



**A GUIDE WRITTEN TO ASSIST ADVOCATES REPRESENTING
PEOPLE APPEARING BEFORE THE GUARDIANSHIP LIST OF
THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

Recommended for Legal Advocates

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1. INTRODUCTION

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

The key legislation in this jurisdiction is the *Guardianship and Administration Act 1986* (GAA). The purpose of the GAA is *to enable persons with a disability to have a guardian or administrator appointed when they need a guardian or administrator*.¹ Of particular importance, s. 4(2) states that Parliament's intention is that the GAA should be interpreted, and powers under the GAA exercised, so that:

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

Typically, one VCAT member conducts a hearing. VCAT members are chosen from a wide variety of professions including law, medicine, social work, psychology etc. The VCAT member has to be satisfied that the following criteria are met before submitting a person with a disability to a guardianship and/or administration order.

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

¹ S.1 (All references are to the GAA unless otherwise specified.).

- (6) The order must take into account the *wishes of the person* with a disability wherever possible.²

This publication is specifically written for advocates representing a person with a disability. It should be noted that there is very little case law specific to this jurisdiction. The focus is on representing the person who has a disability on his or her instructions and wishes.

The aim of this publication is, in part, to increase legal representation to people with disabilities who are subject to an application before the VCAT and to promote the persons right to an advocate of choice. It is crucial in this jurisdiction that the law is rigorously applied and tested and that VCAT is accountable and peoples human rights are protected. Although this publication is for legal advocates in many cases a non legal advocate or support person may assist the person with a disability, thus the guide is written in a style which is accessible and will be widely available. The guide refers generally to ‘advocate’ meaning legal advocate.

2. HISTORY OF GUARDIANSHIP AND ADMINISTRATION – A HUMAN RIGHTS PERSPECTIVE

The VCAT Guardianship List has the power to make protective orders for persons aged 18 years and older when, because of their disability, they are unable to make decisions for themselves.

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

The Act was passed by the Victorian Parliament in 1986 following the Report of the Ministers’ Committee on Rights and Protective Legislation for Intellectually Handicapped Persons (known as the ‘Cocks Committee Report’). Issues and

² S. 22, 46 (Also see s. 4 objects of the GAA).

concerns expressed by the community and disability advocates lead to the creation of the Cocks Committee in 1982. Although the Committee was commissioned to look at the needs of people with intellectual disabilities, the Committee's terms of reference were extended to cover other disabilities.

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

The disability advocacy sector embraced the legislation as acknowledging the rights of people with disabilities to equal participation and as a significant reform in the move away from institutional care. The Act, as it emerged, embraced a functional not a medical test for when an order is needed.

From its presentation in December 1982, the report enjoyed ministerial, public and parliamentary support. The legislation was introduced in conjunction with the *Mental Health Act* 1986 and the *Intellectually Disabled Persons' Services Act* 1986. Together with the passage of the *State Trustees Corporation of Victoria Act* 1987, these four Acts represented a raft of legislation addressing the legal rights of people with disabilities. In addition, section 118 of the *Instruments Act* 1958 gave the Guardianship Board jurisdiction to revoke enduring powers of attorney. In April 1990 the *Medical Treatment (Enduring Power of Attorney) Act* 1990 was passed, amending the *Medical Treatment Act* 1988 and providing for competent adults to appoint an agent to make decisions on behalf of the person if they became incompetent. Together, these reforms sought to meet existing and emerging social needs and to strike a balance between the ethical values of autonomy (choice) and paternalism (protection).

After a major review of tribunals in the late 1990's the Guardianship and Administration Board was abolished and its role conferred on VCAT in 1998.³ The renamed *Guardianship and Administration Act (1986)* (GAA) governs this jurisdiction. The GAA created the Office of the Public Advocate and the VCAT Act created the Guardianship List. The Guardianship List sits within VCAT under the guidance of a Deputy President of VCAT, with at least five years experience as a duly qualified lawyer, responsible for the day to day management of the list.

³ *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act* 1998.

3. THE GUARDIANSHIP & ADMINISTRATION LIST - VCAT

The Guardianship List is within the Human Rights Division of VCAT. The key legislation, as stated above, is the *Guardianship and Administration Act 1986*, however, the *Instruments Act 1958* and the *Medical Treatment Act 1988* also apply to this jurisdiction. Hearings by VCAT are governed primarily by the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act).⁴

The Guardianship List makes guardianship and administration orders and reviews existing orders through reassessments under the GAA.⁵ However, VCAT can also revoke enduring powers of attorney (including medical and financial), suspend medical powers under these three Acts or make other orders about those enduring powers.

The main venue for VCAT is in Melbourne, however hearings are usually scheduled as close as possible to the place where the person lives. Cases are heard in the Magistrates' Courts buildings, hospitals, nursing homes and other venues as required. The VCAT website outlines location, date and time of hearings. See www.vcat.vic.gov.au. There are approximately 50 members, mostly sessional, who preside over hearings as single member panels. Most of the members are lawyers, and many of whom are not familiar with services available to people who appear.

⁴ In the context of guardianship and administration orders, these provisions are varied by the Provisions of Schedule 1, Part 9 VCAT Act.⁴ Also note the *Victorian Civil and Administrative Tribunal Rules 1998*; in particular Part 5 which is concerned with the Guardianship List.

⁵ This Guardianship List received 3,242 original applications and 6104 reassessments in 2005-06. Types of cases handled include: 17% guardianship; 8% guardianship reassessments; 26% administration orders; 40% administration reassessments; 1% advice to administrators; 1% revocation of enduring powers of attorney (VCAT Annual Report 2005-06).

3.1 WHAT IS THE APPROACH TO ADVOCACY IN THIS JURISDICTION?

3.1.1 TAKING INSTRUCTIONS

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

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

Firstly, the GAA requires that VCAT be informed of their views or wishes of the client. The role of the advocate is to make sure that such views or wishes are properly, fairly and well presented to VCAT.

Secondly, a person has a right to equality before the law and to legal representation. To appoint a litigation guardian in a case where the very issue in dispute is capacity of the client, is to pre-judge the case and to remove the client from engagement with the court process about this central issue.

3.1.2 CAPACITY

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

evidence or assert positive evidence . A lawyer in such circumstances has a duty to the client and to the court. Lay advocates are not bound by this duty.

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

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

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

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

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

Inform VCAT in writing that you are acting on behalf of a client and request that notices are sent to you.

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

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

4. BEFORE THE HEARING

4.1 HOW IS AN APPLICATION MADE?

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

There is a standard application form for both applications. Amongst other things, it requires the applicant to “briefly outline the issues of problems faced by the person you are applying about which have prompted your application. If you wish VCAT to appoint an administrator or guardian, please explain why they are needed”⁶

4.2 WHAT TYPE OF HEARING IS LISTED?

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

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

Guardianship- issues about life style - where a person lives and with whom, whether they can work and if so where and for whom, what health care they are to receive, who they may associate with etc.

Administration – issues relating to a persons legal and financial affairs.

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

VCAT Application to Guardianship List.

4.2.1 REHEARING

A rehearing is a *de novo* hearing.⁷ A person has a right to a rehearing if they were unaware of the hearing that made the order or there is new evidence. Generally, a rehearing is conducted by a VCAT member more senior than the original member who heard the case.⁸

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

- (a) affirm the order;
- (b) vary the order; or
- (c) set aside the order and make another order in substitution.⁹

An application for a rehearing does not affect the operation of any order or prevent the taking of action to enforce the order, unless VCAT makes an order staying the operation of an order pending the determination of the rehearing.¹⁰

4.2.2 REVIEW

A person in respect of whom an order is made may apply to VCAT for a review of the order if the person did not appear and was not represented at the hearing at which the order was made.¹¹ VCAT may:

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

⁷ *RL (Guardianship)* [2002] VCAT 12.

