice direction regarding expert evidence which is published on the VCAT website. Essentially, it mandates that the expert must set out his or her qualifications and provide certain assurances of independence to the Tribunal.

N.2 Nursing Homes

Given the age of the average Represented Person, it often becomes necessary for them to transition to a nursing home.

It is not up to the Administrator to make decisions about where a Represented Person should live and whether there needs to be a change of accommodation. That responsibility vests in the Guardian. The Administrator's involvement is restricted to considering the proposal of the Guardian in light of the cost involved.

Commonly VCAT will appoint the Office of the Public Advocate as Guardian with a view to making enquiries and a recommendation about accommodation. That appointment will usually extend to the period of transition to a nursing home.

So when the need for transition to a nursing home arises there is usually an active conversation between the Administrator, the Guardian and friends and family of the Represented Person.

Nursing homes are funded through the Commonwealth Government and there are entry criteria that must be satisfied.

Typically, a nursing home will require payment of a Refundable Accomodation Deposit (commonly referred to as a "bond"). The quantum of the Refundable Accomodation Deposit will range significantly from facility to facility. Sometimes it will be difficult to compare the cost because the services covered by the Refundable Accomodation Deposit may vary.

If cash to pay the Refundable Accomodation Deposit is not readily available the Administrator may need to sell the Represented Person's house. In such circumstances it is usually possible to pay a modest amount on placement with the balance to be paid at settlement on the sale of the house property.

It is rare to find a Represented Person who is enthusiastic about moving to a nursing home. However, in our experience at Burke & Associate Lawyers, most people settle down soon after the transition and actually enjoy greater access to services and companionship in the nursing home.

Because we deal in this area all the time, we deal routinely with financial planners who have expertise in this area and also consultants who can liaise with family and Guardians to identify a suitable placement and negotiate with nursing home proprietors.

If the Guardian encounters resistance from the Represented Person in making the transition then orders can be sought under Section 26 of the Act which reads as follows.

S26 Power to enforce guardianship order

(1) If, having regard to the circumstances of the case, the Tribunal considers it appropriate to do so the Tribunal may—

(a) when making a guardianship order under Division 2 or 4, specify in the order; or

(b) at any time while a guardianship order under Division 2 or 4 is in force, make an order specifying—

that the person named as plenary guardian or limited guardian or another specified person is empowered to take specified measures or actions to ensure that the represented person complies with the guardian's decisions in the exercise of the powers and duties conferred by the guardianship order.

(1A) If the Tribunal makes an order under subsection (1) empowering a guardian or a specified person to take such measures or actions as are specified in the order, the Tribunal must hold a hearing to reassess that order as soon as practicable after the making of that order but within 42 days of making that order.

(2) Where a guardian or other person specified in the order under subsection (1) takes any measure or action specified in the order in the belief that—

(a) the measure or action is in the best interests of the represented person; and

(b) it is reasonable to take that measure or action in the circumstances—

the guardian or other person is not liable to any action for false imprisonment or assault or any other action, liability, claim or demand arising out of the taking of that measure or action.

(3) Subsection (1) does not limit section 24 or 25.

O

O.1 Office of the Public Advocate

The Public Advocate has a significant role in the area of guardianship.

For all practical purposes the Public Advocate, or one of his/her delegates, become involved when an application is made to VCAT for the appointment of a plenary Guardian or limited Guardian.

Under the Act, the Public Advocate has established the Office of the Public Advocate (the OPA). Essentially, a Guardian is appointed when VCAT finds that a person with disability cannot make reasonable judgments about their personal and lifestyle affairs, such as where they will live, and there are concerns about the decisions they are making, or others are making for them. This is to be contrasted with financial decisions which are in the realm of an Administrator.

The distinction between Guardianship and Administration can at times be somewhat illusory. After all, it is the Administrator who must pay for the lifestyle expenses and the housing or any accommodation requirements of a Represented Person and so close liaison is often required between the parties fulfilling those respective roles.

In contentious circumstances, VCAT will often call upon the OPA to conduct an investigation and report. In that situation the Public Advocate will formally appoint a senior staffer under an instrument of delegation and that staffer will then report to VCAT.

Over the years at Burke & Associates Lawyers we have had cause to deal with many of the OPA investigators and find them to be people of the highest quality.

As part of its broad remit, OPA provides a free advice service on 1300 309 337 and also has very useful website at www.publicadvocate.vic.gov.au which deals with a wide range of Elder Law issues.

The statutory OPA has been created under Section 14 of the Act. The functions of the Public Advocate are set out at Section 15 of the Act which reads as follows:

> *S15 Functions of the Public Advocate*
>
> *(a) to promote, facilitate and encourage the provision, development and co-ordination of services and facilities provided by government, community and voluntary organisations for persons with a disability with a view to—*

(i) promoting the development of the ability and capacity of persons with a disability to act independently; and

(ii) minimizing the restrictions on the rights of persons with a disability; and

(iii) ensuring the maximum utilization by persons with a disability of those services and facilities; and

(iv) encouraging the involvement of voluntary organizations and relatives, guardians and friends in the provision and management of those services and facilities; and

(b) to support the establishment of organizations involved with persons with a disability, relatives, guardians and friends for the purpose of—

(i) instituting citizen advocacy programs and other advocacy programs; and

(ii) undertaking community education projects; and

(iii) promoting family and community responsibility for guardianship; and

(c) to arrange, co-ordinate and promote informed public awareness and understanding by the dissemination of information with respect to—

(i) the provisions of this Act and any other legislation dealing with or affecting persons with a disability; and

(ii) the role of the Tribunal and the Public Advocate; and

(iii) the duties, powers and functions of guardians and Administrator s under this Act; and

(iv) the protection of persons with a disability from abuse and exploitation and the protection of their rights; and

(d) to investigate, report and make recommendations to the Minister on any aspect of the operation of this Act referred to the Public Advocate by the Minister.

O.2 Orders

Sometimes the manner in which VCAT publishes the Administration Orders can unintentionally cause issues.

An Administration Order may be provided as an A4 sheet of paper folded to produce a flap sealed envelope with tear off flaps. It does not have the look, feel and official imprimatur of, for example, a Grant of Probate.

The Administration Order may be imbedded amongst numerous other orders relating to the Represented Person and so may be hard to discern. Some Courts have difficulty accepting that such a document is satisfactory evidence that the Administrator has been validly appointed.

In the age of identity fraud, heightened *Privacy Act* concerns and the like, we can see the benefit in VCAT adopting a simpler and more impressive certification of appointment in much the same way that Grants of Probate issuing from the Supreme Court of Victoria bear the clear imprimatur of the Court. The Administration Order could be precise as to the identity of the Administrators and the Represented Persons and include identity characteristics that can be easily verified.

P

P.1 Pets

The property of a Represented Person will at times extend to living and breathing property such as pets. As most nursing homes restrict pets, one of the challenges for an Administrator can be deciding what to do with the Represented Person's pets.

At Burke & Associates Lawyers we have had several situations where we have been able to arrange for a family member to take on responsibility for the Represented Person's pets and to make sure that the family members are not out of pocket for so doing. It can be a great comfort to a Represented Person to know that their much loved pets are being well looked after and can be visited from time to time.

P.2 Philanthropy

The Administrator is occasionally required to consider philanthropic endeavours of the Represented Person. This usually arises where the Represented Person had engaged in donating to charitable institutions in the past and wishes to continue this activity.

When making philanthropic donations, the Administrator will consult with the Represented Person's advisors and family members as appropriate, to determine the past practice of such charitable donations and will work to ensure that any future donations are appropriate and continue to be in the best interests of the Represented Person.

At Burke & Associates Lawyers we encourage those Represented Persons who can to continue to engage in discussion about the management of their finances. This is particularly important when the Represented Person wishes to make gifts associated with their personal beliefs.

See also Gifts.

P.3 Powers of Attorney

An Administrator appointed by VCAT has authority to deal with the financial affairs of the Represented Person. Therefore, there cannot be a subsisting and concurrent Financial Power of Attorney. Accordingly, it is commonplace for VCAT to formally revoke any prior Financial Power of Attorney before it appoints an Administrator.

However, there are many other forms of Power of Attorney that may continue in full force and effect, notwithstanding the appointment of an administrator. They include:

- The appointment of a Medical Treatment Decision Maker;
- The appointment of a Guardian;
- The appointment of a Corporate Power of Attorney by a company associated with the Represented Person.

It also follows that if an Administration Order has been made the Represented Person no longer has the legal capacity to execute a Power of Attorney in relation to financial matters. However, this does not stop some Represented Persons purporting to do so which can give rise to confusion in the managements of financial affairs.

P.4 Probate

It is quite common for a Represented Person to have been involved in the Administration of a deceased estate, commonly a deceased spouse. At Burke & Associates Lawyers we have had several situations where the Represented Person has obtained a Grant of Probate of a Will of a deceased spouse but has failed to complete the administration of that estate. Often the incapacity or illness that prompts the appointment of an Administrator in the first place explains the failure to conclude the administration of the deceased estate.

A legal consequence of the appointment of an Administrator under the Act is that the Represented Person cannot continue with the administration of the deceased estate.

Further, the role of an executor of a deceased's estate is not a role that can be delegated or passed on automatically to the Administrator. In such circumstances one must look to the Will itself because commonly a Will sets out a cascading series of executor appointments.

Sometimes it is necessary to bring a separate application in the Supreme Court of Victoria for the appointment of an alternative executor to conclude the administration of that deceased estate and for the Administrator to liaise closely with the newly appointed executor.

