

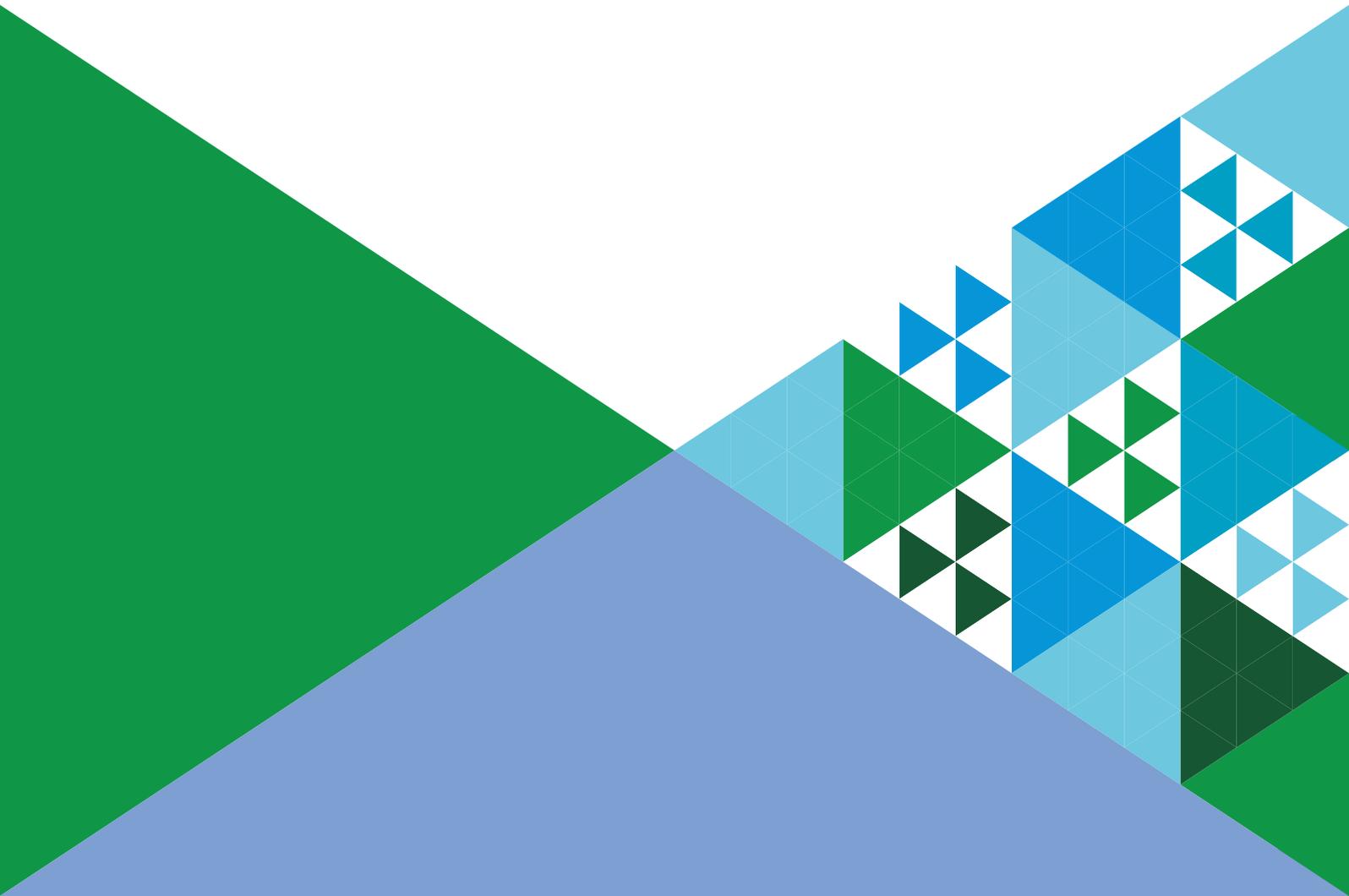


Office of the
Public Advocate

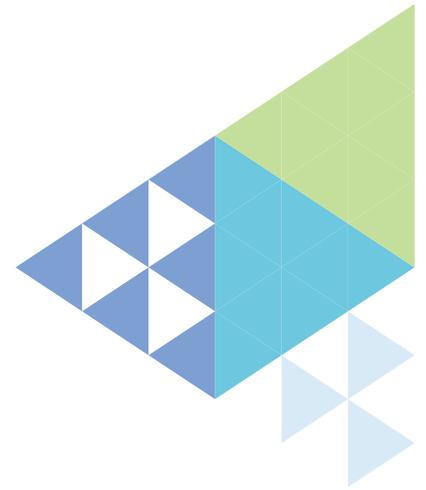
March 2020

Guardianship Guide

A guide for guardians appointed under the
Guardianship and Administration Act 2019



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



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.

ISBN 978-0-6484797-5-8

© Office of the Public Advocate (State of Victoria)
March 2020

First published July 2000 as *Good Guardianship*.



This work, *Guardianship Guide*, 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.

Contents



From the Public Advocate	4
Introduction to guardianship	5
Decision-making	5
Decision-making capacity	5
Principles to keep in mind	6
Supporting the person	6
Developing decision-making capacity	6
Will and preferences	7
Serious harm	7
Least restrictive	7
Understanding the order	8
What is in the order?	8
Working as a joint guardian	8
Duties	9
Decision-making	10
Steps for guardians	10
Steps for guardians flowchart	12
Acting as a guardian	13
Legal responsibility	13
Medical treatment decisions	13
Signing documents	13
Order for the represented person to comply	13
Enforcement order	13
Notifying VCAT of significant events	13
Things a guardian can't do	14
Safeguards	14
How to resign as guardian	14
Reassessment of the order	14
Medical treatment decisions	15
How to identify the medical treatment decision maker	15
When the medical treatment decision maker makes decisions	15
How you make decisions if you are the medical treatment decision maker	16
Relationships and networks	17
Where to get help and more information	18
Appendix	19

From the Public Advocate

If you have been recently appointed by the Victorian Civil and Administrative Tribunal (VCAT) as guardian for another person, you may be wondering where to start and how to proceed.

My office has a role to provide information to assist you.