⁸ XYZ at [10] per Cavanough J.

⁹ S.60C.

¹⁰ S.60D.

¹¹ S.120(1) VCAT Act.

4.2.3 REASSESSMENT

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

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

- (a) within 12 months after making the order, unless the Tribunal orders otherwise; and
- (b) in any case, at least once within each 3 year period after making the order unless the Tribunal orders otherwise.

(2) The Tribunal may at any time conduct a reassessment of any order made by it under this Act.

(3) A reassessment under this section may be conducted-

- (a) on the Tribunal's own initiative; or
- (b) on the application any person.

The reassessment of orders is important because the represented person's condition and circumstances may change. A reassessment hearing upon the application by a person (as distinct from an 'automatic' reassessment or on the Tribunal's own initiative) is by leave of VCAT. In the period 2005-06, guardianship orders were generally reassessed within one year and administration orders within three years.¹²

In addition to any other parties, the represented person and the guardian or administrator (as the case may be) are parties to a reassessment.¹³

Upon completing a reassessment VCAT may, by order, amend, vary, continue or replace the order subject to any conditions or requirements it considers necessary or revoke the order.¹⁴

4.3 PARTIES TO THE HEARING

The person subject to a hearing and any person proposed as a guardian or an administrator are parties to the proceedings (ref GAA S17 and S43).

¹² VCAT Annual Report p.26.

¹³ S.61, 17, 43.

¹⁴ S.63.

4.4 WHO IS ENTITLED TO A NOTICE OF HEARING?

As person subject to a hearing is a party to the proceeding, they *must* be served a notice (VCAT Act). The notices are difficult to open and may seem cryptic to some people. They need to be explained carefully. Notices do not encourage the person to appear. If they do not appear and fail to provide a reasonable excuse that would justify an adjournment, VCAT will proceed without them.

Person proposed as guardian or administrator:

As they are also considered a party to the proceedings and entitled to receive notices.

Applicant:

The applicant will be notified of the hearing.

Nearest relative:

The nearest relative (who is not the applicant or proposed guardian or administrator) of the person to whom a hearing relates is entitled to notice of the application, notice of the hearing and notice of any order.

Primary carer:

The primary carer of the person to whom a hearing relates is entitled to notice of the application, notice of the hearing and notice of any order.

Public advocate:

The public advocate is entitled to notice of the application, notice of the hearing and notice of any order.

Administrator:

If the application is for a guardianship order and there already exists an administration order, then any administrator of the estate of the person in respect of whom the is made is entitled to notice of the application, notice of the hearing and notice of any order.

Guardian:

If the application is for an administration order and there already exists a guardianship order, then any guardian of the person in respect of whom the application is made is entitled to notice of the application, notice of the hearing and notice of any order.

Other interested parties:

If the application is for an administration order, any person who has advised the Tribunal of an interest in the person in respect of whom the application is made or in his or her estate.

4.5 WHERE DO HEARINGS TAKE PLACE?

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

4.6 AT WHAT TIME ARE THE HEARINGS?

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

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

4.7 NOTIFICATION OF REPRESENTATION

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

4.8 CAN HEARINGS BE ADJOURNED?

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

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

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

4.9 WILL AN INTERPRETER BE REQUIRED?

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

4.10 ACCESSING THE VCAT PROCEEDING FILE

The proceeding file contains all documents lodged in the proceeding in relation to the guardianship and/or administration orders.¹⁵ This may include a statement by the applicant, medical and other expert reports and submissions by

¹⁵ S.146(1) VCAT Act.

interested parties.¹⁶ With a signed authority from the person subject to the application a lawyer can inspect the file or request VCAT to fax or mail a copy of the application form and supporting documents. There is a fee for copying.¹⁷ Requests should be made at the earliest opportunity but it should be remembered that further documents may be filed subsequently.¹⁸

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

The proceeding file will usually contain:

- The application
- Medical and other professional reports
- OPA report (if involved)
- Any submissions/letters from interested parties
- All notices issued by VCAT relating to the application.

4.11 DISCUSSIONS WITH GUARDIAN OR ADMINISTRATOR OR PERSON WHO HAS LODGED THE APPLICATION

With the client's permission, contact the guardian and/ or administrator or person who has lodged the application, or OPA if that office is involved in providing a report, before the hearing to clarify any matter that might be helpful for the case. It is not appropriate to contact the applicant if he or she is a family member, without instructions from the client. It may be a situation where the applicant is a family member and there is conflict and the client does not want you to discuss the case with her or him before the hearing.

Discussions and negotiations with any guardian, administrator or applicant or interested party or OPA investigator may result in a positive outcome for your client at the hearing. You may be able to discuss whether there is a need for a guardian or administrator or least restrictive alternatives. In some cases it may

¹⁶ Billings at 10.

¹⁷ S.146(2) (3).

¹⁸ Billings at 10.

lead to the withdrawal of the application. It will also provide valuable information about the issues involved and assist in preparing for the hearing.

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

4.12 OBTAINING SECOND OPINIONS

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

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

For detailed assessments in relation to:

- **Age related disabilities** contact ACAT (aged care assessment team).
- **Intellectual disability** obtain a functional assessment from an O.T speech therapist or a neuropsychologist.
- **Acquired brain injury** obtain a report from ARBIAS or an allied health assessment.
- **Mental illness** the Victorian Mental Illness Awareness Council has a list of psychiatrists who will bulk bill to provide a report.

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

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

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

4.13 LEGAL FEES

4.13.1 LEGAL AID FUNDING

Victoria Legal Aid (VLA) may be able to fund a case if there is merit to the case – a reasonable prospect of revoking an existing order or preventing the appointment of a guardian or administrator and the person cannot, in accordance with the VLA guidelines, afford a private lawyer.

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

Victoria Legal Aid also runs a duty lawyer service daily at VCAT. Victoria Legal Aid has an office at VCAT and may be able to assist your client. They have a duty lawyer service that provides advice on the day or you can contact VLA before hand to discuss the clients appearance, and they may be able to assist on the day.

4.13.2 NON LEGAL AID

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

If you believe that the administrator is not acting in the best interests of the client by disallowing the payment of legal fees you can apply to VCAT for a determination on the matter¹⁹.

¹⁹ S. 56.

4.14 HANDY HINTS BEFORE THE HEARING

- *Notify VCAT in writing that you are acting for the person.*
- *Act on instructions and do not presume that what a person is telling you is incorrect, regardless of the content.*
- *Your role is to act on the person's instructions, not in their best interests.*
- *Be clear about the fact that you are representing the proposed represented person, not their family.*
- *Be patient – it may take time to gain full instructions from a person with a disability. This may mean additional appointments with the person to get full instructions. Some people may be on medication that tires them.*
- *Clients may never have been to a Court or Tribunal before. Inform them of the process and, if required, assure them that they are not at the Tribunal because they have done something wrong*
- *Remember that this jurisdiction can be very emotional for the client. Trusted family members, friends and medical practitioners may state issues relating to a persons' disability and functioning capacity that may be confronting and offensive to the client. The client may become emotional and upset and it is the role of the advocate not to judge or deny the person the right to express their feelings.*
- *Apply for legal aid funding or check with the administrator if they will cover your legal fees.*
- *Explore least restrictive options.*
- *Obtain all necessary paperwork from VCAT before the case. You can call and ask to view the file or pay a fee for copying and ask VCAT to send the information to you.*
- *If a person's disability is in dispute, seek an independent medical report. You may be able to obtain legal aid for this report.*
- *In relation to the diagnosis of a disability check the medical report provided to VCAT by the applicant, to see if it is up to date. VCAT may be relying on old medical reports. If it is an old report and you do not believe that the person has a disability at the time of the hearing, obtain a new and appropriate medical report.*
- *Where relevant request a copy of the investigation report from OPA. OPA write the report and only VCAT can release it, therefore the request should be in writing to VCAT, with a signed authority from your client. It may be that VCAT will not give you the report. If so you will need to make seek release at the commencement of the hearing and adjourn for instructions. You may also make an application and argue the case at VCAT to see the report. You can always call OPA and ask to speak to the report writer for information in relation to the report.*