It is also commonly the case that the disabled Represented Person will be the primary beneficiary of the incompletely administrated estate and so ultimately it will be the estate of the Represented Person that bears the associated legal costs.

The process becomes more complicated when there are assets to be dealt with in other States and Territories of Australia or overseas. In such circumstances there can be further applications to the Courts in those States and Territories and other countries and the process can become quite complicated.

Fortunately, at Burke & Associates Lawyers we have had extensive experience in such matters as our practice extends to the administration of deceased estates and we have been dealing with such work for well over sixty years.

Q

Q.1 Questions of VCAT

VCAT maintains a supervisory role when it appoints an Administrator. It has a number of mechanisms for so doing including requirements for the filing of statutory reports, regular re-hearings and so on.

Often the initial Administration Order will limit the scope of an Administrator's actions by, for example, forbidding the sale of a family home without a further VCAT Order.

Section 55 of the Act enables an Administrator to approach VCAT for advice.

That Section reads as follows:

S55 Administrator may seek advice

(1) An administrator may apply for the advice of the Tribunal upon any matter relating to the scope of the administration order or the exercise of any power by the administrator under the administration order.

(2) Without limiting subsection (1), the jurisdiction of the Tribunal includes jurisdiction in the case of an administration by State Trustees to approve, order or advise the commencement of proceedings by State Trustees acting in one capacity or on behalf of one represented person against State Trustees acting in another capacity or on behalf of another represented person.

(4) The Tribunal may—

(a) approve or disapprove of any act proposed to be done by the administrator; and

(b) give such advice as it considers appropriate; and

(c) make any order it considers necessary.

(4A) The Tribunal may on its own initiative direct, or give an advisory opinion to, an administrator concerning any matter.

(5) An action does not lie against an administrator on account of an act or thing done or omitted by the administrator under any order or on the advice of the Tribunal made or given under this section unless in representing the facts to the Tribunal the administrator has been guilty of fraud, willful concealment or misrepresentation.

VCAT can deal with Section 55 applications on an administrative basis without requiring formal hearing. On other occasions, if the matter is complex or contentious, VCAT will schedule a hearing in order to give the interested persons the opportunity to attend and be heard.

At Burke & Associates Lawyers we have used the Section 55 process on many occasions, including with respect to:

- Applications for leave to deal with the sale of important assets such as the family home;
- Approval of a multi-party agreement to finalise complex issues, including Family Law issues;
- To sanction a family agreement as to the division of personal effects;
- Leave to commence a proceeding in another Court or Tribunal in the name of the Represented Person, usually based on advice from Counsel;
- Applications for approval of our professional fees;
- Report on investigations conducted; and
- Seek approval for larger charitable gifts, particularly where there has been a long standing history of the Represented Person making such gifts.

The time to obtain a response to an application for an opinion under Section 55 of the Act can vary. Urgent applications should be appropriately marked.

Q.2 Qualifications

There is no formal accreditation process for persons to be appointed as an Administrator. Section 47 of the Act deals with this issue as follows:

> *S47 Persons Eligible as Administrators*
>
> *(1) The Tribunal may appoint as an Administrator of the estate of a proposed represented person—*
>
> *(c) any person who consents to act as Administrator if the Tribunal is satisfied that—*
>
> *(i) the person will act in the best interests of the proposed represented person; and*
>
> *(ii) the person is not in a position where the person's interests conflict or may conflict with the interests of the proposed represented person; and*
>
> *(iii) the person is a suitable person to act as the Administrator of the estate of the proposed represented person; and*
>
> *(iv) the person has sufficient expertise to administer the estate or there is a special relationship or other special reason why that person should be appointed as Administrator.*

(2) In determining whether a person is suitable to act as the Administrator of the estate of a proposed represented person, the Tribunal must take into account—

(a) the wishes of the proposed represented person, so far as they can be ascertained; and

(b) the compatibility of the person proposed as Administrator with the proposed represented person and with the guardian (if any) of the proposed represented person; and

(c) whether the person was a member of the Tribunal as constituted for a proceeding under this Act.

(2A) The Tribunal may appoint a person who was at any time a member of the Tribunal as constituted for a proceeding under this Act only if the Tribunal considers that in the circumstances it is appropriate for the person to act as an Administrator.

(3) Where a parent or nearest relative of the proposed represented person is proposed as the Administrator, that person is not by virtue only of the fact that that person is a parent or nearest relative to be taken to be in a position where the person's interests conflict or may conflict with those of the proposed represented person.

(4) If the Tribunal makes an order—

(a) appointing State Trustees as Administrator of the estate of a proposed represented person; and

(b) specifying that the Administrator is to have powers and duties which are more limited than those referred to in Division 3A—

the Tribunal must give State Trustees a copy of the order as soon as practicable after it is made.

The Act also contemplates that beyond a family member or friend or a trustee company, VCAT may appoint a professional Administrator such as an accountant or a lawyer.

Lawyers at Burke & Associates Lawyers have often been appointed by VCAT as Administrators for a Represented Person. Those appointments have usually been in circumstances where there has been some degree of acrimony within the family or network of the Represented Person or, alternatively, there have been complex issues and legal complexity.

Section 47A of the Act contemplates such arrangements and reads as follows:

S47A Remuneration of Professional Administrator

(1) An Administrator other than an Administrator who carries on a business of, or including, the administration of estates is not entitled to receive any fee, remuneration or other reward from the estate of a represented person for acting as Administrator unless the Tribunal otherwise specifies in the administration order.

(2) The remuneration to which an Administrator who carries on a business of, or including, the administration of estates is entitled is to be approved by the Tribunal.

(3) Despite subsection (2), the remuneration approved by the Tribunal in respect of a licensed trustee company must not exceed the limit on fees that may be charged by a licensed trustee company under Chapter 5D of the Corporations Act.

(4) For the purposes of this section—

"Licensed trustee company" has the same meaning as in section 601RAA of the Corporations Act.

From time-to-time there has been discussion about VCAT establishing a panel of accredited professional Administrators much in the same way as there are panels of accredited insolvency practitioners appointed by the Courts as company administrators or liquidators.

Although at present there are no formal qualifications expected of a prospective appointee as Administrator, anyone considering the appointment of an Administrator to look after the affairs of a Represented Person should look for at least these qualifications:

- Lengthy experience as a lawyer or an accountant;
- Familiarity with Courts and Tribunal processes;
- Reputational and occupational risk such that the Administrator is subject to supervision from several quarters (see Supervision);
- Extensive experience in property, banking and commercial arrangements;
- Common sense and commercial judgment;
- Ability to make decisions in circumstances of conflict.

Further, it is often a good idea to have more than one Administrator. On that subject see Joint Administrators.

R

R.1 Registrar's Caveat

Upon being appointed, an Administrator should carry out due diligence to identify the nature and extent of the Represented Person's assets and liabilities.

Assets of course include interest in land. Investigating titles to land is now possible by search of the register of the Land Titles Offices in Victoria and elsewhere. As yet, there is no single national database of landholding throughout Australia.

Sometimes landholdings are recorded in names which are not the same as those used regularly by the Represented Person. We have come across situations where people have been shown on title by three or more different variations of their names, with middle names left out, with first names anglicised, shortened, hyphenated and so on. It is prudent to search by several different metrics such as name and address.

Once properties have been identified the Administrator should write to the Registrar of Titles seeking registration of a Registrar's Caveat pursuant to Section 106 of the *Transfer of Land Act* 1958. In substance, this permits the Registrar to record a caveat on title on behalf of a Crown, a minor or a person of unsound mind to prohibit any transfer or dealing with any land registered in the name of the Represented Person. Essentially, this is an administrative notation by the Registrar on the searchable database of titles to show that dealings with the relevant land is prohibited without the Registrar's consent and is a protection against unauthorised land dealing in circumstances where the Represented Person is at risk.

Of course, there can be valid circumstances when land owned by the Represented Person must be sold, such as to fund payment of a Refundable Accommodation Deposit. In such circumstances the Administrator will be required to provide evidence that the Administration Order is still on foot and that the transfer of the relevant land is in the best interest of the Represented Person.

R.2 Report by Administrator

In anticipation of a review of appointment an Administrator should routinely prepare and provide to VCAT a summary report as to the status of the administration, the net financial position of the Represented Person and other pertinent financial information. This assists the Tribunal by providing a snapshot.

There is no formal requirement under the Act for such a report but at Burke and Associates Lawyers we find it a useful way of drawing together in summary form

the key particulars of the Represented Person's affairs, the actions undertaken and the matters still outstanding. If you like, it is a report to stakeholders akin to an annual report. We find that the extended family of the Represented Person find it a useful snapshot.

R.3 Register

VCAT does not maintain a searchable register of persons who are subject to Administration Orders. Accordingly, there is no way of knowing whether that seemingly plausible person you encounter as a customer or client has been found by VCAT to lack capacity.

R.4 Restrictions

The role of an Administrator under the Act is limited in scope to dealing with the financial affairs of the Represented Person.

It follows that an Administrator has no authority to deal with medical treatment, guardianship matters, access to services and general lifestyle considerations. Likewise, an Administrator cannot change the Will of a Represented Person but may be entitled to inspect it. It would also be inappropriate for an Administrator to step into the shoes of a Represented Person and exercise their voting rights.

S

S.1 Sale of Property

More often than not, when first appointing an Administrator VCAT will include amongst its pro-forma Administration Orders a restriction on the sale of any real estate owned by the Represented Person without the prior written consent of the Tribunal. This is a protective measure so as to ensure that when significant transactions are in contemplation VCAT has an opportunity to satisfy itself that it is for a proper purpose and in the best interest of the Represented Person.