As Public Advocate for Victoria, I can be appointed by VCAT to be guardian for a person, in some circumstances. This means that my office understands the role of guardian and has expertise to assist you in your role.

Your authority as guardian comes from the *Guardianship and Administration Act 2019*, which sets out your powers and duties as guardian.

The person who is the subject of the guardianship order is known as the 'represented person'.

This guide will help you to understand your powers and duties as guardian for the represented person.

In broad terms, your role is to:

- support the represented person with their decision-making where practicable and appropriate
- make decisions for them when they are not able to make the decision, even with support.



To assist you with what, at times, may seem a daunting and challenging role, I encourage you to contact the Office of the Public Advocate (OPA) Advice Service on 1300 309 337 with any questions you may have, or to discuss any issues of concern to you.

Colleen Pearce
Public Advocate

Introduction to guardianship

If you are a guardian for another adult (the 'represented person'), you:

- have been appointed by the Victorian Civil and Administrative Tribunal (VCAT)
- have legal authority to make decision(s) for the represented person about specified **personal matter(s)**.

Personal matters

A personal matter is a matter relating to the represented person's personal or lifestyle affairs.

Examples of personal matters are:

- where the person lives and who they live with
- other people they associate with
- whether they work and, if so, the kind of workplace
- whether they do training or education and if so, what kind and where
- whether they engage services and, if so, what kind
- medical treatment decisions.

A personal matter can also be a legal matter that relates to the represented person's personal or lifestyle affairs. (The guardianship order will specify whether you have power, as guardian, to undertake a legal proceeding related to a personal matter in the order.)