- *Inform the Registrar at VCAT if the matter is going to be contested and take longer than 45 minutes. It may be that they will set down a directions hearing before the actual hearing itself.*
- *Request a time and location which will suit your client best.*
- *Where relevant and your client agrees, speak with the applicant, family members and carers, State Trustees Ltd. (or other administrator) or OPA in relation to the case before the hearing. This will help you prepare the case more fully before the day.*
- *Check on the VCAT website the night before hearings of your hearing time and location.*

5. AT THE HEARING

5.1 REPRESENTATION

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

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

So you need to seek leave to appear.

5.2 WHO WILL HEAR THE CASE?

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

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

5.3 WHAT IF THE CLIENT DOES NOT WANT TO ATTEND THE HEARING?

Clients should be made aware that, except in the most unusual cases, failing to participate in the hearing will significantly reduce the chances of the application being dismissed or of an order being revoked.

However, if VCAT thinks it appropriate, proceedings may be conducted, in whole or in part, by means of a telephone or video conference or other system of telecommunication.²⁰ If the parties agree, the proceeding may be conducted entirely on the basis of documents.²¹

5.4 WHO CAN ATTEND THE HEARING? CAN THE HEARING OUTCOME BE MADE PUBLIC?

Unless otherwise provided, hearings are public but VCAT may, on application or its own initiative, direct that a hearing or any part of it be held in private.²² The Tribunal will generally want all parties present during the hearing, however you can request for witnesses to be excluded from parts of the hearing. You may request for witnesses to be sworn before giving evidence however, it would be wise to forewarn the Tribunal of your request with written reasons for the request.

In specified circumstances, VCAT may also impose restrictions on publication of evidence or other information arising during the proceedings.²³ Unless VCAT orders otherwise, a person must not publish or broadcast or cause to be published or broadcast any report of a proceeding under the Act that identifies, or could reasonably lead to the identification of, a party to the proceeding.²⁴ VCAT may only order otherwise if it considers that it would be in the public interest to do so²⁵ and such an order must specify that pictures are not to be taken of any party to the proceeding.²⁶ (see 6.3 decisions)

²⁰ S.100(1) VCAT Act.

²¹ S.100(2) VCAT Act.

²² S.101(1)(2) VCAT Act.

²³ S.101(3)(4) VCAT Act.

²⁴ VCAT Act Sch 1, Part 9s. 37(1). Penalty: 20 Penalty Units.

²⁵ VCAT Act Sch 1, Part 9 s. 37(2).

²⁶ VCAT Act Sch 1, Part 9 s. 37(3).

5.5 THE PROCEDURE OF VCAT

Hearings are conducted as informally as possible, often seated around a table.²⁷ Family members and other interested persons are invited to participate, but it is rarely necessary for medical practitioners and other experts who have assessed the person and made a written report to attend. If issues such as disability or capacity are disputed, it is then important that you have expert witnesses. The Tribunal is able to take evidence from practitioners over the telephone and may on occasion spontaneously ring a doctor or service provider.

The hearing usually commences with introductions by the VCAT member and a request for those present to identify themselves. The VCAT member will explain the purpose of the hearing and seek contributions from those present. The proceeding is intended to be inclusive and is inquisitorial in nature.²⁸ The conduct of the hearing is up to the individual member however it is usual that there is an opportunity for the lawyer to present opening and closing submissions and cross examine witnesses.

5.5.1 DURATION OF HEARINGS

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

5.5.2 RULES OF NATURAL JUSTICE

A non-adversarial approach is generally adopted. However, this is not uniformly the case and will depend upon the circumstances. For example, *where there is a challenge to the guardianship order and a conflict of expert opinion, it becomes difficult to maintain a non-adversarial approach to the matter while ensuring that the statutory procedural requirements, including natural justice, are met.*²⁹ Although VCAT has the power to decide the way in which a proceeding will be conducted, the principles of natural justice must be observed.

²⁷ Lawyers Practice Manual, Lawbook Co, [8.2.602].

²⁸ Lawyers Practice Manual, Lawbook Co, [8.2.602].

²⁹ Ibid.

The Supreme Court has stated:

It must not be forgotten that the jurisdiction, while protective, is one which can result in the life and liberty of an individual being placed in the control of another.’³⁰...the protective role requires the Tribunal to be vigilant to protect persons subject to such orders from attempts by third parties to gain control of their lives and assets.³¹

Under s.97 of the VCAT Act, VCAT must act fairly and according to the substantial merits of the case in all proceedings. VCAT is bound by the rules of natural justice;³²is not bound by the rules of evidence,³³ may inform itself on any matter as it sees fit; and must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed as possible.³⁴

5.6 HANDY HINTS AT THE HEARING

- *Seek leave to appear.*
- *Request that your client be addressed as they wish; e.g. ‘Mrs H’ not ‘Sally’.*
- *The general rule is that this jurisdiction is not adversarial.*
- *Do not stand up in hearings.*
- *Do not run the proceedings.*
- *Do not speak until the VCAT member speaks to you first, unless it is necessary.*
- *It is likely that the VCAT member will speak directly to the client. If there is a moment when your client wants to speak to VCAT directly and not through you, advise VCAT of this. Consider if this should happen at the beginning of the hearing, which may be easier for your client, or at the end when you client has settled and may want to respond to others remarks. The client may want to do both..*

³⁰ Daynes at [33] per Smith J.

³¹ Daynes at [38] per Smith J.

³² S.98(4) VCAT Act.

³³ This includes admitting into evidence the contents of any document despite non-compliance with any time limit or other requirement specified in the rules in relation to that document or service of it; s.98(2) VCAT Act.

³⁴ S.98(1) VCAT Act.

- *It may be appropriate for your client to speak to VCAT without anyone else present. You may want to suggest this as a possibility to your client and to VCAT if that is wanted in which case you would remain.*
- *If you want to examine professionals such as doctors and neuropsychologist, make sure this will happen easily through advance notice to VCAT. Arrange for your witnesses to attend the hearing or request that the party relying on them arrange for them to attend the hearing. [is there a capacity/need to mention subpoenas?]*
- *The legal issues before VCAT are disability, incapacity and need for a guardian and/or administrator. The issues for your client may be about the quality of the guardian's and / or administrator's work. Make sure that VCAT is made aware of the client's concerns even if they do not bear on the legal issues. These issues may help VCAT understand your client's distress and allow the member to address any concerns.*
- *Ask for your client to speak first if their attention might lapse. It also signals to other parties that your client is the most important voice at the hearing.*
- *If your client wants to be kept informed, request that reports, particularly financial reports, be made available to the represented person. These can be 3, 6 or 12 monthly.*
- *Raise with VCAT the person's interests and activities. For example, a person may have attended the opera all of their life and now has dementia. The person may still wish to attend the opera and an administrator should be made aware of this as an interest that should be continued, regardless of whether the person will 'remember' the event.*
- *Arrange a time for the person to meet with the guardian or administrator. This may even be after the hearing. There ought to be rooms available so you can assist.*
- *At the end of the hearing spend some time going through what has happened to make sure your client understands what has transcribed.*

6. THE LAW RELATING TO GUARDIANSHIP AND ADMINISTRATION

6.1 WHAT IS A GUARDIAN? WHAT IS AN ADMINISTRATOR?

Guardians: Typical decisions which may be made by guardians include decisions in relation to health care, accommodation, employment and access to services and people.³⁵

³⁵ See generally *Good Guardianship. A Guide for Guardians Appointed under the Guardianship and Administration Act, OPA 2005.*

Administrators: Administrators make decisions in relation legal and financial matters - including access by the client to their money, the management of investments, sale of property or paying of bills.³⁶

6.2 LEGAL THRESHOLD

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

- Has a *disability*; and
- Is *unable by reason of this disability to make reasonable judgments* about their person or circumstances or in relation to an administration order, their estate; and
- *Needs* a guardian and/or administrator; and
- It is in the person's *best interest* that a guardian and/or administrator is appointed; and
- The order must be made in a way which is the least restrictive of that person's freedom of decision and action as is possible in the circumstances.