In other situations where at the time the initial appointment is made it is clear that there is a pressing financial need VCAT may order that the Administrator has leave to sell a specific property, usually for a specific purpose and to meet an identified financial need.

When selling property owned by a Represented Person an Administrator steps into the shoes of the Represented Person and has authority to sign all documents, engage lawyers or a conveyancer to deal with the sale and to execute a valid Transfer of Land to the purchaser.

Sadly, it is often the case that such a sale will occur in circumstances where the Represented Person has transitioned to some form of supported accommodation, leaving a home bursting with the accumulated bits, pieces and memorabilia of many decades. Drawing upon our experience in such work and in the administration of deceased's estates, at Burke & Associates Lawyers we know that such houses more often than not have very little in the way of saleable goods. Accordingly, difficult decisions must be made about clearing and cleaning the property in preparation for sale.

Fortunately, over the years we have established a reliable network of contractors who can assist. Working co-operatively with the family we will arrange for the property to be cleared and cleaned. Where household goods can be repurposed for a charitable undertaking we try to make sure that this occurs. (See also Stuff).

Unfortunately, we have encountered some situations where properties were in a fetid and filthy condition. However our contractors were able to quickly transform these properties to a presentable and saleable condition.

S.2 Stuff

Few of us are good at culling the clutter of memorabilia, documents and records that we accumulate during a lifetime. By the time of VCAT appointing an

Administrator the Represented Person will often have accumulated a considerable amount of "stuff". There is often a household full of appliances, furniture and numerous items of sentimental value.

From our extensive dealings in VCAT appointed administrations and the Administration of deceased estates we know that the typical household collection of appliances, collectibles, decorative art and furniture has little realisable value.

Sadly, this means that when the property is to be cleared in readiness for sale hard headed and economical rational decisions must be made by the Administrator. Not surprisingly, this can be deeply distressing to the Represented Person and their extended family members. We seek to be sensitive to the Represented Person and co-operative with their family but the Administrator must make sensible business decisions and act in the best interest of the Represented Person.

A balance needs to be found as sometimes the process of having items valued is more expensive than the value determined. Identifiable antiques can and should be appropriately dealt with. Located where we are in High Street, Armadale and having been in practice since 1953, at Burke & Associates Lawyers we have seen the glory days of the antique trade come and go. The area used to be a hub for antique dealers that drew customers and collectors from all over Australia. The antique trade has diminished and those days are long gone.

Even gifting otherwise useful and serviceable furniture and appliances to charities can be problematic. Nowadays few charities have the resources to inspect and collect items. An extensive array of occupational health and safety regulations also make the task more problematic than it once was.

However, one of our preferred contractors has developed a niche business in liaising with charities and community groups who might have a use for stuff that might otherwise have found its way to landfill. For example, our contractor has found uses for tools at some of the Men's Shed outlets, for other material for schools creating art projects and so on.

It is not uncommon for a Represented Person who has survived the Great Depression to have developed a long-lasting apprehension about banks and financial institutions. Therefore, more often than you would think the Represented Person may have hidden cash around the house. In the process of sorting out the stuff we have come across cash hidden in clothing, furniture, chimneys and kitchen appliances.

Many years ago we had involvement with a family helping an elderly and senile widower pack up his home in the Eastern suburbs in preparation for a move to supported accommodation. In the process the family was shifting an old dog kennel. A large tin which had been hidden within the kennel fell out. When the tin was opened it revealed a stash of cash amounting to tens of thousands of dollars. The family members confronted the elderly man. In answer to their questions he said "Oh good, you got it. Now did you find the other one?" Despite their persistent questioning the elderly man simply could not remember if there actually was another container of cash hidden in the property and, if so, where it was. If it did exist it stayed behind when the property was sold, despite the family tearing the

place apart in a search for it. Of course, it could have been a trick of his memory or perhaps the purchaser stumbled upon it years later when doing renovations.

Stuff needs dealing with. At Burke & Associates Lawyers we have had lots of experience with stuff.

S.3 Supervision of Administrators

Administrators appointed under the Act are subject to supervision by VCAT. There is also supplementary supervision to the extent that financial returns filed with VCAT by Administrators are subject to independent scrutiny, usually by State Trustees.

The supervision of lawyer Administrators is more extensive. To the extent that a lawyer Administrator receives funds from on or behalf of a Represented Person and holds those funds in a trust account the lawyer Administrator must also comply with the obligations under the separate legislation governing the legal profession. The lawyer Administrators in such a role are routinely audited by auditors working for the Legal Services Commission and also independent auditors retained by the law practice.

A lawyer Administrator has significant reputational and professional licence risk and must be scrupulous in looking after the interest of a Represented Person.

Under the Act there is no requirement for an Administrator to be insured for professional negligence. However, all lawyer Administrators must be so insured.

It follows that lawyer Administrators are subject to much more rigorous supervision than other administrators and this should work for the protection of Represented Persons.

T

T.1 Taxation

An Administrator for a Represented Person has responsibility to deal with his or her taxation affairs. That means the Administrator will usually have to engage the services of an accountant to prepare Financial Statements, taxation returns and sometimes also Business Activity Statements (BAS).

It is not uncommon for the disability of the Represented Person to result in past years of taxation returns being neglected. Sometimes it is possible for the Administrator to make representations to the Australian Taxation Office to seek relief against fines and penalties that might otherwise be payable given the circumstances of the disability.

At Burke & Associates Lawyers we have had occasions when, prior to the appointment of the Administrator) a Represented Person has been less than forthright in dealing with his or her taxation obligations. Given the statutory and other responsibilities to which an Administrator is subject the Administrator has no discretion and must make full and complete disclosure, even if it means that there are penalties.

Being vigilant in the protection of the financial affairs of the Represented Person we look for opportunities to claim deductions or rebates that might otherwise be overlooked. We will work together with an independent accountant to determine if some portion of the Administrators professional fee might be referrable to the gaining of assessable income for the Represented Person. If so, the relevant portion is claimable as a deduction against income and thus reduces the cost of the administration.

Likewise, persons suffering a disability are eligible to claim certain expenses against income for taxation purposes. There are three types of eligible expenses namely disability aids, attendant care and age care expenses. In each instance there are specific requirements, full details of which are set out on the website of the Australian Taxation Office. The amount of the offset received is based on the person's adjusted taxable income but can only have the effect of reducing the taxable income to zero. It is not a refund in itself.

The key point is that with care, attention to detail and the assistance of experienced players the taxation affairs of the Represented Person can be managed to optimal effect.

T.2 Transition

At Burke & Associates Lawyers we think of ourselves as performing a transition role in our VCAT appointed administrations. While we are happy to manage the financial affairs of the Represented Person long term, it is not always necessary.

Once the Represented Person's affairs have been transitioned from complexity to simplicity and are easy to manage it may be appropriate for trusted family member or friends to take over the Administration and avoid the expense of an independent Administrator.

However, the process of achieving that transition can be challenging. It involves having a clear-eyed view as to what needs doing, a conviction to get it done in a practical, economic and efficient manner and moving quickly to a "set and forget" regime of financial management that is primed for handover to a family member.

Those of us at Burke & Associates Lawyers who practice in this area, report that this process of transition is amongst the most intellectually challenging and rewarding work that we have come across in our legal careers. It involves the application of commercial and property law skills, project management skills, legal analysis skills and a range of other disciplines. It is very much an outcomes focused undertaking that draws upon decades of experience in the law and the ability to tap into a wide network of contacts in numerous professions, industries and support services.

T.3 Trustee Companies

Commonly, VCAT will appoint a Trustee Company as the Administrator for a Represented Person. The default appointee is State Trustees.

The cost structure of Trustee companies varies from one to another.

The fee structure of State Trustees acting in VCAT appointments as at September 2019 is generally as follows:-

Value of Assets	***Commission***
Up to $500,000.00	*3.3%*
Greater than $500,000.00 and up to $1,000,000.00	*$16,500.00 plus 1.5% of the amount over $500,000.00*
Greater than $1,000,000.00 and up to $3,000,000.00	*$24,000.00 plus 0.55% of the amount over $1,000,000.00.*
Greater than $3,000,000.00	*$35,000.00 plus 0.44% of the amount over $3,000,000.00.*

In addition, State Trustees charges commission on income at 3.3% in relation to pension income and 6.6% on all other gross income. There are additional charges for various services including legal services where the rates for lawyers vary between $350.00 per hour for a junior lawyer and $550.00 per hour for a senior

lawyer, significantly in excess of the scale for lawyer Administrators as usually applied.

https://www.statetrustees.com.au/what-we-do/state-trustees-commissions-fees-charges#section-7

T.4 Trusts

In the main, the Act is silent on the issue of trusts even though since the 1980s Discretionary Trusts and Self-Managed Superannuation Trusts have become ever more prevalent and hold ever greater wealth.

In the more complex matters where we had been appointed by VCAT as Administrators, it is common to encounter Discretionary Trusts, often with a Corporate Trustee. The Represented Person may have treated the assets and undertakings of that trust as forming part of his or her personal property when, as a matter of law, it is not.

To the extent that a Represented Person has effective control over a Discretionary Trust it becomes the responsibility of the Administrator to protect the interests of the Represented Person. That can mean dealing with other beneficiaries and navigating a path through complex Trust Law and Superannuation Law.

It is beyond the scope of this publication to go in to those more complex issues other than to observe that we have had cause to do so and routinely handle such matters.

U

U.1 Under New Management

The title may seem cheeky but think of it this way. The making of an Administration Order by VCAT effectively means that there is a new management regime for the financial affairs of the Represented Person.