Decision-making

As guardian you may sometimes:

- support the represented person to make their own decision
- make a decision on their behalf if they are not able to make the decision with support.

Decision-making capacity

When a person is able to make a particular decision, they have 'decision-making capacity' for the decision.

They may have decision-making capacity for some decisions and not for others.

About decision-making capacity

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

- understand the information relevant to the decision and its effect
- retain that information to the extent necessary to make the decision
- use or weigh that information as part of the process of making the decision
- communicate their decision, and their views and needs as to the decision in some way, including by speech, gesture or other means.

The represented person may have capacity to make the decision if they have practicable and appropriate support.

Principles to keep in mind

There are important principles in the Act:

- general principles
- principles to follow when you make a decision.

Some key principles to keep in mind are introduced over the next two pages.

Supporting the person

The person should be provided with practicable and appropriate support to help them to:

- make and participate in decisions affecting them
- express their will and preferences.

For example, you may be able to support the person to make their own decision by explaining information in a way they can understand and breaking down the decision into small steps.

Developing decision-making capacity

The represented person should also be supported to develop their decision-making capacity, as far as this is practicable in the circumstances.

For example, by supporting the represented person to make decisions, you may also help them to develop skills and confidence to make personal and lifestyle decisions.

Why is it important to support the person to make decisions?

Everyone with decision-making capacity has the right to make their own decisions, and to receive the support they need to do so.

The law says if a person is able to make a decision with support, then they have decision-making capacity for the decision.

Even if you have legal authority to make a decision as guardian, you should first consider if the represented person can be supported to make the decision.

It may be you, or another person, who supports them.

Support may include:

- additional time to make the decision
- someone who helps with obtaining and explaining information
- someone who helps the person to think about the likely outcome(s) of a decision
- someone to assist the person to communicate the decision
- technology that assists them
- information explained in an appropriate way, using modified language or visual aids
- linking the person with other support.

Will and preferences

When you make a decision for the represented person, their will and preferences of the represented person should direct, as far as practicable, the decisions you make for them.

About the term ‘will and preferences’

The term ‘will and preferences’ is not defined in the Act. It could be thought of as what is important to the represented person.

A person’s will may be thought of as what drives them and gives their life meaning. Sometimes this can only be seen through their actions.

A person’s preferences reflect the things they like.

A person’s particular will and preferences may arise from experience, knowledge or intuition. Our will and preferences can change over time.

It may be necessary to try to reconcile evidence of a person’s will and preferences that appears to be inconsistent. For example, a person with dementia might say they want to stay at home but reject services to assist them.

Some people with a disability may not have been encouraged to reflect on and communicate their will and preferences. It is expected under the new Act that greater effort will be made to support people to develop and convey their will and preferences.

Serious harm

The Act says that you should only override the represented person’s will and preferences if it is necessary to do so to prevent serious harm to them.

The Act does not define what ‘serious harm’ means. It may be helpful to consider both the level of harm to the person and whether it is likely this harm will eventuate or happen.

Keep in mind that if you have doubt about a decision that you are making, you can ask VCAT for advice.

Least restrictive

When you act as a guardian, you should do this in a way that is least restrictive as possible for the represented person.

This means in relation to their ability to:

- make their own decisions
- act in the way they choose.

Understanding the order

A guardianship order is a legal document that lists your powers as guardian and may include restrictions on your power.

To find out what powers you have as guardian, read the terms of your order.

If you are uncertain about anything, contact OPA's Advice Service for assistance. You can also formally seek advice, in writing, from VCAT.

What is in the order?

The guardianship order must specify the personal matter(s) that you, as guardian, can make decisions about.

For example, you could have authority to make decisions about:

- where and with whom the represented person lives
- access to services for the represented person
- other people the represented person has contact with
- medical treatment.

Other things in the order

The order will also specify:

- the name of the represented person
- your name, if you are appointed as guardian
- whether you have power, as guardian, to undertake a legal proceeding related to a personal matter(s) listed in the order
- any restrictions on your powers as guardian
- whether it is an urgent order.