6.3 DISABILITY

'*Disability*' is defined to mean intellectual impairment, mental disorder, brain injury, physical disability or dementia.³⁷ Note that the person's inability to make reasonable judgments must be by reason of the disability. Medical reports have to be provided to VCAT as evidence of a disability.

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

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

³⁶ See generally *Administration. A Guide for People Appointed as Administrators under the Guardianship and Administration Act 1986* OPA 2002. Administration orders are regulated by Part 5 of the GAA.

³⁷ S.3(1).

CASE EXAMPLE

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

6.4 IS UNABLE BY REASON OF THIS DISABILITY TO MAKE REASONABLE JUDGMENTS ABOUT THEIR PERSON OR CIRCUMSTANCES

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

To rebut these assessments, tangible evidence will assist. Explore with the person what they can and cannot do, how they manage daily life, what assistance they require and how they organise this. What evidence is relevant will depend to some extent on the type of application being heard. Obtain an independent report that assesses the person's ability to manage different tasks. For example, as stated above, an occupational therapist can assess the person's ability to manage all activities of daily living. A financial counselor can offer support and assist the person to work out ways to pay bills, while a speech pathologist can assist with comprehension and devise ways to communicate. Neighbors, friends, family and home help workers can provide background as to how the person manages various tasks. Ask the person about anyone they think may be supportive and if you can speak to them to see how they may assist.

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

It should not be presumed that because a person has a disability, he or she is unable to make reasonable judgments because of the disability.

6.4.1 WHAT IS REASONABLE?

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

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

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

The precise test for whether a person is 'unable' to make reasonable judgments is unclear, and the Supreme Court has stated that it would be desirable for VCAT to consider to what extent the person must be 'unable to make reasonable judgments' and what may amount to a 'reasonable' judgment.³⁸ The test does not require total and complete 'incapacity', or something similar. On the other hand, whether the disability affects or 'diminishes' the person's capacity to make reasonable decisions would be setting the standard too low.³⁹ There is *obiter dicta* that the appropriate test may be whether the person's capacity is '*lacking or severely impaired*'.⁴⁰

³⁸ XYZ at [71] per Cavanough J.

³⁹ XYZ at [42] per Cavanough J.

⁴⁰ XYZ at [72] per Cavanough J, citing 'Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons' (1982).

CASE EXAMPLE

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

6.5 IS THERE A NEED FOR A GUARDIAN OR ADMINISTRATOR?

Guardian:

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

- (a) whether the needs of the person in respect of whom the application is made could be met by other means less restrictive of the person’s freedom of decision and action; and
- (b) the wishes of any nearest relative or other family members of the proposed represented person; and
- (c) the desirability of preserving existing family relationships.⁴¹

Administrator:

In determining whether a person is in need of an administrator VCAT must consider –

- (a) whether the needs of the person in respect of whom the application is made could be met by other means less restrictive of the person’s freedom of decision and action.⁴²

There is no presumption that a person is in need of a guardian only because he or she has a disability and by reason of that disability is unable to make reasonable judgments. The question is whether there is a *need* for a guardian or administrator to be appointed.⁴³ Relevant to this question is the existence of other arrangements, such as an enduring power of attorney (medical treatment), or whether informal arrangements between family members and service providers may be sufficient.⁴⁴

The question of need usually concerns what the applicant sees as going wrong in your client’s life. It may be that the client is at risk at living at home because they forget to put the gas stove off. It may be that the client fails to pay the rent and so is at risk of eviction. It may be that the person cannot resist a bargain and has a huge credit card debt with little means to meet the payments. If the applicant

⁴¹ S 22 (2).

⁴² S. 46 (2).

⁴³ *Moore* at 916 per Gobbo J.

⁴⁴ *Public Advocate and RCS (Guardianship)* [2004] VCAT 1880 at [9] per Morris J.

cannot establish that there is a need then an order cannot be made. However, these examples may not result in an order if there is evidence of a less restrictive way of ensuring that the person or their estate is protected.

CASE EXAMPLE

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

6.6 WHAT IS IN THE PERSON'S BEST INTERESTS

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

CASE EXAMPLE

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

6.7 WHAT IS LEAST RESTRICTIVE IN THE CIRCUMSTANCES?

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

CASE EXAMPLE

Mr. M has an intellectual disability. A social worker made an application to VCAT for an administration order because he was having difficulty managing his estate and shares that had been left to him in a will. The lawyers submitted to VCAT that Mr. M was able to manage his day to day finances in relation to paying rent and utility bills and that a least restrictive alternative was to allow him to continue doing this and for an administrator or mange the rest of his estate. VCAT allowed the application with the least restrictive option of allowing him to manage his day to day affairs.

6.8 DECISIONS

6.8.1 REASONS FOR DECISIONS

VCAT must give reasons for making an order. The reasons for an order, whether oral or written, form part of the order.⁴⁵ In the majority of cases, the decision and oral reasons are given at the hearing.⁴⁶

It may be that the person is not aware that the member is giving oral reasons but may believe that they are merely summing up. Where VCAT gives oral reasons, a party has 14 days to request written reasons,⁴⁷ so it's important to apply quickly in case there were oral reasons. If VCAT does not give reasons at the time of the hearing, reasons must be given within 60 days of the making of the order or such other period as is specified by the rules or the President.⁴⁸

Reasons must be given within 45 days after receiving the request unless extended by the President.⁴⁹ Written reasons must include the Tribunal's findings on material questions of fact.⁵⁰

6.9 COSTS

The award of costs is governed by Division 8 of the *Victorian Civil and Administrative Tribunal Act*. In general, each party is to bear their own costs⁵¹ but VCAT may, at any time, order that a party pay all or a specified part of the costs of another party in a proceeding.⁵² Costs orders are rarely sought and rarely granted in the Guardianship List.⁵³ Thus, there is no financial disincentive to anyone making an application.⁵⁴

⁴⁵ S.117(6) VCAT Act.

⁴⁶ Billings at 11.

⁴⁷ S.117(2) VCAT Act.

⁴⁸ S.117(1) VCAT Act.

⁴⁹ S.117(3)(4) VCAT Act.

⁵⁰ S.117(5) VCAT Act.

⁵¹ S. 109(1) VCAT Act.

⁵² S.109(2) VCAT Act..

⁵³ Billings at 10.

⁵⁴ Billings at 1.