The effect of the Administration Order is clear, namely that the Represented Person has lost contractual capacity. This is set out in Section 52 of the Act.

It is important to look closely the legislation which reads as follows:

> *S52 Restriction on Powers of Represented Person to Enter into Contracts etc*
>
> *(1) Where the Tribunal has made an administration order the represented person whilst a represented person or until the Tribunal revokes that order is, to the extent that the represented person's estate is under the control of the Administrator, deemed incapable of dealing with, transferring, alienating or charging her or his money or property or any part thereof or becoming liable under any contract without the order of the Tribunal or the written consent of the Administrator .*
>
> *(2) Every dealing, transfer, alienation or charge by any represented person in respect of any part of the estate which is under the control of the Administrator is void and of no effect, and the money or property the subject of the dealing, transfer, alienation or charge is recoverable by the Administrator in any court of competent jurisdiction.*
>
> *(3) This section does not render invalid any dealing, transfer, alienation or charge by any represented person made for adequate consideration with or to or in favour of any other person who proves that she or he acted in good faith and did not know or could not reasonably have known that the person was a represented person.*
>
> *(4) For the purpose of this section the acceptance of payment of the whole or any part of a debt is deemed to be a dealing with property.*

So, it is routine for a newly appointed Administrator to make contact with banks, financial institutions, insurance companies and other organisations to advise them of his or her appointment and to ensure that they are appropriately informed of the change of management and the fact that the Represented Person has lost legal capacity to do business other than through the Administrator.

U.2 Undue Influence

An allegation that a person or several people have undue influence over another may prompt VCAT to appoint an independent Administrator in the first place. Whether or not that is the case, all sorts of people can come and go in the life of the Represented Person and seek to position themselves to advantage of them.

At Burke & Associates Lawyers we have come across many situations where friends and family have sought to spirit the Represented Person away, either permanently or for the purpose of making a new Will or taking money out of the bank. We even had one situation where a child of a frail and demented Represented Person flew to Melbourne and in the early hours of the morning bundled up the Represented Person, took them out of the nursing home and had them on a plane interstate within hours. The Represented Person survived just a matter of weeks. It took years for the legal reverberations of that episode to play out in the Courts.

It is for fear of such undue influence that an Administrator must move very quickly to safeguard bank accounts, notify the Registrar of Title and various others so as to thwart the opportunity for those who would do harm.

U.3 Useful Resources

Whilst off course we trust this publication may be a useful starter, the area of VCAT appointed administration is complex and becoming more complex as the years go by.

There are some very useful materials available on the internet but probably the best is to be found at the website of the Office of the Public Advocate at https://www.publicadvocate.vic.gov.au/

V

V.1 Vehicles

A finding by VCAT that someone doesn't have capacity to manage their financial affairs doesn't automatically mean that the Represented Person isn't capable of driving a vehicle. However, it is a basic principle of insurance law that the insured has a positive obligation to notify the insurer of anything that might be material to the risk. That obligation arises under the Insurance Contracts Act.

A person who is found to lack capacity would be uninsurable and unable to contract for fuel and maintenance. It is highly likely they would be a hazard on the road.

A prudent Administrator should address that risk.

The Administrator should notify the motor vehicle insurer and invite the insurer to consider whether the Administration Order is material to the risk and the premium. It is our belief that in most instances, insurers would decline to continue the cover, with the consequence that the vehicle is not insured and should not be driven.

V.2 VicRoads

A person who suffers a disability in relation to management of their financial affairs may have a corresponding difficulty in terms of coping with daily tasks like driving a car. Likewise, disability may result in a lack of appreciation of diminished capacity and consequential risk as a driver.

If you develop a permanent disability or medical condition that affects your ability to drive you must notify VicRoads. This is a legal requirement.

Sometimes it is necessary for an Administrator or family or friends to notify VicRoads if a person suffers from dementia or other conditions that affect clear thinking and which may impede the ability to make judgements about safe driving.

Anonymous reports can be provided to VicRoads by email at medicalreview@roads.vic.gov.au Persons who make a report to VicRoads in good faith about a driver who may need review are protected from legal action. Likewise, VicRoads will not divulge the identity of the person who makes the report.

V.3 Voting

Nowadays, it is common for the Australian Electoral Commission to visit nursing homes and like establishments to allow pre-polling day voting for people who might find it difficult to get to a regular voting place on election day.

It is possible that electoral officers may exercise some discretion as to who is fit to vote and may seek guidance from nursing home staff.

Whilst the Act is silent, it is our view at Burke & Associates Lawyers that it would be inappropriate for an Administrator to seek to be involved in voting for a Represented Person. It is not strictly within the ambit of the financial affairs of the Represented Person. We are yet to hear of a Guardian being involved in voting on behalf of the Represented Person.

W

W.1 Wills

Under Section 58G of the Act an Administrator may familiarise himself or herself with the Will of the Represented Person. That Section reads as follows:

> *S58G Power to Open Will*
>
> *An Administrator may, either before or after the death of a represented person, open and read without order any paper or writing deposited with the Administrator and purporting or alleged to be the will of the represented person.*

It is often important and appropriate for the Administrator to ascertain the testamentary wishes of the Represented Person. A Will may contain specific bequests and it would be reckless for an Administrator to proceed in disregard of the clearly stated wishes of the Represented Person unless there are compelling reasons to do so.

W.2 Will Making

The fact of an Administration Order does not have the consequence that the Represented Person cannot validly make a new Will. At law there is a difference in the test of capacity to make a Will to the test that VCAT applies in relation to the appointment of an Administrator.

It is quite possible that a Represented Person might still have the legal capacity to revoke a previous Will and to make a new Will. In such circumstances, it would be prudent for the Represented Person and any persons assisting or advising the Represented Person to commission comprehensive and contemporaneous expert evidence as to capacity. Otherwise, on the death of the Represented Person, there is every reason to expect that there might be dispute as to whether they had capacity at the time of making the Will. Ideally, that expert evidence should be committed to an Affidavit as to Testamentary Capacity by the expert witness and kept in safe custody along with the new Will so that it can be produced to the Registrar of Probates when application is made for a Grant of Probate of the new Will.

It is possible for the Supreme Court to make a Will, commonly referred to as a Statutory Will, for a person who does not have testamentary capacity. This is made possible by Section 21 of the *Wills Act* 1997. That Section reads as follows:

S21 Wills for Persons who do not have Testamentary Capacity Authorised by Court

(1) The Court may make an order authorising a will to be made in specific terms approved by the Court or revoked on behalf of a person who does not have testamentary capacity.

(2) Any person may make an application for an order under this section.

(3) The Court may make an order under this section on behalf of a person who is a minor and who does not have testamentary capacity, but must not make an order under this section on behalf of a person who is deceased at the time the order is made.

It is our understanding that such applications are rare.

The Administrator does not have power to change the Will of the Represented Person.

X

X.1 Xenophobia

Xenophobia? Yes, it is challenging to find a topic for "X". However, xenophobia can become an issue in VCAT appointed administration.

The most typical VCAT appointment occurs in circumstances where the Represented Person is disabled by a cognitively based illness such as dementia or Alzheimer disease. Often the symptoms include disinhibition. In other words, lack of sensitivity to the surrounding environment. With the loss of those social mores inappropriate behaviour sometimes becomes an issue.

At Burke & Associates Lawyers we have had a number of situations where the Represented Person has engaged in racist, xenophobic, sexist and abusive behaviour which would have been shocking prior to the onset of the illness. This makes for particular difficulty in scheduling carers because so many carers for the elderly and infirmed are migrants and often relatively new arrivals in Australia.

When you look at it from the perspective of the care provider (which has legal obligations to provide a safe and respectful work place) such behaviour by the Represented Person makes for particular challenges.

Indeed, we have had situations where the care provider has threatened to withdraw support due to such behaviour. This can have dramatic consequences because if the Represented Person is relying on in-home care in order to maintain an independent lifestyle, the withdrawal of support enlivens Guardianship issues. If in-home care is no longer available, nursing home care may be the only alternative. However, few nursing homes are keen to take on as a resident a Represented Person whose disinhibited and offensive behaviour is likely to create exactly the same problems in its workplace.

X.2 Experience

No, Experience does not start with an X, but very few words do. But having got your attention, may we point out that at Burke & Associates Lawyers we do have some experience in this area of law. And by dint of our experience, we have established a network of reliable professionals and contractors who can assist us in working efficiently and economically to look out for the interests of those Represented Persons whose affairs are in our charge.

Y

Y.1 Yearly Events

To some extent, the life of an Administrator becomes somewhat like that of an accountant in public practice. There are various statutory reports that must be prepared and filed with VCAT at about the same time each year. There are scheduled reviews for which reports must be prepared. There are the taxation affairs of the Represented Person to be sorted out.

Y.2 Your Role

Independent Administrators are appointed in circumstances where there is no suitable family member available or already appointed.

As part of prudent succession planning everyone should contemplate the possibility of incapacity before death and plan for an appropriate and trusted support process if that occurs. This means appointing one or more people as attorney to deal with financial matters under a Power of Attorney. If there are no family members available or suitable then you can appoint a professional person to take on that role.

At Burke & Associates Lawyers we always tell our clients that it is preferable to appoint two or more people as attorneys to deal with financial matters, in case one of them is unavailable or becomes incapacitated. It may be appropriate to choose as an appointee a lawyer or an accountant as such a person has reputational risk and professional skills that should allow for impartial and prudent decision making.

It is far better to have your financial affairs under the control of people you know and trust than to leave them at large for a Court or Tribunal to deal with.