If VCAT has made an urgent order, it must hold a hearing as soon as practicable after making the order (and not more than 42 days after the urgent order is made).

Working as a joint guardian

Two or more people can be appointed joint guardians, depending on the circumstances. In this case, both or all the guardians must agree when making a decision in order for the decision to be valid.

“To find out what powers you have as guardian, read the terms of your order.”

Duties

The Guardianship and Administration Act sets out your role as guardian.

You have duties you must comply with.

They are to:

- act as an advocate for the represented person
- encourage and assist the represented person to develop their decision-making capacity in relation to personal matters
- act in such a way so to protect the represented person from neglect, abuse or exploitation
- act honestly, diligently and in good faith
- exercise reasonable skill and care
- not use the position for profit
- avoid acting if there is or may be a conflict of interest
- not disclose confidential information gained as a guardian unless authorised to do so under the guardianship order or by law
- act in accordance with the general principles in the Act
- act in accordance with the decision-making principles in the Act.

VCAT will usually reassess the order within 12 months of making it. At the reassessment, VCAT will consider whether the guardian has performed their duties under the Act.

General principles

Your duties include acting in accordance with the general principles in the Act (section 8, see Appendix on page 19).

When you act as guardian you must have regard to all of the following:

- The represented person with a disability who requires support to make decisions should be provided with practicable and appropriate support to enable the person, as far as practicable in the circumstances, to:
 - make and participate in decisions affecting them
 - express their will and preferences
 - develop their decision-making capacity.
- The will and preferences of the represented person should direct, as far as practicable, decisions you make for them as guardian.
- You should exercise your powers as guardian in a way which is the least restrictive of the ability of the represented person to decide and act as is possible in the circumstances.

Decision-making principles

When you make a decision, one of your duties is to act in accordance with the decision-making principles in the Act (section 9).

The decision-making steps for guardians are explained on the next two pages.



Decision-making

Steps for guardians

OPA has developed a 'Steps for guardians' flowchart to assist guardians in their role. It outlines the decision-making steps for guardians to follow.

A small version of the flowchart is provided on page 12.

To order a large version of the flowchart, contact OPA and request a free copy of *The role of a guardian* fact sheet.

Email: opa_advice@justice.vic.gov.au
Phone: 1300 309 337.

Below are the steps from the flowchart.

1. Check the order gives you authority to make a decision about the matter.

If yes, go to step 2.

2. Is it a medical decision?

If, yes:

- The health practitioner will assess whether the represented person has capacity to make the decision.
- If they do not have capacity to make the decision, you may be asked to do so as their medical treatment decision maker.

You must make the decision you reasonably believe the represented person would make. (This is what you are required to do under the *Medical Treatment Planning and Decisions Act 2016*.)

If it is not a medical decision, go to step 3.

3. Does the represented person have decision-making capacity to make the decision with support?

If yes:

- You, or another person, provides the represented person with practicable and appropriate support to make the decision.
- You should make anyone relying on the decision aware that the represented person made the decision, not the guardian.

If no, go to step 4.

4. Do you know the represented person's will and preferences that are relevant to the decision?

If yes:

- Comply with the duties and act in accordance with the general principles in the Act.
- Check if there is guidance from VCAT or restrictions in the order.
- If the represented person has a companion animal, act in a way that recognises the importance of the companion animal to them and any benefits they obtain from it.
- Consider if it is necessary to override the represented person's will and preferences to prevent serious harm to them. Their will and preferences should only be overridden if it is necessary to do so to prevent serious harm to them.

- Make a decision** that gives all practicable and appropriate effect to the represented person's will and preferences, unless this would cause serious harm to them.

If no, go to step 5.