6.10 TYPES OF GUARDIANSHIP ORDERS

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

6.10.1 PLEANARY GARDIAN

A plenary guardian has *‘all the powers and duties which the plenary guardian would have if he or she were a parent and the represented person his or her child.’*⁵⁵

This includes, but is not limited to, the power:

- (a) to decide where and with whom the represented person is to live, whether permanently or temporarily; and
- (b) to decide whether the represented person should or should not be permitted to work and, if so, related matters such as the nature or type of work and for whom the represented person is to work; and
- (c) to consent to any health care that is in the best interests of the represented person; and
- (d) to restrict visits to a represented person to such extent as may be necessary in his or her best interests and to prohibit visits by any person if the guardian reasonably believes that they would have an adverse effect on the represented person.

Because the appointment of a plenary guardian *‘officially and formally removes the whole of a person’s legal rights over person and circumstances’*, it is to be made only as a last resort.⁵⁶

⁵⁵ S.24(1 and 2).

⁵⁶ *McDonald v Guardianship and Administration Board* [1993] 1 VR 521 at 531 per the Court, citing *Re M and R and Guardianship and Administration Board* (1988) 2 VAR 213 at 219-21; and cited with apparent approval in XYZ at [27] per Cavanough J.

6.10.2 LIMITED GUARDIAN

A limited guardian's powers and duties are limited to those powers and duties of a plenary guardian which are specified by VCAT in its order.⁵⁷ For example, the guardian's powers and duties may relate solely making decisions about appropriate accommodation⁵⁸ or to medical, dental or other health care⁵⁹. They ought also to contemplate appropriate time lines. An order must not be speculative. Eg a woman with an intellectual disability may need a guardian to sign consent for a pap smear in 18 months, an application would need to be made at the time. Consistent with the principle of least restrictive alternative guardians should bring matters back for an early review when the decision is made and the order no longer necessary.

6.10.3 TEMPORARY ORDERS

An urgent application can be made and the matters listed as soon as possible. These matters are referred to OPA who will assess the urgency and if necessary assist in the preparation of the case.

For example, in relation to accommodation for an elderly person, when they are unable to consent to an immediate move it is possible for a person to apply for a temporary guardianship order.⁶⁰ Such applications are subject to the same notice and eligibility requirements,⁶¹ and the same criteria are applied as under s.22(1).⁶² A temporary order is effective for a specified period not exceeding 21 days, and may be renewed for a further period not exceeding 21 days.⁶³ A hearing to determine whether a guardianship order should be made under section 22 must be held as soon as practicable but within 42 days of the making of the temporary order.⁶⁴

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

⁵⁷ S.25(1).

⁵⁸ *Re Technau and Secretary, Department of Social Security* (1987) 13 ALD 641 at [14].

⁵⁹ *Daynes v The Public Advocate* [2005] VSC 485 at [2] per Smith J ('Daynes').

⁶⁰ S.32(1)(2).

⁶¹ Ss.32(3) and 33(1).

⁶² S. 22 (1)

⁶³ S.33(2)

⁶⁴ S.33(3).

6.11 SPECIAL PROCEDURES

Defined under s 3(1) of the Act special procedures include procedures that will result in infertility, termination of pregnancy or for the removal of tissue for transplantation to another person. It is only VCAT that can consent to a special procedure and only a person who is the “person responsible” for the patient ⁶⁵or any person who, in the opinion of the Tribunal has a special interest in the affairs of the person, can make an application to the Tribunal for consent to a special procedure.⁶⁶

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

CASE EXAMPLE

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

⁶⁵ S.37.

⁶⁶ S.42 B.

6.12 WHO CAN BECOME A GUARDIAN?

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

- VCAT is satisfied he or she will act in the best interests of the person; and
- He or she is not in a position of conflict; and
- Is a suitable person.⁶⁷

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

6.12.1 THE PUBLIC ADVOCATE

In many cases the Public Advocate is appointed as a person's guardian. Office of Public Advocate (OPA) is an independent statutory body which aims to promote the rights and dignity of people with disabilities, and to strengthen their position in society.⁶⁸

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

The Office of the Public Advocate Advice line is 1300 309 337

The Office of the Public Advocate also produces guidelines for guardians and administrators see website: www.publicadvocate.vic.gov.au

⁶⁷ S. 23

⁶⁸ Around 25% of VCAT applications are referred to the OPA for investigation and report. In 2006, guardianship services were provided for 1,145 persons with a disability. At the end of the year there were 637 Victorians for who the Public Advocate was a guardian and 413 with a private guardian. See www.publicadvocate.vic.gov.au.

6.13 JOINT AND ALTERNATIVE GUARDIANS

VCAT may also appoint persons (including the Public Advocate) as joint guardians.⁶⁹ There may be conflict in relation to a decision that has to be made and it may be best to preserve family relationships that a joint guardianship order is made.

An alternative guardian can be appointed in the event of death, absence or incapacity.⁷⁰

6.14 WHO CAN BECOME AN ADMINISTRATOR?

Any person 18 years of age or over may become an administrator as long as VCAT is satisfied that the person will act in the best interests of the person; is not in a position of actual or potential conflict; is a suitable person and has sufficient expertise⁷¹. Very often family members are appointed administrators. However, it may be the case that an independent person is appointed by VCAT because of conflict in the family. In many cases State Trustees Limited is appointed the administrator.

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

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

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

⁶⁹ S 23(5).

⁷⁰ S. 35 (1) (3).

⁷¹ S. 47.

6.14.1 STATE TRUSTEES LIMITED

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

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

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

State Trustees Limited and other trustee companies should make an assessment of the person estate and plan for a progressive move towards independence. In some cases a person may be able to sign an enduring power of attorney financial. This is a less restrictive option than administration as the person is making an autonomous decision about who will run their affairs. It will involve costs and the person should be aware of such costs and there is no oversight of the operation of the power of attorney by the Tribunal as there is with an administrator.

6.14.2 ADMINISTRATION FEES

An administrator who is not a professional administrator is not entitled to receive any fee, remuneration or other reward from the estate of a represented person for acting as administrator unless VCAT otherwise specifies in the administration order.⁷² The power of courts and tribunals to order that the costs of administration be paid or reimbursed out of the estate is addressed in s.47B. The remuneration of a professional administrator is to be approved by the VCAT.⁷³

⁷² S.47A(1).

⁷³ S.47A(2).

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

It is recommended that you speak to the proposed administrator in relation to the cost of administering a persons affairs and how they will act in the clients best interest. A person on Commonwealth benefits will be charged 3.3% of their benefit p.a, a 6.6% of any interest earned on other income (for example if they have money in the bank and it earns interest the administrator will charge 6.6% of the interest gained) and an annual capital fee of 1.1% of any money earned from capital investments.

6.15 FUNDS IN COURT

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

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

6.16 WHAT IS A LITIGATION GUARDIAN?

A litigation guardian essentially stands in the position of a person with a disability in legal proceedings in order to give instructions in those proceedings.⁷⁴ The concept applies only in civil, not criminal proceedings.

Although an administrator is able to '*bring and defend*' legal actions on behalf of the represented person⁷⁵ there is no equivalent provision in relation to guardians.

⁷⁴ OPA Practice Guidelines No.15, Litigation Guardian 2.1.

⁷⁵ S.58B(2)(1).

A guardian may therefore have to be appointed litigation guardian⁷⁶ in order to act for the represented person in legal proceedings.⁷⁷

Any person may be a litigation guardian if he or she is not under disability and has no interest in the proceeding adverse to that of the person under disability.⁷⁸ The litigation guardian must consent to act as such. The litigation guardian may, for example, be a friend or relative of the represented person or the Public Advocate.⁷⁹ However, appointment as litigation guardian carries significant responsibilities and may place the litigation guardian at risk of an order of costs.⁸⁰

Where an administrator has been appointed, he or she has power to 'bring and defend actions and other legal proceedings in the name of the represented person.'⁸¹ The OPA is of the view that these powers are limited to matters relating to a person's finances and estate and do not extend to litigation related to 'lifestyle' issues such as family law or discrimination cases.⁸²

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

For more information see Office of the Public Advocate Guidelines; Litigation Guardian.