Z

Z.1 Zonal Limitations

As the name suggests a VCAT Order such as an Administration Order is only applicable in Victoria. However, given that many people own assets Australia wide, and decisions may need to be made for interstate property, the Administrator is able to make an application for an interstate order, which will permit the VCAT Order to come into force in the relevant state. This will ensure that the Administrator can simply and easily deal with any interstate assets without the need to apply for an order in the relevant state or territory Tribunal.

Each state and territory has its own Tribunal:

- New South Wales Civil and Administrative Tribunal (NCAT)
- Australian Capital Territory Civil and Administrative Tribunal (ACAT)
- Queensland Civil and Administrative Tribunal (QCAT)
- Northern Territory Civil and Administrative Tribunal (NTCAT)
- Western Australia Civil and Administrative Tribunal (WCAT)
- South Australia Civil and Administrative Tribunal (SACAT)
- Tasmania does not at this point have a Civil and Administrative Tribunal. The Guardianship and Administration Board undertakes work for Administrations of Represented Persons in Tasmania.

About Burke & Associates Lawyers

Our philosophy

Here at Burke & Associates Lawyers we see ourselves as “big picture” lawyers.

We believe it’s our job to provide you with peace of mind in difficult or complex circumstances.

We understand the cost of legal disputes and complex transactions can be counted in more than dollars. That means we carefully consider your legal needs in relation to how they might impact other aspects of your life or business.

And we’re committed to achieving positive legal solutions for you, your business and your family in a sensible, creative, cost effective and straightforward manner.

How we work

We understand you’re focussed on outcomes rather than lawyer-speak. That’s why we meet with you as an equal, taking the time to listen carefully to your exact requirements.

Once we understand your situation, we work quickly to explore the most timely, cost-effective and appropriate solutions for your situation.

We offer practical and commercial advice in clear, plain language. Then we lay out your options so you can make informed decisions about your future.

Litigation

At Burke & Associates Lawyers our emphasis is always on solving your problem, not on legal action for its own sake. We never recommend action unless there is a clear cost benefit to you.

If litigation does become necessary, we’ll let you know the process from start to finish to minimise any unpleasant surprises. And we’ll remain vigilant in monitoring the potential risks to you throughout the entire course of action.

Our history

As one of the longest established law firms in Melbourne’s South East, we’ve been providing transparent, effective legal solutions since 1953.

Over more than 65 years we’ve helped literally thousands of our clients achieve outcomes that have effected positive and lasting change in their lives.

That’s why our clients keep returning and recommending us to their friends and families.

Services

The law is a complex and ever-changing field of knowledge. Providing up-to-the-minute advice across the entire spectrum of legal issues would be an unfeasible task.

As well as providing advice for individuals and families, we focus on the following areas of Commercial and Property Law:

- Private client advisory work
- Substantial commercial and residential property transactions
- Large commercial and residential developments
- Business establishment, sale, and purchases
- Strategic and succession advice for Small Businesses and family businesses
- Estate planning and administration
- Commercial dispute resolution (including mediation and litigation)
- Negotiating and drafting commercial ingredients
- Complex family business law matters
- General commercial advice.

Burke & Associates Lawyers does not practice:

- Criminal Law
- Personal Injury Law
- Migration Law.

Should you need this kind of advice, we can, however, refer you to an appropriately qualified legal practitioner who meets your requirements.

Alliances

We work closely with your advisors – accountants, financial planners, and management consultants – to ensure we take a holistic approach to resolving your legal matters.

We've also developed an extensive network of professional contacts over our many years of experience. We work alongside these allied professionals every day on a range of client projects. And we have no hesitation recommending them to you should you need their help.

Our contacts include but are not limited to:

- Accountants
- Architects
- Barristers with a specialist focus on court advocacy
- Business Brokers
- Land Surveyors
- Management Consultants
- Property Valuers

- Owners Corporation Managers
- Real Estate Agents
- Website Developers
- Building Consultants
- Financial Planners
- Mediators

Annexure A

VCAT Practice Note - PNG1 - Guardianship List General Procedures

Effective date: 1 June 2017

This information applies to proceedings in the Guardianship List.

See all practice notes.

On this page

- *Introduction*
- *Definitions*
- *The kinds of cases heard in the Guardianship List*
- *How to begin a proceeding*
- *How VCAT deals with applications*
- *The parties*
- *Joining or removing parties*
- *Notice about applications, hearings and orders*
- *Communicating with other parties*
- *The nature of hearings in the Guardianship List*
- *Who should attend the hearing*
- *Filing and serving documents*
- *Confidentiality of information*
- *Access to documents before a hearing*
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- *Directions hearings*
- *Settlement between the parties*
- *Re-hearing*
- *Withdrawal of an application*
- *Venue for hearings*
- *Adjournment and change of venue*
- *Urgent matters and temporary orders*
- *Missing persons*
- *The role of the Public Advocate*
- *The role of State Trustees*
- *Other reports*
- *Other professional administrators*
- *Identifying a potential administrator or guardian before a hearing*
- *Interstate orders*

- *Forms*

Introduction

This practice note applies to the practice of the Tribunal in exercising a function allocated by the Victorian Civil and Administrative Tribunal Rules 2008 (Vic)('VCAT Rules') to the Guardianship List of the Human Rights Division.

In any proceeding, the Tribunal may at its discretion vary the operation of a practice note by direction or order.

This practice note has been issued by the Rules Committee pursuant to s 158 of the Victorian Civil and Administrative Tribunal Act 1998 (Vic) ('VCAT Act').

Definitions

Word	***Definition***
List	*A Tribunal list established under the Rules through which the functions of the Tribunal for certain types of proceedings are allocated or exercised (e.g. Building and Property List, Guardianship List, Planning and Environment List).*
Act	*The Guardianship and Administration Act 1986 (Vic).*
Primary carer	*Generally the person who provides or arranges for domestic and personal services for a patient (see s 37(2) of theAct).*
Represented person/proposed represented person	*A represented person is someone who has a guardian or administrator appointed under the Act. A proposed represented person is someone about whom an application has been made for the appointment of a guardian or administrator.*
Guardianship order	*An order made under Part 4 of the Act appointing someone to make decisions for the represented person about personal matters. The categories of personal matters to be decided by the guardian are set out in the order. For example a guardian may have power to decide about the represented person's accommodation or the services they receive.*
Administration order	*An order made under Part 5 of the Act appointing someone to make decisions for the represented person about financial and legal matters. This may be limited to particular kinds of matters, but often applies to the whole of the represented person's estate.*
Reassessment	*Once a guardianship or administration order is made, it will be reassessed regularly, if it has not been revoked. The Tribunal usually reassesses guardianship orders at least every 12 months and administration orders at least every three years. The represented person or anyone else may apply for a reassessment of a guardianship or administration order at any time. The Tribunal will then decide*

whether a reassessment hearing is required.

Re-hearing — *Up to 28 days after a final order has been made under the Act or the Powers of Attorney Act 2014 (Vic), a party may apply for a re-hearing at which the whole matter will be heard again by a more senior member of the Tribunal than the one who heard it first. A non-party who was entitled to notice of the hearing may be able to apply for a re-hearing if the Tribunal gives leave.*

Nearest relative — *The Act (see section 3) sets out a formula for identifying a person's nearest relative. This is used in identifying who can consent to medical treatment for a patient who is unable to consent.*

Party — *The people most closely concerned in a proceeding are the parties. The following persons are parties to a proceeding: the person who makes an application, the proposed represented person, the principal who has given an enduring or supportive power of attorney and the attorney under such a power. Other people may also be parties, or may be joined by an order.*

The kinds of cases heard in the Guardianship List

The Guardianship List conducts hearings about the following matters:

- *applications for appointment of a guardian or administrator*
- *reassessments of appointment of a guardian or administrator (both regular reassessments and otherwise when a new hearing is required, such as a change of relevant circumstances)*
- *applications for advice to a guardian or administrator or attorney*
- *other applications under the Act such as medical treatment and special procedures for people who are unable to make medical treatment decisions*
- *applications for orders about enduring powers of attorney*
- *applications for orders about supportive powers of attorney*
- *re-hearing of cases decided under the Act and the Powers of Attorney Act 2014 (Vic)*
- *applications for orders under the Medical Treatment Act 1988 (Vic)*

How to begin a proceeding

Application forms are available on this website.

The applicant may attach supporting documents to the application, such as a medical reports or reports from someone providing services to the person the application is about.

Every application should include sufficient information for the other parties to know what issues will be discussed at the hearing.

A person applying for the appointment of a guardian or administrator for someone (the proposed represented person) is expected to provide (or arrange for) a medical report about the disability of the proposed represented person and their capacity to make decisions. The Tribunal provides a form for a medical report to be completed by a medical practitioner.

A person applying for reassessment or revocation of a guardianship order or an administration order on the grounds that the represented person has capacity to make their own decisions is expected to

provide with the application a medical report about the represented person's capacity to make decisions.

A person applying for orders about an enduring power of attorney must provide a copy of the signed power of attorney with the application.

A person applying for revocation of an enduring power of attorney must provide a medical report about the current capacity of the principal (that is, the person who made the power of attorney) to make an enduring power of attorney.