5. Are you able to form a belief about their likely will and preferences? (based on all information available, including from consulting their relatives, close friends and carers)

If yes:

- Comply with the duties and act in accordance with the general principles in the Act.
- Check if there is guidance from VCAT or restrictions in the order.
- If the represented person has a companion animal, act in a way that recognises the importance of the companion animal to them and any benefits they obtain from it.
- Consider if it is necessary to override the represented person's will and preferences to prevent serious harm to them. Their will and preferences should only be overridden if it is necessary to do so to prevent serious harm to them.
- Make a decision** that gives effect, as far as practicable in the circumstances, to what the represented person's will and preferences are likely to be, unless this would cause serious harm to them.

If no, go to step 6.

6. If you are not able to form a belief about their likely will and preferences, do the following.

- Comply with the duties and act in accordance with the general principles in the Act.
- Check if there is guidance from VCAT or restrictions in the order.
- Make a decision that promotes the represented person's personal and social wellbeing.

This is promoted by:

- recognising their inherent dignity
- respecting their individuality
- having regard to their existing supportive relationships, religion, values and cultural and linguistic environment
- keeping their confidential information confidential
- recognising the importance to them of their companion animal, if they have one, and the benefits that may be obtained by having one.

Duties of guardians

Guardians must:

- act as an advocate for the represented person
- encourage and assist the represented person to develop their decision-making capacity in relation to personal matters
- act in such a way so to protect the represented person from neglect, abuse or exploitation
- act honestly, diligently and in good faith
- exercise reasonable skill and care
- not use the position for profit
- avoid acting if there is or may be a conflict of interest
- not disclose confidential information gained as a guardian unless authorised to do so under the guardianship order or by law
- act in accordance with the general principles and the decision-making principles in the *Guardianship and Administration Act 2019*.

Steps for guardians

Check that the order gives you authority to make a decision about the matter

YES

Is it a medical treatment decision?

YES

The health practitioner will assess whether the represented person has capacity to make the decision.

If not, you may be asked to make the decision as their **medical treatment decision maker**. You must make the decision you reasonably believe they would make. (This is what you are required to do under the *Medical Treatment Planning and Decisions Act 2016*).

NO

General principles

A person with a disability who needs support to make decisions should be provided with practicable and appropriate support to enable them, as far as practicable in the circumstances to:

- make and participate in decisions affecting them
- express their will and preferences
- develop their decision-making capacity.

The will and preferences of a person with a disability should direct, as far as practicable, decisions made for that person.

Powers, functions and duties under the Act should be exercised, carried out and performed in a way which is the least restrictive of the ability of a person with a disability to decide and act, as is possible, in the circumstances.

Does the represented person have 'decision-making capacity' to make the decision with support?

YES

You, or another person, provides the represented person with practicable and appropriate support to make the decision. You should make anyone relying on the decision aware that they made the decision, not the guardian.

NO

Decision-making principles from the *Guardianship and Administration Act 2019*

Do you know the represented person's 'will and preferences' that are relevant to the decision?

YES

NO

Are you able to form a belief about their likely will and preferences?

(based on all information available, including from consulting their relatives, close friends and carers)

YES

NO

To make a decision

- Step 1** Comply with the **duties** and act in accordance with the **general principles** (see above).
- Step 2** Check if there is guidance from VCAT or restrictions in the order.
- Step 3** If the represented person has a companion animal, act in a way that recognises the importance of it to them and any benefits they obtain from it.
- Step 4** Consider if it is necessary to override the represented person's will and preferences to prevent serious harm to them. Their will and preferences should *only* be overridden if it is necessary to do so to prevent **serious harm** to them.
- Step 5** Make a decision that gives all practicable and appropriate effect to the represented person's **will and preferences**, unless this would cause serious harm to them.

To make a decision

- Step 1** Comply with the **duties** and act in accordance with the **general principles** (see above).
- Step 2** Check if there is guidance from VCAT or restrictions in the order.
- Step 3** If the represented person has a companion animal, act in a way that recognises the importance of it to them and any benefits they obtain from it.
- Step 4** Consider if it is necessary to override the represented person's will and preferences to prevent serious harm to them. Their will and preferences should *only* be overridden if it is necessary to do so to prevent **serious harm** to them.
- Step 5** Make a decision that gives effect, as far as practicable in the circumstances, to what the represented person's **will and preferences** are likely to be, unless this would cause serious harm to them.

