



Office of the Public Advocate

Guardianship and administration

An introduction

March 2020

Contents

The information in this guide relates to adults and to Victoria.

18+

The Office of the Public Advocate (OPA) acknowledges Victoria's Aboriginal communities and their rich culture. OPA pays respect to their Ancestors, Elders and communities, who are the custodians of the land on which we work.



From the Public Advocate 4

Guardianship and administration applications 5

Role and responsibilities of guardians and administrators 10

Supportive guardianship and supportive administration 13

More information 15

ISBN 978-0-6484797-3-4

© Office of the Public Advocate, March 2020



This work, *Guardianship and administration*, is licensed under a Creative Commons Attribution 4.0 licence. You are free to re-use the work under that licence, on the condition that you credit the Office of the Public Advocate (State of Victoria) as author, indicate if changes were made, and comply with the other licence terms. The licence does not apply to any images or branding, including logos.

Disclaimer: The information in this publication is of a general nature and readers may require legal advice for specific circumstances. The Office of the Public Advocate expressly disclaims any liability howsoever caused to any person in respect of any action taken in reliance on the contents of this publication.



From the Public Advocate



It is a human right, enjoyed by all adults, that we make our own decisions. Some people with disability need support to do this.

One way a person can be supported is by the appointment of a supportive guardian or supportive administrator. These are appointments the Victorian Civil and Administrative Tribunal (VCAT) can make under the new *Guardianship and Administration Act 2019*.

Sometimes, even with support, a person is not able to make decision(s) about a financial or personal matter. If there is no alternative to protect and promote the human rights of an adult with disability, VCAT may appoint a guardian and/or an administrator.

The guardian or administrator is appointed with legal authority to make decisions for the person about specific personal or financial matter(s). They make decisions that reflect the person's will and preferences unless it would cause serious harm to the person.

Colleen Pearce

Colleen Pearce
Public Advocate

Guardianship and administration applications



Guardianship is about the protection and promotion of human rights. Any adult can make an application to the VCAT Guardianship List for a guardianship or administration order.

A person may choose to apply to VCAT if they are concerned that:

- a person with disability is not able to make a decision that needs to be made and
- an order is needed.

Someone may make an application because they are concerned about the decisions a person is making, or others are making for them.

If the application is for someone under 18 years of age the order will only take effect once the person turns 18.

VCAT can appoint:

- an **administrator** with power to make decisions for the person about specified financial matter(s)
- a **guardian** with power to make decisions for the person about specified personal matter(s).

When will VCAT make an order?

VCAT may only make an order if it is satisfied that:

- because of the person's disability, they do not have decision-making capacity in relation to the personal or financial matter(s)*
- the order will promote the person's personal and social wellbeing
- the person is in need of a guardian having considered:
 - the will and preferences of the person (if VCAT can find out what these are)
 - whether the decisions for which the order is sought may be made informally or through negotiation or mediation
 - the wishes of any primary carer, relative of the person, or someone with a direct interest in the application
 - important relationships that the person has and the benefits in maintaining them.

* The applicant may need to provide a medical or specialist report about the person's decision-making capacity for the personal and/or financial matter(s).

The Act says that VCAT should exercise its power in a way that is the least restrictive of the ability of a person with disability to decide and act as is possible in the circumstances.

Decision-making capacity

Adults are presumed to have decision-making capacity unless there is evidence to the contrary.

A person has decision-making capacity to make a decision if they are able to:

- understand the information relevant to the decision and its effect
- retain the information to the extent necessary
- use or weigh the information, and
- communicate their decision in some way, including by speech, gestures or other means.

Personal and financial matters

A personal matter is a matter relating to the person's personal or lifestyle affairs, such as services they may need, or where they live.

A financial matter is a matter relating to a person's financial or property affairs. Examples include paying expenses, undertaking a real estate transaction, or carrying on a business.

Investigations

VCAT may ask the Office of the Public Advocate (OPA) to investigate matters in the application. While OPA staff collect and provide information, it is VCAT that decides whether a guardian or administrator is needed and, if so, who should be appointed.

The hearing

In most cases, the person who is the subject of the application must be at the hearing so they have the chance to have their say. However, they do not have to attend if they do not want to or it is impracticable or unreasonable.

VCAT should be informed of any adjustments that it can make to enable the person to attend. For example, any interpreter or accessibility requirements, a preferred venue, or access to hearing loop technology.

VCAT will usually list a hearing within 30 business days from receiving the application.

Urgent orders

An urgent order may be needed if there is an immediate risk of harm to the health, welfare or property of the person. This may mean that VCAT is not able to hear from all parties. For more information about urgent orders contact OPA's Advice Service on 1300 309 337.

Who can be appointed?

For a **guardianship** order, VCAT will usually appoint a relative or friend of the represented person*. They must be an adult and agree to take on the role.

* The person the order relates to is known as the **represented person**.

In some circumstances, VCAT may appoint the Public Advocate as guardian. The Public Advocate can then delegate the powers and duties in the order to an Advocate Guardian from her office or a volunteer Community Guardian trained and supported by OPA.