The applicant must immediately copy the application to all of the following people:

- *the proposed represented person*
- *any primary carer*
- *any current administrator or guardian*
- *any person the applicant proposes as administrator or guardian*
- *the person appointed as the attorney if the application is about a power of attorney (enduring or supportive)*
- *the person who appointed the attorney or supportive attorney (the principal) if the application is about a power of attorney*
- *any agent appointed under an Enduring Power of Attorney (Medical Treatment) if the application is about that kind of power of attorney or is about the medical treatment of the person who made the Enduring Power of Attorney (Medical Treatment); and*
- *any other person who has been joined as a party by order of the Tribunal.*

In addition, if the applicant is aware of a person who is likely to be affected by the application (such as someone who lives with the person who is the subject of the application) then the applicant should send that person a copy of the application and include their contact details in the application so the Tribunal can notify them of the hearing. This helps to avoid the need for adjournments or further hearings which may arise if a person likely to have evidence or a legitimate interest has been excluded from the hearing.

How VCAT deals with applications

When an application is filed, the registry may contact the applicant about any material which is missing. Applications are listed for hearing as soon as possible and usually within 30 days.

The parties

In a hearing of an application for appointment of a guardian or administrator or a reassessment of an appointment already made, the following people are parties:

- *the person making the application*
- *the person the application is about (proposed represented person or represented person)*
- *any person joined by the Tribunal as a party.*

Being entitled to receive notice of the hearing is not the same as being a party.

In a hearing of an application for orders about an enduring power of attorney or supportive power of attorney, the following people are parties:

- *the person making the application*
- *the person who gave the power of attorney*
- *the attorney (or supportive attorney)*

- *any person joined by the Tribunal as a party.*

In the hearing of an application for the Tribunal's consent to a special procedure, the following people are parties:

- *the person who made the application*
- *the patient*
- *any person joined by the Tribunal as a party.*

In the hearing of an application under the Enduring Power of Attorney (Medical Treatment) the parties are as follows:

- *the person who made the application*
- *any person joined by the Tribunal as a party.*

The relevant legislation does not specify this but the Tribunal would also expect that the agent or alternate agent appointed to make medical treatment decisions would be a party.

Joining or removing parties

A person who is not a party in a proceeding in the Guardianship List may apply in writing to be joined as a party. The Tribunal has power to join any person as a party if satisfied it is desirable to do so. Orders joining a person as a party may be made before the first hearing, at a subsequent hearing or on the papers, depending on the circumstances.

A person may be removed as a party either on written application by a party or if the Tribunal decides to do so. A party may be removed if the Tribunal considers they are not a proper or necessary party in the proceeding. Again, such orders may be made at a hearing or on the papers, as appropriate.

Notice about applications, hearings and orders

A number of people are entitled to notice of an application for appointment of a guardian or administrator (or reassessment of the appointment), even if they are not parties. Those people are also entitled to be notified of the hearings and of any orders made by the Tribunal. They are as follows:

- *the nearest relative of the proposed represented person (that is, nearest relative other than the applicant and any person proposed or already appointed as guardian or administrator)*
- *the primary carer of the proposed represented person*
- *the Public Advocate*
- *a person who notifies the Tribunal of an interest in the proposed represented person or in that person's estate is entitled to notice of an application for appointment of an administrator for the proposed represented person.*

In a hearing of an application for an order about a power of attorney or supportive power of attorney, the following people are entitled to notice of the application, the hearing and any orders made by the Tribunal:

- *the applicant*
- *the person who made the power of attorney*
- *the attorney under the power of attorney*
- *the supportive attorney under a supportive power of attorney*
- *the principal's domestic partner, if they have one*
- *the principal's nearest relative*

- *any person who the Tribunal decides should be notified.*

Communicating with other parties

Parties and others attending a hearing are free to discuss the case before a hearing. Confidential information should only be discussed in general terms. There is no need to discuss matters before the hearing if that is likely to lead to further dispute.

The nature of hearings in the Guardianship List

The legislation which applies to the Guardianship List protects people who have or need a substitute decision-maker. Accordingly hearings are not usually adversarial. Parties should be prepared to participate in a hearing conducted with a view to protect or fulfil the needs of the person who has or may need an administrator, a guardian, an attorney or a supportive attorney.

It is normal for the registry to contact a medical practitioner directly to obtain a medical report about a person who may need a guardian or administrator appointed if there is insufficient evidence on the file.

Occasionally, in appropriate circumstances as determined by the presiding member, the member will arrange to speak privately with the person who has or may need a substitute decision-maker (guardian, administrator, attorney or supportive attorney). That person is the one whose rights will be affected by the Tribunal's orders and their views and wishes are important.

Parties and their legal representatives (if any) should be prepared for hearings to be conducted with a level of formality appropriate to the particular circumstances of the case. In many cases this will be a minimal level of formality.

If there is a dispute at a hearing about relevant facts or about matters of law, a further hearing may be listed for a longer time. In those cases, the parties should be prepared for a more formal procedure and the presiding member may give directions about preparation for the next hearing.

Hearings are open to the public, as are all Tribunal hearings, unless an order is made to the contrary. However, because many hearings concern sensitive health information or family issues, it is normal for the Tribunal to ask each person present to explain why they are there.

In the Guardianship List, the Tribunal usually gives its decision and reasons for decision orally at the end of the hearing. The Tribunal is not obliged to give written reasons, unless a party requests them within 14 days after the order.

Who should attend the hearing

The person who made the application must attend the hearing.

The person who is the subject of the application – whether they are the person for whom a guardian or administrator is proposed, the person who needs a medical treatment decision or the person who gave an enduring or supportive power of attorney – should also attend if possible. If that person does not attend, the applicant should be prepared to give evidence about why that is not possible.

A party who wishes to give evidence must attend. Also any other person who wishes to be joined as a party or who wishes to give evidence for one of the parties should attend.

Filing and serving documents

If a person provides a document to the Tribunal in relation to an upcoming hearing, the person must immediately provide a copy of the document to all parties.

The Tribunal accepts that many self-represented parties do not understand the importance of this and sometimes documents are filed with the Tribunal and not served on the other parties. The presiding member at the hearing can make orders to rectify this (for example by allowing time for people to read the documents or adjourning the hearing to another day if necessary).

Confidentiality of information

No person may publish or broadcast a report identifying any party in a proceeding in the Guardianship List unless the Tribunal makes an order permitting it. See Schedule 1 to the VCAT Act clauses 37, 50, 51AJ.

Section 146 of the VCAT Act allows both parties and non-parties access to Tribunal files. The Tribunal has power to give directions preventing access to files or particular documents. That power is used where needed in the Guardianship List to protect information about a proposed represented person or represented person which is confidential or sensitive.

All requests for access to documents on a proceeding file are referred to a member of the Tribunal to consider whether access should be granted and on what conditions. A document which has been filed may contain sensitive personal information which should not lightly be disclosed to all parties. This includes information given in confidence (for example by a medical practitioner) and information about a person's health, finances or other personal affairs or family or domestic issues. These documents are referred to in this practice note as "sensitive documents".

Documents on a Tribunal file may be subject to obligations under the common law which prevent a person using them for purposes other than the purpose of the Tribunal hearing for which they were submitted, particularly if the documents have not been used in evidence for the case. These are known as the "Harman obligations". A person who wants to use such documents for a purpose outside hearings in the Guardianship List should seek an order from the Tribunal permitting that use.

Access to documents before a hearing

People filing documents should be aware that the Tribunal may show the document to other parties in the proceeding even if the person filing them seeks confidentiality.

A party to a proceeding who seeks access to documents before a hearing will usually be given access to them. In some cases, a person may be refused access to sensitive documents before the hearing. The application for access can then be renewed at the hearing.

A person who considers that they are disadvantaged by only seeing documents at the time of the hearing may seek an adjournment to prepare a response to the information. The presiding member will decide whether an adjournment should be granted on those grounds.

Access to documents at a hearing

At a hearing, the presiding member will check whether all parties have copies of relevant documents upon which another party relies.

Where the information in a sensitive document is relevant to the issues being decided at the hearing, the information will be made available to all parties, but not necessarily to persons present who are not parties. The form in which information is made available is at the discretion of the presiding member. For example, if copies of sensitive documents or confidential documents have been distributed to the parties at the hearing, they may be collected again at the end of the hearing.

Access to documents when there is no further hearing planned

While section 146 of the VCAT Act allows access to Tribunal files for both parties and non-parties, the Tribunal has power under section 146(4)(b) to give directions preventing access to some files or documents to some (or all) persons.

The Tribunal receives confidential and sensitive documents for the purpose of making decisions about appointing guardians or administrators or making orders about medical treatment or powers of attorney. Possible reasons for the Tribunal to prevent a person having access to a file or a document on a file are:

- *access would or may cause serious harm to the health or safety of a person*

- *access would be unreasonable disclosure of a person's personal affairs*
- *access would be a breach of confidence; or*
- *the document sought is not relevant to the proceedings at the Tribunal.*

In the Guardianship List, if the Tribunal member considering an application for access to documents is considering refusing access, the person seeking access will be told the reasons why access might be refused and given an opportunity to make submissions in response. If they make no submissions, the Tribunal will consider the request withdrawn. If they make submissions, the Tribunal will consider the request further and may then inform the parties to the proceeding in case they wish to make submissions about the proposed access. Submissions may be in writing or made at a directions hearing, depending on the Tribunal's discretion in each case.

When the person seeking access and the parties to a proceeding have made submissions, and had a hearing if necessary, the member considering the application for access will decide whether to disclose the documents or give a direction under section 146(4)(b) of the VCAT Act preventing access.

If a person who is the subject of a Tribunal proceeding does not have capacity to express their wishes or make submissions about access to documents concerning them, their administrator or financial enduring power of attorney can do so instead.

When the person who was the subject of a Tribunal proceeding has died, their legal personal representative (e.g. their executor) will be able to give consent or make submissions about access to documents concerning them.