To make a decision

- Step 1** Comply with the **duties** and act in accordance with the **general principles**
- Step 2** Check if there is guidance from VCAT or restrictions in the order.
- Step 3** Make a decision that promotes the represented person's **personal and social wellbeing**. This is promoted by:
 - recognising their inherent dignity and respecting their individuality
 - having regard to their existing supportive relationships, religion, values and cultural and linguistic environment
 - keeping their confidential information confidential
 - recognising the importance to them of their companion animal, if they have one, and the benefits that may be obtained by having one.

Acting as a guardian

Legal responsibility

It is important to comply with your duties as a guardian.

If a guardian fails to comply with their duties and this results in a loss to the represented person, they may be ordered to compensate the represented person for the loss.

They can be charged with a criminal offence if they dishonestly use the guardianship order to obtain financial advantage for themselves (or for another person) or to cause loss to the represented person (or another person).

If you are unsure about what to do in a certain situation, you can ask VCAT for advice. Approval by VCAT protects guardians from legal action, unless the guardian fraudulently misrepresents facts to VCAT.

Medical treatment decisions

If you have authority under the VCAT order to make medical treatment decisions, you may be the person's 'medical treatment decision maker'. (See page 15 to find out.)

If you are, you must follow the process set out in the Medical Treatment Planning and Decisions Act.

As medical treatment decision maker you must make the decision you reasonably believe is the decision the person would have made, if they had capacity to make the decision. (See page 15 for the steps you take to do this.)

Signing documents

As guardian you can sign documents, when necessary, to carry out your duties as specified in the order, for example, signing a medical consent form.

Order for the represented person to comply

As a last resort, under section 45(1) of the Act, VCAT can make orders that give you or another person the power to make sure that the represented person complies with your decision.

This authority is mainly used in situations where the person is at significant risk, needs to be moved to accommodation or a healthcare service that is more appropriate, and is refusing to agree.

If you are confronted with such a situation, you should contact OPA for advice and assistance in applying to VCAT for a section 45 order.

If VCAT makes such an order, it must be reassessed within 42 days.

Enforcement order

You can also apply to VCAT for an enforcement order if you are concerned that another person has not recognised a decision you have made, and have power to make, under the guardianship order. Contact OPA's Advice Service for more information.

Notifying VCAT of significant events

VCAT must be notified of all significant events or changes to the details of guardians and represented persons.

If you or the represented person change address, or if you cannot continue to act as guardian, notify VCAT immediately in writing.

All orders cease on the death of a represented person. If the represented person dies during the term of your order, you must notify VCAT in writing.

Things guardians cannot do

You cannot:

- make a legal will for the represented person
- consent to entering into a marriage or divorce for them.

Safeguards

All guardians must act in accordance with the legislative principles of the Act.

You are accountable to:

- the represented person
- VCAT.

Any person can apply to VCAT to seek a reassessment of the guardianship order. At a reassessment, VCAT can continue, vary or revoke its order.

If you are unsure of your duties and responsibilities as a guardian, or would like some guidance regarding a particular decision, you can write to VCAT and request advice. You may also phone OPA's Advice Service for assistance.

How to resign as guardian

Your role as guardian is voluntary. Should you become unable or unwilling to continue in the role for any reason, and choose to resign, you should inform VCAT in writing. VCAT can then hold another hearing to determine if the represented person still requires a guardian, and appoint one, if necessary. You will continue in the role until VCAT makes a decision about your resignation.

Reassessment of the order

VCAT guardianship orders will ordinarily be reassessed within 12 months of the original order being made.

You can request an early reassessment from VCAT if you think guardianship is no longer necessary.