For an **administration** order, VCAT may appoint a friend, relative, solicitor, accountant or organisation. If there is no suitable person or organisation, State Trustees Limited or a private trustee company may be appointed.

What will VCAT consider?

VCAT must be satisfied that whoever they appoint will take on the duties of the role, will not have a conflict of interest, and will be suitable. For an administrator, VCAT must also be satisfied that the person has enough expertise to make decisions about the financial matter(s) in the order.

For help to decide if an application to VCAT is necessary, contact OPA's Advice Service on 1300 309 337.

Role and responsibilities of guardians and administrators



A **guardianship** order will specify the personal matter(s) a guardian can make decisions about, such as:

- where and with whom the person lives
- access to services
- restricting visits to the person
- medical treatment decisions.

An **administration** order will specify the financial matter(s) that an administrator can make decisions about.

VCAT must reassess the order within 12 months unless it has stated otherwise in the order. At the time, VCAT will consider whether the guardian or administrator has performed their duties.

Supporting the person

Depending on the specific decision that needs to be made, the represented person may be able to make the decision. Guardians and administrators should support the represented person, as far as practicable and appropriate in the circumstances, to do this.

Making decisions

If the represented person cannot be supported to make their own decision about the matter, the guardian or administrator makes the decision. They should support the person to express their will* and preferences and to participate as much as possible in the decision.

* For example, a person may express, through their words and actions, their will to live independently and be well.

When making decision(s) a guardian or administrator should:

- give all practicable and appropriate effect to the represented person's will and preferences if these are known and, if not, to what they believe these are likely to be[†]
- only override the represented person's will and preferences if it is necessary to do so to prevent serious harm to them
- consider the importance of any companion animal to the person.

[†] In some circumstances the guardian or administrator may not be able to identify the represented person's likely will and preferences. If this is the case, they make a decision that promotes the represented person's personal and social wellbeing.

Duties

Guardians and administrators must:

- act as an advocate

- act honestly, in good faith, and with reasonable skill and care
- encourage and assist the represented person to develop their decision-making capacity
- act in a way to protect them from neglect, abuse or exploitation
- not use the position for profit or act if they have a conflict of interest (unless authorised by law or VCAT)
- not disclose confidential information gained in their role unless authorised to do so under the order or by law.

Administrators have other duties including in relation to:

- management of the property of the represented person
- keeping records and accounts
- providing annual accounts to VCAT.

There are possible legal consequences for people appointed to these roles if they act dishonestly or negligently. It is, therefore, important that they take the duties seriously.

Medical treatment decisions

If a guardian makes a medical treatment decision, they must follow the process set out in the *Medical Treatment Planning and Decisions Act 2016*, and make the decision they reasonably believe the represented person would have made.

Supportive guardianship and supportive administration



The role of a supportive guardian or supportive administrator is to support a person with disability to make their own decisions.

They support the person to make, communicate and/or give effect to decisions about:

- the personal matter(s) set out in the order (supportive guardian)
- the financial matter(s) set out in the order (supportive administrator).

The order may give them authority to get information from others about the person to help the person make a decision. For example, from doctors, banks, utility providers, disability organisations or government agencies.

Who can apply?

Any person can apply to VCAT for a supportive guardianship or supportive administration order for an adult with disability. However, the application needs to propose someone for the role and they need to agree to take it on.

VCAT will not appoint the Public Advocate, State Trustees Limited or a similar body if there is no one suitable who agrees to take on the role.

Does the person who will be supported need to agree?

For a supportive guardian or supportive administrator to be appointed, the proposed supported person needs to agree. If the application is for someone under 18 years of age, the order will only take effect once the person turns 18.

What if there is an application for a guardian or administrator?

VCAT may decide a supportive guardianship or supportive administration order is a more appropriate option after considering an application for a guardianship or administration order.

Other options

Apart from supportive guardianship and supportive administration orders, there are other ways that a person can be supported to make their own decisions.

Find more information on the OPA website at publicadvocate.vic.gov.au

More information



Office of the Public Advocate (OPA)

Level 1, 204 Lygon St, Carlton VIC 3053



OPA Advice Service: 1300 309 337
(Inform reception if you require an interpreter)

TTY: 1300 305 612

Fax: 1300 787 510

publicadvocate.vic.gov.au

VCAT (Victorian Civil and Administrative Tribunal)

William Cooper Justice Centre
223 William Street, Melbourne 3000

Phone: 1300 018 228

If you need to speak to someone in your own language, call the Translating and Interpreting Service on 131 450.

Email: humanrights@vcat.vic.gov.au

vcat.vic.gov.au

If you are deaf or have a hearing or speech impairment



Use the National Relay Service to phone.

For more information visit:

relayservice.com.au



Office of the
Public Advocate

Level 1, 204 Lygon Street, Carlton, Victoria 3053

OPA Advice Service: 1300 309 337

TTY: 1300 305 612 NRS: 133 677

Fax: 1300 787 510

publicadvocate.vic.gov.au