⁷⁶ The power to appoint a litigation guardian is found in Order 15 of the Supreme/County Court (General Civil Procedure) Rules 2005⁷⁶ which is concerned with persons under a disability. Under rule 15.01 a "handicapped person" is defined to mean "a person who is incapable by reason of injury, disease, senility, illness or physical or mental infirmity of managing his or her affairs in relation to the proceeding".

Under rule 15.02(1), except where otherwise provided, a 'person under disability'⁷⁶ shall commence or defend a proceeding by his litigation guardian. If a party becomes a "handicapped person" after proceedings commence, the Court shall appoint a litigation guardian of that party. A party can only have one litigation guardian, unless the Court otherwise orders. However, the Court may appoint, remove or substitute a litigation guardian if the interests of the party so require

⁷⁷ OPA Practice Guidelines No.15, Litigation Guardian 2.1.

⁷⁸ Rule 15.03(1).

⁷⁹ As to the role of OPA as litigation guardian see generally OPA Practice Guidelines No.15, Litigation Guardian.

⁸⁰ *Clarey v Permanent Trustee Co Ltd* [2005] VSCA 128 at [49] per the Court.

⁸¹ S.58B(2)(1). There is apparently some debate as to whether in some jurisdictions, such as the Victorian Supreme Court, an administrator cannot institute legal proceedings for a person with a disability as of right but must be appointed litigation guardian; OPA Practice Guidelines No.15, Litigation Guardian 2.2.

⁸² OPA Practice Guidelines No.15, Litigation Guardian 3.2.

7. AFTER THE HEARING

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

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

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

7.1 APPEALING THE DECISION

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

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

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

The Court must also grant leave to appeal. The application for leave to appeal must be made within 28 days after the day of the order of the Tribunal and in

accordance with the rules of the Supreme Court.⁸³ Where leave is granted, the appeal must be instituted within 14 days after the day on which leave is granted.⁸⁴

VCAT, either on application or its own initiative, may stay the operation of any order it makes pending the determination of any appeal subject to any conditions it considers appropriate.⁸⁵

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

- (a) an order affirming, varying or setting aside the order of the Tribunal;
- (b) an order that the Tribunal could have made in the proceeding;
- (c) an order remitting the proceeding to be heard and decided again, either with or without the hearing of further evidence, by the Tribunal in accordance with the directions of the court;
- (d) any other order the court thinks appropriate.⁸⁶

The proceeding is by way of judicial review rather than by way of appeal in the usual sense.⁸⁷ Generally speaking, the court should not substitute a new decision for VCAT's decision unless it was the only decision open to VCAT as a matter of law.⁸⁸

7.2 COMPLAINTS

No review or appeal process exists under the GAA in relation to decisions made by a guardian or administrator. However, application can be made to VCAT in relation to the delivery of those services within the parameters of the guardianship and/or administration order. If a person is unhappy about the way they are being treated by the guardian or administrator they can apply for a review of their order and may be successful in changing the guardian or administrator. A person can bring an application in relation to the decision of an administrator.⁸⁹

⁸³ S.148(2) VCAT Act. Where oral reasons are given and a party then requests written reasons the day on which the written reasons are given to the party is deemed to be the day of the order for these purposes; s.148(4) VCAT Act.

⁸⁴ S.148(3) VCAT Act.

⁸⁵ S.149. There is some authority that under s.149 the Tribunal may stay not only an order the subject of an appeal, but any order which it makes, although it seems that the circumstances in which this would occur are exceptional; *MD (Guardianship)* [2005] VCAT 2597.

⁸⁶ S.148 (7) VCAT Act.

⁸⁷ XYZ at [63] per Cavanough J.

⁸⁸ Ibid at [64].

⁸⁹ S. 56.

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

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

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

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

Complaints can be made to the Health Services Commissioner who can investigate, conciliate, propose appropriate remedies, report to Parliament and where required refer the complaint to an appropriate registration board.

Health Services Commissioner
Complaints and Information
Telephone: (03) 8601 5200
Toll Free: 1800 136 066
Fax No.: (03) 8601 5219
TTY No. 1300 550 275
E-mail: hsc@dhs.vic.gov.au

or write to:

Health Services Commissioner
30th Floor
570 Bourke Street
Melbourne VIC 3000

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

Ombudsman Victoria

Level9, 459 Collins Street (North Tower)
Melbourne VIC 3000

Telephone: (03) 9613 6222

Toll Free: 1800 806 314

Facsimile: (03) 9614 0246

Email: ombudvic@ombudsman.vic.gov.au

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

7.3 HANDY HINTS AFTER THE HEARING

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

8. ENDURING POWERS OF ATTORNEY

A person may appoint an alternative decision maker (an attorney) to manage their affairs in the event that they lose the capacity to do so. This may avoid the need to appoint a guardian or administrator in the event of incapacity. This may be done by enduring power of attorney. There are three types of enduring power of attorney: enduring power of attorney (financial), enduring power of attorney (medical treatment) and enduring power of guardianship. *Take Control, A Guide to Powers of Attorney and Guardianship* by the Office of the Public Advocate and Victoria Legal Aid is an excellent guide to the law in Victoria and *pro formas*.⁹⁰

8.1 GENERAL POWER OF ATTORNEY

A person can appoint a general power of attorney, usually for a specific period of time, to make financial or legal decisions.

8.2 ENDURING POWER OF ATTORNEY (FINANCIAL)

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

8.3 ENDURING POWER OF ATTORNEY (MEDICAL TREATMENT)

A person can appoint someone to make medical treatment decisions for them in the event he or she loses capacity to make those decisions.

8.4 ENDURING POWER OF GUARDIANSHIP

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

⁹⁰ Self help and information kits and advice on Powers of Attorney are available from the Office of the Public Advocate.

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

9. USEFUL CONTACT DETAILS

VCAT

55 King Street
Melbourne VIC 3000

Ph: (03) 9628 9755

Website: www.vcat.vic.gov.au

Victoria Legal Aid

350 Queen St
Melbourne VIC 3000

Ph: (03) 9269 0234

Website: www.legalaid.vic.gov.au

Office of the Public Advocate

Level 5 / 436 Lonsdale Street
Melbourne VIC 3000

Ph: (03) 9603 9500; 1300 309 337

Website: www.publicadvocate.vic.gov.au

State Trustees Limited

168 Exhibition Street
Melbourne VIC 3000

Ph: (03) 9667 6444

Website: www.statetrustees.com.au

Mental Health Legal Centre

Level 4 / 520 Collins Street
Melbourne VIC 3000

Ph: (03) 9629 4422

Website: www.communitylaw.org.au/menthalhealth

Villamanta Disability Rights Legal Service Inc.