Directions hearings

Most matters in the Guardianship List proceed to hearing without a preliminary directions hearing. If an additional hearing is needed, the member at the first hearing will make orders and directions about preparation for the next hearing.

Settlement between the parties

Apart from procedural matters, the Tribunal rarely makes consent orders in the Guardianship List. Most of the substantive orders sought in the Guardianship List can only be made if the Tribunal is satisfied of particular matters (such as that the order being made is the least restrictive possible). Accordingly, parties who have reached agreement about some issues should still be prepared to attend a hearing – though it will be shorter if some practical matters are already resolved.

Re-hearing

Under the Act and the Powers of Attorney Act 2014 (Vic), a person who is entitled to notice of the hearing may apply for a re-hearing order. This does not apply to temporary or interim orders. If the order was made at a routine reassessment, a person may only seek a re-hearing if the Tribunal gives leave (permission).

If the person seeking a re-hearing was not a party or has not been joined as a party, they must first seek the Tribunal's leave to apply for a re-hearing.

An application for re-hearing (or for leave to seek a re-hearing) must be made within 28 days after the order (or after the giving of written reasons if those have been requested).

A re-hearing deals with the same issues as were the subject of the first hearing. It should not be confused with a reassessment or a review. A review is held when a person applies under section 120 of the VCAT Act for a new hearing because they were not present at the first one and have a reasonable excuse. Reassessments are held regularly to consider whether an order is still required. Reassessments may also be held because of a change of circumstances.

For a re-hearing, all persons who were entitled to notice of the original application, hearing and order are entitled to notice of the application for re-hearing, hearing and order.

For a re-hearing, the following people are parties:

- *the applicant for re-hearing*
- *the parties to the original application*
- *any joined parties.*

Withdrawal of an application

Withdrawal of an application requires the Tribunal's leave (permission). Applicants seeking to withdraw their application should do so in writing, explaining why orders are no longer needed. The Tribunal will consider whether there are any remaining protective concerns before allowing the applicant to withdraw. That is because the legislation relevant to the Guardianship List is intended to protect persons who have or may need a substitute decision-maker such as an administrator, guardian or attorney.

In the Guardianship List, even if an application has been withdrawn, the applicant or anyone else is able to make a further application about the same circumstances at any later time.

Venue for hearings

Most hearings in the Guardianship List are conducted at the William Cooper Justice Centre on 223 William Street Melbourne.

The Tribunal also hears Guardianship List matters in suburban and regional courts.

If there is a suburban or regional Tribunal venue close to the represented person, the Tribunal will conduct the hearing there, where possible.

In some cases, it is acceptable for one or more people to attend a hearing by telephone. A person who wants to attend by telephone must notify the Tribunal in writing and their request will be accommodated if possible and suitable in the particular circumstances.

If the proposed represented person is unable to leave their hospital or care facility, the Tribunal may be able to arrange a hearing at the hospital or care facility, in limited circumstances.

Adjournment and change of venue

- *Notes about adjournments and change of venue appear in Practice Note – PNVCAT 1 Common Procedures.*
- *In the Guardianship List, the interests of the person with a disability will be of the greatest importance. Thus, for example, even if all the parties agree to an adjournment, the Tribunal may decide not to grant an adjournment if that is more in the interests of the represented person (or proposed represented person, or of the principal who has given a power of attorney, or of the patient requiring a medical treatment decision).*
- *As to seeking a change of venue, the most important factor will be to conduct the hearing at a venue which is easiest to attend for the person who is the subject of the proposed orders (that is, the represented person, proposed represented person or principal who has given a power of attorney, or of the patient requiring a medical treatment decision).*

Urgent matters and temporary orders

The Tribunal has power to make urgent temporary orders. A person seeking such an order should contact the Office of the Public Advocate first and that office is able to contact the Tribunal at any time, including after hours, if an urgent order is needed.

Any order made without a hearing will be reviewed at a hearing as soon as possible. The maximum time for such a review is six weeks.

Parties who wish to raise urgent matters about an upcoming hearing or about a person who already has an administrator guardian or attorney under an EPA may contact the Tribunal's registry (during office hours) or the Public Advocate after hours and explain the issue.

Missing persons

Administration orders can be made about a missing person. For these applications, there is no need to show that the person has a disability – it is only necessary to show that the person is missing, has contacted no friends or family for 90 days and reasonable efforts have been made to find them. An administrator can be appointed for such a person when there are decisions to be made about their finances or property.

An application to appoint an administrator for a missing person should be accompanied by evidence that the person is missing, in either an affidavit or a witness statement. The criteria to be addressed are in section 60A of the Act.

The role of the Public Advocate

Under the VCAT Act (for example, see clause 35 of Schedule 1), the Tribunal can request the Public Advocate to investigate and report about an issue. In such cases, the Tribunal does not decide the issue until it receives the report, although there may be interim orders about urgent matters.

At the next hearing, the parties and other people affected by the report will have an opportunity to comment on it. A person who wishes to see the report before the hearing may apply in writing. Reports are not always distributed as they may contain sensitive health or other personal information.

The Public Advocate is available to be appointed as guardian for a person where no other suitable guardian is available.

The role of State Trustees

State Trustees Limited (STL) is a state government-owned company which is available to be appointed as an administrator. The order appointing STL as an administrator sets standard fees.

STL as an administrator reports to the Tribunal about the financial affairs of the represented person.

The Tribunal also arranges for STL to examine the annual accounts prepared by private administrators. Fees for this service are paid from the funds of the person under administration. If STL identifies issues in the annual examination, the Tribunal notifies the administrator and seeks resolution of those issues.

Other reports

The Tribunal has power to seek a report from other persons or bodies. For example, the Tribunal could ask a guardian or administrator who has already been appointed, or a service provider, to provide a report, which would then be treated in the same way as a report from the Public Advocate.

Other professional administrators

A number of trustee companies are available to be appointed as professional administrators. The Tribunal has no fee agreements with those companies. Parties who anticipate that an administrator will be appointed for a friend or family member may approach one of these companies for information about their fees and to obtain their consent to an appointment, before a hearing. This would then be available for the Tribunal to consider at the hearing. The order will set the fees.

Some solicitors also offer a service as professional administrators. A party who anticipates the need for appointment of a professional administrator may obtain from the solicitor information about their fees and their willingness to be appointed and present the information at the hearing.

Identifying a potential administrator or guardian before a hearing

The Act sets criteria for persons eligible to be appointed as an administrator (section 47) or guardian (section 23). Applicants may wish to identify potential guardians or administrators in the application. Unless those people are professional administrators (such as a trustee company or solicitor) they should attend the hearing. Generally the Tribunal does not appoint as a guardian or administrator a person who does not attend the hearing. For professional administrators other than STL, a letter of consent to be appointed which sets out the proposed fees is usually sufficient.

Interstate orders

Either the Public Advocate or a guardian or administrator of a represented person in another state or territory can apply for the guardianship or administration order to be registered in Victoria so that it can have effect in Victoria.

For information about interstate orders, see the website of the Public Advocate or the Australian Guardianship and Administration Council

Forms

All forms referred to in this practice note are available on this website. Find all forms in the following sections:

- *Appoint a guardian or administrator for an adult with a disability*
- *Apply to reassess or revoke a guardianship or administration order*
- *Appoint an administrator for a missing person*
- *Enduring power of attorney*
- *Enduring power of attorney (medical treatment)*
- *Medical report*
- *Register an interstate order in Victoria*

For more information, see Guardianship and administration or Powers of Attorney.

ANNEXURE B

Law Institute of Victoria Capacity Guidelines and Toolkit

OCTOBER 2016

Introduction

The Capacity Guidelines and Toolkit is designed to provide a practical overview for legal practitioners who may have concerns about their client's capacity.

While there is a basic common law presumption that every adult person has legal capacity to make their own decisions, in some cases, legal practitioners may find they have doubts about whether their client has the required level of legal capacity.

A person's capacity may be affected by a number of factors including:

- *an intellectual disability*
- *mental illness*
- *a particular medical condition*
- *an age-related cognitive disability, such as Alzheimer's disease.*

It is fundamental to the practitioner/client relationship that a practitioner relies and acts upon instructions of their client. However, where a practitioner has doubts about a client's capacity to give competent instructions, it is the practitioner's responsibility to explore this issue further. This Toolkit aims to help legal practitioners take a principled approach to this task that is thorough, thoughtful and respectful of each client's particular circumstances. Practitioners who inform themselves of the issues surrounding client capacity and who are aware of the available resources in the area will be better equipped to face the challenges which often arise in this area of practice, while still providing a high standard of legal service to clients.

What is capacity?

The common law presumes that every adult person (over the age of 18 years) has legal capacity to make their own decisions. In the Supreme Court of Victoria case Goddard Elliott (a firm) v Fritsch, Bell J stated that:

> The individual is taken to have legal personality because 'rights and duties involve choice' and individuals 'naturally ... enjoy the ability to choose. Bell J highlights that this foundational principle of the common law is also an international human right which, in Victoria, is protected by the Charter of Human Rights and Responsibilities Act 2006 (Vic).
>
> Capacity is a legal, rather than a medical, concept and will depend on the relevant law applicable in each situation.
>
> The High Court recognised this in Gibbons v Wright and held that "the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument and may be described as the capacity to understand the nature of that transaction when it is explained."

General points to consider

As a general rule, capacity will be present where a client:

- *understands the information relevant to the decision*
- *retains that information*
- *uses or weighs that information as part of the process of making the decision (using reasoned processes)*

- *communicates their decision.*

Capacity as a concept is fluid and decision-specific. Each transaction must be considered in relation to its particular character and circumstances.