For example, you may seek a reassessment because:

- you do not think there are any further decisions that need to be made
- you believe that matters could be resolved without guardianship
- you believe the person is now capable of making their own decisions in relation to the personal matter(s) in the order.

VCAT may take the initiative to conduct a reassessment, or may do so on the application of any person including the represented person.

In the course of conducting the reassessment, VCAT will consider whether you have performed your duties in compliance with section 41.

The reassessment may involve a hearing or VCAT may reassess the order 'on the papers' without having a formal hearing.

Check your order to see if you are required to provide a written report.

Supportive guardians

VCAT may consider appointing a supportive guardian if:

- the represented person can make decisions with support
- there is someone willing to be their supportive guardian.

A supportive guardian supports a person to make, communicate and/or give effect to decisions about the personal matter(s) set out in the supportive guardianship order.

Medical treatment decisions

An important principle of our law is that each individual has autonomy over their own body. Health practitioners cannot treat us unless we consent to that treatment.

How to identify the medical treatment decision maker

If the represented person does not have decision-making capacity to make a medical treatment decision their medical treatment decision maker can make it for them. They can consent to or refuse the treatment.

Under the Medical Treatment Planning and Decisions Act the represented person's medical treatment decision maker is the first person on the following list who is:

- reasonably available, and
 - willing and able
- to make the medical treatment decision.
1. The represented person's appointed medical treatment decision maker
 2. A guardian appointed by VCAT with authority to make decisions about medical treatment for them
 3. The first of the following people who is in a close and continuing relationship with the represented person:
 - a. their spouse or domestic partner
 - b. their primary carer (not a paid service provider)
 - c. their adult child
 - d. their parent
 - e. their adult sibling.

Where there are two or more relatives who are first on this list, the eldest is the medical treatment decision maker.

If the represented person has not appointed anyone, it is their guardian (if the guardian has authority to make medical treatment decisions) who is their medical treatment decision maker.

The guardian only makes the decision if the represented person does not have capacity to make it.

If the guardian is not reasonably available and willing and able to make the decision, the treating health practitioner will refer to the list to identify the medical treatment decision maker for the person.

If the represented person does not have a medical treatment decision maker, the Public Advocate has authority to make significant medical treatment decisions for the person.

When the medical treatment decision maker makes decisions

If the health practitioner assesses that the represented person does not have capacity to make a medical treatment decision and you are their medical treatment decision maker, you may need to make a decision on their behalf unless:

- emergency treatment is required
- it is palliative care
- there is a relevant instructional directive in an advance care directive (where the represented person consented to or refused the treatment).



How you make decisions if you are the medical treatment decision maker

The Medical Treatment Planning and Decisions Act sets out how the medical treatment decision maker must make decisions.

If you are the medical treatment decision maker, you must make the decision that you reasonably believe is the decision the represented person would have made. This may be a decision to consent to, or refuse, the treatment.

Consider the preferences and values of the represented person

To make the decision that you reasonably believe the represented person would have made, you must:

- First, consider any valid and relevant values directive in an advance care directive that they made, if any.

A values directive records the patient's values and preferences for their medical treatment, and it guides you when you make a decision on their behalf.

- Next, consider any other relevant preferences that they have expressed, and the circumstances in which those preferences were expressed.
- If you cannot identify any relevant preferences of the represented person, you must give consideration to their values.

For example, they may have written down their wishes, or may have told close family members.

They may have expressed their values, or you may be able to infer their values from their life.

Consider the proposed medical treatment

As the represented person's medical treatment decision maker, you must also consider:

- the likely effects and consequences of the medical treatment, including its effectiveness
- whether the likely effects and consequences are consistent with their preferences or values
- whether there are any alternatives, that would be more consistent with their preferences or values. (An alternative can include refusing medical treatment).

Consult

In the process of making the decision for the represented person, you must consult with anyone that you reasonably believe they would want you to.

Act in good faith and with due diligence

You must act in good faith and with due diligence.