44 Bellerine Street
Geelong VIC 3220

Ph: (03) 5229 2925

Website: www.villamanta.org.au

Aged Care Assessment Team

Website: www.heath.gov

(Search: Age Care Assessment Victoria)

ARBIAS

27 Hope Street
Brunswick VIC 3056

Ph: (03) 8388 1222
Email: arbias@arbias.com.au

VMIAC

23 Weston Street
Brunswick VIC 3056

Ph: (03) 9387 8317
Website: www.vmiac.com.au
Email: info@vmiac.com.au

APPENDIX A: POWERS OF ATTORNEY

ENDURING POWER OF ATTORNEY (FINANCIAL)

An enduring power of attorney (financial) may be appointed under Part XIA of the *Instruments Act* 1958. Such a person cannot make decisions in relation to medical treatment or guardianship; it is limited to financial and legal matters.⁹¹ An adult donor may make an enduring power of attorney which:

- (a) authorises one or more attorneys to do anything on behalf of the donor that the donor can lawfully authorise an attorney to do; and
- (b) provides conditions and limitations on, and instructions about, the exercise of the power.⁹²

In particular, an attorney may, if he or she thinks fit, execute any instrument with the attorney's own signature/seal and do any other thing in the attorney's own name.⁹³ An attorney cannot, however, make a decision about the medical treatment of the donor.⁹⁴

The enduring power of attorney must comply with the formal requirements of the *Instruments Act* 1958.⁹⁵ The attorney's powers are exercisable once the enduring power of attorney is made unless the donor has specified an alternative time.⁹⁶ He or she must be at least 18 years old,⁹⁷ and there may be one or more attorneys.⁹⁸ A donor may also appoint an alternative attorney to act in the event of the death, absence or legal incapacity of the attorney.⁹⁹

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

- (a) that the donor may specify conditions or limitations on, or instructions about, the exercise of the power to be given to the attorney;
- (b) when the power is exercisable;
- (c) that once the power is exercisable, the attorney has the same powers as the donor had (when not under a legal incapacity) to do anything for which

⁹¹ Take Control at 21.

⁹² S.115(1) *Instruments Act*.

⁹³ S.125E(1) *Instruments Act*.

⁹⁴ S.125F(1) *Instruments Act*.

⁹⁵ See, in particular, s.123-125C.

⁹⁶ S.117 *Instruments Act*.

⁹⁷ S.119(4) *Instruments Act*.

⁹⁸ S.119(1)-(3) *Instruments Act*.

⁹⁹ S.120 *Instruments Act*.

- the power is given subject to any limitations or restrictions on exercising the power included in the enduring power of attorney;
- (d) that the donor may revoke the enduring power of attorney at any time if the donor is capable of making an enduring power of attorney;
 - (e) that the power the attorney is given continues even if the donor subsequently ceases to have legal capacity;
 - (f) that at any time that the donor is not capable of revoking the enduring power of attorney, the donor is unable to effectively oversee the use of the power.¹⁰⁰

An enduring power of attorney is not revoked by the subsequent legal incapacity of the donor.¹⁰¹

Where there is a conflict between the decision made by the attorney and a decision made by a guardian, the decision of the guardian prevails.¹⁰² Where an administration order has been made in respect of the donor of an enduring power of attorney, the attorney may exercise power under the enduring power of attorney only to the extent authorised by VCAT.¹⁰³

In addition to other forms of revocation listed in Division 4, an enduring power of attorney may be revoked by VCAT under Division 6.¹⁰⁴ Under s.125V(1), an application may be made to VCAT for a declaration, order, direction or recommendation about the scope of an attorney's powers, the exercise of those powers or any other thing in or related to Part XIA. Such an application may be made by the Public Advocate, the donor, an attorney or another person whom the Tribunal is satisfied has a special interest in the affairs of the donor.¹⁰⁵

Either on application or its own initiative, VCAT may revoke the appointment of an attorney if satisfied that it is in the best interests of the donor to do so. Before making this decision, VCAT must be satisfied that the donor lacks the capacity to make an enduring power of attorney.¹⁰⁶ VCAT may also declare an enduring power of attorney to be invalid if it is satisfied that the donor lacked capacity at the time it was made, it does not comply with the requirements of the Act or is invalid for another reason; for example, the donor was induced to make it by

¹⁰⁰ S.118(2) *Instruments Act*.

¹⁰¹ S.115(2) *Instruments Act*.

¹⁰² S.125F(2) *Instruments Act*.

¹⁰³ S.125G *Instruments Act*.

¹⁰⁴ S.125Q *Instruments Act*. As to the constitution of the Tribunal in such proceedings, see Schedule 1, Part 12, s.40F VCAT Act.

¹⁰⁵ S.125V(2) *Instruments Act*.

¹⁰⁶ S.125X *Instruments Act*.

dishonesty or undue influence.¹⁰⁷ If VCAT declares an enduring power of attorney invalid, the power is void from the start.¹⁰⁸

In addition, VCAT may:

- (a) make a declaration or make recommendations or give any directions it considers necessary in relation to an enduring power of attorney;
- (b) vary the effect of an enduring power of attorney;
- (c) suspend for a specified period an enduring power of attorney, either generally or in respect of a specific matter;
- (d) make any order it considers necessary in relation to an enduring power of attorney.¹⁰⁹ Without limiting the above, the Tribunal may, on its own initiative, give directions to an attorney in respect of any matter.¹¹⁰

¹⁰⁷ S125Y(1) *Instruments Act*.

¹⁰⁸ S.125Y(2) *Instruments Act*.

¹⁰⁹ S.125Z(1) *Instruments Act*.

¹¹⁰ S.125Z(2) *Instruments Act*.

ENDURING POWER OF ATTORNEY (MEDICAL TREATMENT)

An 'agent' may be appointed to make decisions about the medical treatment of a person by an enduring power of attorney (medical treatment) under s.5A *Medical Treatment Act* 1988. 'Medical treatment' means an operation, the administration of a drug or other like substance or any other medical procedure but does not include palliative care.¹¹¹ 'Palliative care' includes the provision of reasonable medical procedures for the relief of pain, suffering and discomfort or the reasonable provision of food and water.¹¹² The *Medical Treatment Act* does not apply to palliative care.¹¹³

An agent or alternate agent¹¹⁴ (there is no provision for joint agents) is appointed under an enduring power of attorney in the form set out in Schedule 2. It takes effect only if the person giving the power becomes incompetent. An enduring power of attorney (medical treatment) is not revoked by the subsequent incapacity of the donor of the power or upon the donor of the power becoming a 'protected person'¹¹⁵ or a represented person. Otherwise, it may be revoked in the same way as a general power of attorney is revoked.¹¹⁶

If a registered medical practitioner and another person are each satisfied that the patient's agent or guardian has been informed about the nature of the patient's current condition to an extent that would be reasonably sufficient to enable the patient, if competent, to make a decision about whether or not to refuse medical treatment, and that the agent or guardian understands that information, then the agent or guardian, on behalf of the patient, may refuse medical treatment generally or medical treatment of a particular kind.¹¹⁷ The agent or guardian may only refuse treatment if it would cause unreasonable distress to the patient; or there are reasonable grounds for believing that the patient, if competent and after giving serious consideration to his or her health and well-being, would consider

¹¹¹ S.3 *Medical Treatment Act*.

¹¹² S.3. In *Re BWV, ex parte Gardner* (2003) 7 VR 487 it was held that palliative care is care not to treat or cure a patient but to alleviate pain or suffering when a patient is dying. The provision of food and water refers to oral intake and the provision of fluid, nutrition and medicines via percutaneous endoscopic gastrostomy ('PEG') to a woman who had been unconscious for 3 years with no cognitive capacity or conscious perception due to a fatal form of dementia, was medical treatment and not palliative care within the meaning of the Act. (Also see *BWV* [2003] VCAT 121).

¹¹³ S.4(2).

¹¹⁴ An alternate agent can only act if after enquiries the alternate agent believes that the agent is dead, incompetent or cannot be contacted or that the agent's whereabouts are unknown, and the alternate agent complies with the requirements of s.5AA.

¹¹⁵ Defined in the *Public Trustee Act* 1958

¹¹⁶ S.5A(4) *Medical Treatment Act*.