Capacity to manage one's affairs hinges on the complexity of the task or activity, but it is ultimately a "functional" issue – one to be judged in a real-life social context of the person's environment and family or other supports. It is a "task-specific" and context-dependent question.

Because a person's capacity may fluctuate, you must consider issues of capacity with reference to an ongoing relationship with your client, where you consider their patterns of behaviour, rather than relying on a one-off meeting to evaluate capacity. In addition, if a client has capacity for a particular task, for example, making a will, it does not automatically mean that he or she has capacity for other transactions, such as appointing an attorney.

Identify the relevant legal test for capacity

What type of legal assistance is your client seeking?

TYPE OF LEGAL TASK	***LAW TO CONSIDER***
ENTER A LEGAL TRANSACTION/CONTRACT	*Gibbons v Wright (1954) 91 CLR 423*
APPOINT A MEDICAL AGENT	*Powers of Attorney Act 2014 (Vic)*
	Medical Treatment Act 1988 (Vic)
APPOINT A SUPPORTIVE ATTORNEY	*Powers of Attorney Act 2014 (Vic)*
MAKE AN ENDURING POWER OF ATTORNEY	*Powers of Attorney Act 2014 (Vic)*
MAKE A WILL	*Banks v Goodfellow (1870) LR 5 QB 549*
BRING OR DEFEND CIVIL PROCEEDINGS	*Federal Circuit Court Rules 2001 (Cth)*
	Magistrates' Court General Civil Procedure Rules 2010 (Vic)
	County Court Civil Procedure Rules 2008 (Vic)
	Supreme Court (General Civil Procedure) Rules 2005 (Vic)
	Goddard Elliott v Fritsch [2012] VSC 87
	Pistorino v Connell & Ors [2012] VSC 438
DEFEND CRIMINAL CHARGES	*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)*
ACCESS HEALTH INFORMATION	*Health Records Act 2001 (Vic)*
	Privacy and Data Protection Act 2014 (Vic)

MARRIAGE/DIVORCE	*Marriage Act 1961 (Cth)*
	Family Law Act 1975 (Cth)

1. Remember the key principles

Always have these principles in mind during client interviews:

- *Presume a person has capacity*
- *Capacity is decision-specific*
- *Capacity is fluid*
- *Don't assume a person lacks capacity based on appearances (eg because of their age, disability or behaviour)*
- *Assess the person's decision making ability – not the decision they make*
- *Respect a person's privacy*
- *Substitute decision-making is a last resort.*

2. Look for warning signs

Are there any warning signs that your client might lack capacity? For example, the client:

- *has difficulty with recall or has memory loss*
- *has ongoing difficulty with communications*
- *demonstrates a lack of mental flexibility*
- *has problems with simple calculations which they did not have previously*
- *is disoriented*
- *is in hospital or a residential aged care facility when instructions are taken*
- *has changed legal practitioners several times over a short period, particularly if there has been a change from a legal practitioner who has advised the client for many years*
- *is accompanied by many other friends, family or carers to interviews with the legal practitioner but is not given the chance to speak for themselves*
- *shows a limited ability to interact with the legal practitioner (eg is unable to repeat advice to the legal practitioner and ask key questions about the issues), or*
- *suddenly changes core values or long-held beliefs.*

You might have a sense that "something about the client has changed", including deterioration in personal presentation, mood or social withdrawal.

If you are taking instructions for a will and you have doubt about the client's capacity, and the client is elderly or ill but can provide coherent instructions, you should proceed with the will preparation and signing, and obtain a medical assessment of capacity as soon as possible thereafter.

3. If there are warning signs, conduct an initial capacity assessment by interviewing your client

Do you need further expert advice or can you proceed?

3.1 Ask questions to assess if your client understands the particular legal transaction.

- *Ask open-ended questions rather than questions which can be answered by "yes" or "no".*
- *Do not ask leading questions which suggest the answer.*
- *Frame your questions to quickly identify any areas of concern for which a person may need support or help, or require a substitute decision-maker.*
- *Ensure that it is the person being assessed who answers the questions.*

3.2 Spend sufficient time with the client to explore the issues.

3.3 Take detailed file notes and document the process used to establish capacity.

- *Where possible, note all questions and answers – ideally verbatim.*
- *Include opinions of other witnesses about the client's capacity.*
- *Remember to include basic information about the date, the time of the interview, who was present, the length of the interview and the location.*

3.4 Meet the client alone at some stage.

- *Where advice is sought on wills and/or powers of attorney, you should always meet the client alone (in particular, without proposed beneficiaries/attorneys being present).*
- *Remember: only take instructions from your client as this will avoid a conflict of interest.*
- *Be wary of potential undue influence.*

4. If you continue to have doubts about capacity, obtain a formal capacity assessment from a medical practitioner

4.1 Identify the appropriate expert.

In most cases, it will be appropriate to first approach the client's GP, especially where they have known the client for a significant period of time. Where necessary, the client's GP can refer them to an appropriate specialist.

- *There are a number of specialists who can provide a formal capacity assessment of your client. You should consider the client's particular circumstances and possible disability when deciding which doctor or specialist to refer your client to. A list of the types of specialists is provided in the full version of the Toolkit.*
- *If your client provides information about a current medical condition, this may make it easier to decide on a doctor or specialist.*
- *If your client is in hospital, then consideration has to be made of the client's treatment and whether medication might affect capacity. Usually a simple phone call to the hospital to speak to the treating doctor will provide you with sufficient information. Ask the doctor to make a note of the patient's capacity on the patient's chart.*

4.2 Obtain client consent to seek a medical report.

- *Explain to your client the legal need to record evidence of capacity, to protect against possible future legal challenges to the validity of the legal transaction involved.*

- *If your client refuses to consent to a medical assessment, the firm may cease to act, giving reasons (see Ethics Committee Ruling R4568).*

4.3 Prepare a detailed referral letter.

The LIV Elder Law Committee has produced an outline of matters to consider when requesting a medical assessment (to determine a person's capacity), which includes:

- *appointment arrangements*
- *relevant background on the client, including personal, medical and financial information*
- *details of the legal transaction/proceeding and why the assessment is sought*
- *clarity on the scope of the request, ie:*
  - *the type of assessment*
  - *the legal test(s) to be applied, or*
  - *any guidelines about how the assessment is to be conducted*
- *administrative matters, including details of the expert's qualifications and expertise and any relevant court or tribunal Practice Direction on expert evidence*
- *confidentially and access to the report.*

5. What if the client refuses to consent to the health report?

Make all possible inquiries and take detailed file notes. According to the LIV Ethics Committee Ruling R4568, if a client refuses to consent to a medical assessment, the firm can cease to act, giving reasons.

If you are in doubt, call the LIV Ethics Advice Line on 03 9607 9336.

See also the full version of the Toolkit for a flowchart on the consequences of incorrectly assessing capacity.

6. Consider the medical evidence and make a final judgment about the client's capacity to provide instructions for the particular legal transaction

- *The medical report is one source of evidence about capacity – clinical opinions are distinct from a legal determination about capacity.*
- *Take time to thoroughly read and understand the report and to clarify any technical terms or language with the report's author, if necessary.*
- *Consider the potential consequences of ceasing to act and your duty to your client under the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (Vic).*
- *Be prepared to obtain a report from a medical practitioner should the issue of capacity re-arise.*
- *If you are in doubt, call the LIV Ethics Advice Line on 03 9607 9336.*

7. As a last resort, seek the appointment of a substitute decision maker

The appropriate substitute decision maker will depend on the relevant legal transaction.

TYPE OF LEGAL TASK	***SUBSTITUTE DECISION MAKER***	***RELEVANT LAW***
1. Entering into a	*A VCAT appointed*	*Guardianship and*

TYPE OF LEGAL TASK	SUBSTITUTE DECISION MAKER	RELEVANT LAW
legal transaction /contract	*Administrator* *An attorney under an enduring power of attorney (financial and/or personal)* *An attorney under a non-enduring power of attorney*	*Administration Act 1986 (Vic) Part 5* *Powers of Attorney Act 2014 (Vic) ss12, 27* *Powers of Attorney Act 2014 (Vic) s12*
2. Bringing or defending civil proceedings	*A litigation guardian*	*Federal Circuit Court Rules 2001 (Cth)* *Magistrates Court General Civil Procedure Rules 2010 (Vic)* *County Court Civil Procedure Rules 2008 (Vic)* *Supreme Court (General Civil Procedure) Rules 2005 (Vic)* *Goddard Elliott (a firm) v Fritsch [2012] VSC 87* *Pistorino v Connell & Ors [2012] VSC 438*
3. Access health information	*An attorney appointed under an enduring power of attorney (financial and/or personal)* *A medical agent appointed under an enduring power of attorney (medical treatment)* *A person appointed as enduring guardian under an enduring power of guardianship before 1 September 2015* *A 'person responsible' within the meaning of the Guardianship and Administration Act 1986 (Vic)* *A VCAT appointed guardian* *A VCAT appointed Administrator*	*Health Records Act 2001 (Vic) s85* *See also:* *Privacy and Data Protection Act 2014 (Vic) s28*
4. Entering into a divorce or a marriage	*A Case guardian*	*Family Law Act 1975 (Cth)* *Family Law Rules 2004 (Cth) Part 6.3*

If you are of the view that your client does not have capacity, you may make an application to have a substitute decision maker appointed for your client (depending on the particular legal transaction for which instructions are sought).

If your client objects to the application, then you should cease to act, giving reasons.