

## Appointment of a guardian or an administrator

*If a person suffers from a disability and is unable to make reasonable decisions about their lifestyle, personal circumstances, legal or financial affairs, VCAT can appoint a guardian and an administrator to make these decisions.*

### What is a guardian?

A guardian is a person appointed by order of VCAT to make decisions for another person (the represented person) in relation to one or more personal matters which might include:

- > where and with whom the represented person lives;
- > other persons with whom the represented person associates and spends time with;
- > whether the represented person works and, if so, the kind and place of work and employer;
- > whether the person undertakes education or training and, if so, the kind of education or training, and where this takes place;
- > daily living issues such as diet and dress; and
- > medical treatment decisions for the purpose of diagnosing dental or medical conditions, preventing disease and supporting the comfort and quality of life of the represented person.

### What is an administrator?

An administrator is a person appointed by order of VCAT to manage the legal and financial affairs of a represented person. Such duties may include:

- > banking and paying bills;
- > collecting, receiving and recovering money due to the represented person;
- > making investments; carrying on any trade or business of the represented person;
- > executing and signing documents; and
- > dealing with property, including managing and arranging leasing or selling of property.

### What factors will VCAT consider when appointing a guardian or an administrator?

In determining the most appropriate and suitable person to undertake the role of guardian or administrator on behalf of a represented person, VCAT will take into account:

- > the preferences of the represented person (to the extent that those preferences can be ascertained);
- > the best way to preserve existing relationships that are important to the represented person;
- > the desirability of appointing a relative or someone who has a personal relationship with the represented person rather than a person who has no relationship with the represented person;
- > whether the person is available, willing and able to meet and communicate with the represented person; and
- > whether the person will cooperate with any current guardian or administrator for the proposed represented person.

Whether acting as a guardian or as an administrator for a represented person, the best interests of the represented persons must be the paramount consideration for all decisions made.

## What happens if there is no appropriate person to act as a guardian or administrator for a represented person?

Sometimes represented people do not have family or friends who can undertake that role, or there may be conflict within the family as to who should be appointed. In such circumstances, VCAT may make an order for an independent body such as the Office of the Public Advocate (OPA) to be appointed as guardian and/or the State Trustees to be appointed as administrators on behalf of a represented person. It's important to know that these independent bodies will charge a fee and/or a commission for their service.

## When does a person have a disability?

A person has a disability if, pursuant to section 3 of the *Guardianship and Administration Act 2019* (Vic) they have a:

- > neurological impairment;
- > intellectual impairment;
- > mental disorder;
- > brain injury;
- > physical disability; or
- > dementia.

If an application is made to VCAT for the appointment of a guardian or an administrator for a represented person, VCAT will only make an order once satisfied that there is sufficient medical evidence to support that the represented person:

- > has a disability;
- > as a consequence of that disability, does not have sufficient capacity to make decisions about the personal matters for which a guardianship order is sought; and
- > as a consequence of that disability, does not have sufficient capacity to make decisions about financial matters for which the administration order is sought.

This medical evidence will generally be in the form of a report from a treating doctor or medical specialist following a formal assessment of the represented person.

## Who can apply to VCAT?

Any person can apply to VCAT for an order appointing a guardian or an administrator for a person with a disability who is 18 years or older or to take effect when they turn 18.

An application will usually be made by a family member or a health care provider.

### Jim's story

Jim is 83 years old. Following the death of his wife in 2012, Jim's son Michael moved into the family home to help care for him and was appointed as Jim's power of attorney for financial matters. Over the past 12 months, Jim has become very forgetful and has recently been diagnosed with Alzheimer's disease.

Jim has two other children, Jane and Simon, who are concerned that Jim cannot look after himself and needs to go into aged care. Jane and Simon also obtained a copy of the title search of Jim's property and were shocked to learn that the title had been transferred into the joint names of Jim and Michael.

Michael is refusing to let Jane and Simon visit Jim and has told them that Jim does not need to go into aged care as he is looking after their father.



By applying to VCAT for the appointment of a guardian and an administrator for Jim, Jane and Simon were able to ensure that Jim's finances were independently managed and that he received the support he required or his day to day living needs.

An investigation was also conducted by the administrator into the transfer of Jim's property and the title was eventually transferred back into Jim's sole name.

## When should you apply to VCAT?

The primary purpose for appointing a guardian or an administrator is to protect the welfare and interests of a vulnerable person.

Examples of circumstances where there may be a need for a guardian include:

- > where a person is no longer able to care for themselves;
- > where there is disagreement between family members regarding the living arrangements of an elderly parent; and
- > where there are concerns that a person is not being properly cared for or receiving appropriate medical treatment.

Examples of circumstances where there may be a need for an administrator include:

- > where a person is unable to pay their bills or manage their finances;
- > where there are concerns that a financial power of attorney is not acting in the best interests of the person who appointed them as their Attorney; and
- > where there are concerns that a person is being financially exploited.

## What are the duties of a guardian and an administrator?

The principal duty of both a guardian and an administrator is to act in the best interests of the represented person. Guardians and administrators also owe fiduciary duties to the represented person arising from the nature of their relationship.

In the case of a guardian, this includes acting as far as possible:

- > as an advocate for the represented person;
- > in consultation with the represented person and taking into account their wishes;
- > to encourage the represented person to participate in the life of the community;
- > to encourage and assist the represented person to become capable of caring for herself or himself in relation to personal matters;
- > to protect the represented person from neglect, abuse or exploitation; and
- > to act honestly, diligently and in good faith for the best interests of the represented person, avoiding conflict of interest situations.

In the case of an administrator, this includes acting as far as possible:

- > as an advocate for the represented person;
- > in consultation with the represented person and taking into account their wishes;
- > to encourage and assist the represented person to develop decision-making capacity in relation to financial matters;
- > to protect the represented person from neglect, abuse and exploitation;
- > to avoid acting if there is or may be a conflict of interest between their own interests and the interests of the represented person, except where such transactions are permitted by section 58 of the *Guardianship and Administration Act 2019*;
- > not to use their position as administrator to profit in some way from the represented person; and
- > to keep accurate records and accounts of all dealings and transactions in relation to financial matters of the represented person.

Other statutory duties of an administrator include a duty to take care of the estate of the represented person and to exercise the care, diligence and skill of a prudent person in managing the represented person's affairs.

## Can an order appointing a guardian or an administrator be challenged?

If you do not agree with VCAT's decision to appoint a guardian or an administrator for a represented person, it may be possible to apply for a rehearing of the application. There are strict time limits that apply to applications for a rehearing.

It may also be possible to have a guardianship order or an administration order varied or revoked at a reassessment hearing.

If you know someone who would benefit from the appointment of a guardian or an administrator, or you have concerns about the actions of an appointed attorney, guardian or administrator, contact Rigby Cooke Lawyers and we can assist you in navigating through your options, including making an application to VCAT.

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