¹¹⁷ S.5B(1) *Medical Treatment Act*.

that the medical treatment is unwarranted.¹¹⁸ A refusal of treatment certificate must be completed in the form of Schedule 3.¹¹⁹

An NFR (not for resuscitation) directive is effectively a refusal of treatment. As noted above, a person responsible cannot refuse treatment, he or she is only empowered to consent to medical treatment. Although consent may be withheld, this cannot be done for treatment which is hypothetical which is the case with an NFR directive.¹²⁰ Whether a guardian can refuse treatment depends on the order as discussed above.

The test of reasonable grounds for believing that the patient would consider that the medical treatment is 'unwarranted' is of course hypothetical. There need not be specific evidence of the patient's wishes in the particular circumstances. Relevant factors might include general evidence about the patient's values or beliefs. For example, a devout Catholic may have particular views about refusing treatment. In the absence of such evidence, there is no presumption that the patient would wish to refuse medical treatment. However, it is open to infer that the patient would consider continued treatment unwarranted.¹²¹

The decision may be based on the existing and likely future health and well-being of the patient. For example, if the medical evidence were that there was no prospect of recovery or improvement 'it may be enough to establish that a reasonable person would, after giving serious consideration to his or her existing and likely future health and well-being, consider that medical treatment, or particular medical treatment, is unwarranted. This is because, in the absence of particular evidence of the wishes of the patient in the hypothetical circumstances, an inference could be drawn that the patient would form the belief of a reasonable person.'¹²² Equally, there is no presumption that it is always in a person's best interests to live on. 'When death stares one in the face, or when life is futile, the person concerned, or the trusted agent or guardian of that person, may conclude that it is in the best interests of the person to refuse medical treatment and to allow the person to pass away.'¹²³

On application, VCAT ¹²⁴ may suspend or revoke an enduring power of attorney (medical treatment) (s.5C(3), (4), (4A) or (4B)), determine whether an enduring power of attorney (medical treatment) given to an alternate agent does or does not authorise the making of a particular decision by the alternate agent (s.5C(4A)) or determine any question arising out of a conflict between a decision

¹¹⁸ S.5B(2) *Medical Treatment Act*.

¹¹⁹ S.5B(3) *Medical Treatment Act*.

¹²⁰ OPA Practice Guidelines 12 *Not for Resuscitation (NFR)* 2004 at 12.2-12.3.

¹²¹ *Public Advocate and RCS (Guardianship)* [2004] VCAT 1880 at [15].

¹²² *Public Advocate and RCS (Guardianship)* [2004] VCAT 1880 at [18].

¹²³ *Public Advocate and RCS (Guardianship)* [2004] VCAT 1880 at [28]. Also see *Korp (Guardianship)* [2005] VCAT 779.

¹²⁴ VCAT's.3 *Medical Treatment Act*.

made about a person's medical treatment by the person's agent and alternate agents (5C(4B)). Application may be made by the Public Advocate, a person who has a special interest in the affairs of the donor of the power or the agent or alternate agent.¹²⁵ If an enduring power of attorney (medical treatment) or guardianship order is revoked, any refusal of treatment certificate completed by the agent, alternate agent or guardian is also revoked.¹²⁶

The Public Advocate may intervene at any time and is entitled to be joined as a party to proceedings under s.5C.¹²⁷ VCAT may refer any matter to a government department, public authority, service provider, the Public Advocate or a guardian or administrator appointed under the *Medical Treatment Act 1988* for investigation and report.¹²⁸ A hearing or order of VCAT is not invalidated or affected only because of a failure to give notice, including to the person in respect of whom the application was made, so long as VCAT has dispensed with the requirement for notice to be given to that person and has notified the Public Advocate that it has done so.¹²⁹ It has also been stated that the existence of safeguards against the abuse of the power of an agent or guardian to refuse medical treatment to a represented person means it is not necessary to read down the provisions to protect a person who has a disability who is represented by a guardian.¹³⁰

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

¹²⁵ S.5C(2) *Medical Treatment Act*.

¹²⁶ S.5D(1) *Medical Treatment Act*.

¹²⁷ Schedule 1, Part 14, s.47 VCAT Act.

¹²⁸ Schedule 1, Part 14, s.48 VCAT Act.

¹²⁹ Schedule 1, Part 14, s.49 VCAT Act.

¹³⁰ *Public Advocate and RCS (Guardianship)* [2004] VCAT 1880 at [19].

ENDURING GUARDIAN

A person who is over 18 years of age may appoint a person to be his or her enduring guardian, and may also appoint an alternative enduring guardian.¹³¹ To be eligible, the enduring guardian must be over 18 years of age and must not be, in a professional or administrative capacity, directly or indirectly responsible for, or involved in, the care or treatment of the person, or provide accommodation to the person.¹³²

The instrument appointing an enduring guardian must comply with the requirements set out in s. 35A(2)(2A) *Instruments Act*. To the extent specified in the instrument, the guardian has all the powers and duties of a parent as if the appointor was his or her child.¹³³ This authority must be exercised in accordance with section 28 (see above).¹³⁴ If the instrument does not specify particular matters, then the guardian is authorised to act only to the extent that the appointor subsequently becomes unable by reason of a disability to make reasonable judgments in respect of any of the matters relating to his or her person or circumstances.¹³⁵ Where the instrument specifies particular matters, then the guardian's authority is limited to the extent that the appointor subsequently becomes unable to make reasonable judgments in respect of any of those matters.¹³⁶ An enduring guardian cannot consent to any special procedure on behalf of the appointor.¹³⁷

An enduring guardian may apply to VCAT for an advisory opinion or directions on any matter or question relating to the scope of his or her appointment or the exercise of his or her powers.¹³⁸ VCAT may:

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

¹³¹ S.35A(1)-(1B), (3).

¹³² S.35A(3)(4).

¹³³ S.35B(3).

¹³⁴ S.35B(5).

¹³⁵ S.35B(2).

¹³⁶ S.35B(1).

¹³⁷ S.35B(4). A 'special procedure' is any procedure intended, or reasonably likely, to render the person permanently infertile, termination of pregnancy, removal of tissue for the purposes of transplantation or any other medical or dental treatment prescribed by the regulations to be a special procedure; s.3(1).

Authorisation of such procedures is governed by Division 4.

¹³⁸ S.35E.(1).

(d) make any order it considers necessary.¹³⁹

VCAT may also, of its own motion, direct, or give an advisory opinion to, an enduring guardian in respect of any matter.¹⁴⁰

No action lies against an enduring guardian for anything done or omitted to be done under any order or on the advice of VCAT unless there has been fraud, willful concealment or misrepresentation of the facts to VCAT .¹⁴¹

Appointment of an enduring guardian may be revoked either by the appointor¹⁴² or VCAT .¹⁴³ Application to VCAT to revoke the appointment of an enduring guardian or alternative enduring guardian may be made by

- (a) the Public Advocate;
- (b) the enduring guardian or alternative enduring guardian;
- (c) the administrator (if any);
- (d) any other person who VCAT is satisfied has an interest in the person or in the estate of the person in respect of whom the application is made.¹⁴⁴

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

- (a) the enduring guardian or alternative enduring guardian seeks revocation of the appointment; or
- (b) VCAT is satisfied that the enduring guardian or alternative enduring guardian is not able or willing to act in that capacity or has not acted in the best interests of the appointer or has acted in an incompetent or negligent manner.¹⁴⁵

The appointment of an enduring guardian or alternative enduring guardian is not revoked if the appointer becomes a represented person.¹⁴⁶

¹³⁹ S.35E(2).

¹⁴⁰ S.35E(3).

¹⁴¹ S 35E(4).

¹⁴² S.35C.

¹⁴³ S.35D.

¹⁴⁴ S.35D(2).

¹⁴⁵ S.35D(1).

¹⁴⁶ S.35D(3).