If you cannot find out the represented person's preferences or values

If you cannot find out the person's preferences or values, you need to make a decision that promotes their personal and social wellbeing.

In doing this, you need to consider the person's individuality.

You need to consider the proposed treatment, in the same way as described above. The one difference is that you consider whether the proposed treatment, or any alternatives, would be better in promoting their personal and social wellbeing, rather than whether it would be more consistent with their preferences or values.

Relationships and networks

It is important to recognise the value of the represented person's existing relationships and networks and try to work as closely as possible with them.

There are a number of people involved with the represented person, and maintaining positive relationships with them will assist you in ensuring the best possible outcomes for the person.

These networks can include family and friends, professionals, service providers, community groups and legal advisors.

VCAT may have appointed you as guardian for the represented person, but the person may have previously given powers of attorney for financial matters and/or authority to make medical treatment decisions to someone else.

As a guardian, you need to ensure that you have an effective working relationship with whoever is responsible for managing the represented person's financial arrangements.

This could be an administrator appointed by VCAT, an individual appointed by the represented person as their attorney under an enduring power of attorney for financial matters, an appointed supporter, or a family member or friend who is assisting the represented person on an informal basis.

Situations may arise where you need to consult with the person who has responsibility for financial arrangements about questions and potential decisions affecting the represented person's lifestyle and finances. For example, can the represented person afford a certain

type of accommodation, or is money available to increase the represented person's choices and quality of life?

If you and the person who manages the represented person's financial arrangements are unable to agree on a decision, then you should contact OPA for advice. It may be necessary to apply to VCAT.

Contact the OPA Advice Service if you want to clarify the powers and duties of administrators, attorneys or supporters.

You may also need to establish a good relationship with the represented person's medical treatment decision maker.

If you have been appointed guardian with responsibilities for making decisions related to access to services, it is important that you are aware that this may include decisions about accessing healthcare services. The medical treatment decision maker only makes decisions about whether to consent to or refuse a treatment that is offered by a health practitioner.

Therefore, if you work together you will be able to make decisions that best reflect the will and preferences of the represented person. If you are unable to agree on a decision, or resolve any conflict, then you should seek the advice of VCAT.

Where to get help and more information

Office of the Public Advocate

Level 1, 204 Lygon St
Carlton VIC 3053
OPA Advice Service: 1300 309 337
TTY: 1300 305 612
Fax: 1300 787 510
publicadvocate.vic.gov.au

Victorian Civil and Administrative Tribunal

Human Rights Division
Level 5, William Cooper Justice Centre
223 William Street,
Melbourne Victoria 3000
Email:
humanrights@vcat.vic.gov.au
Phone: 1300 01 8228
vcat.vic.gov.au

Appendix

The Guardianship and Administration Act 2019, Sections 8, 9 and 41

Section 8 (1)

General principles

- (1) A person exercising a power, carrying out a function or performing a duty under this Act must have regard to the following principles —
 - (a) a person with a disability who requires support to make decisions should be provided with practicable and appropriate support to enable the person, as far as practicable in the circumstances —
 - (i) to make and participate in decisions affecting the person; and
 - (ii) to express the person's will and preferences; and
 - (iii) to develop the person's decision-making capacity;
 - (b) the will and preferences of a person with a disability should direct, as far as practicable, decisions made for that person;
 - (c) powers, functions and duties under this Act should be exercised, carried out and performed in a way which is the least restrictive of the ability of a person with a disability to decide and act as is possible in the circumstances.

Section 9(1)

Decision-making principles

- (1) A person making a decision for a represented person must have regard to the following principles —
 - (a) the person should give all practicable and appropriate effect to the represented person's will and preferences, if known;
 - (b) if the person is not able to determine the represented person's will and preferences, the person should give effect as far as practicable in the circumstances to what the person believes the represented person's will and preferences are likely to be, based on all the information available, including information obtained by consulting the represented person's relatives, close friends and carers;
 - (c) if the person is not able to determine the represented person's likely will and preferences, the person should act in a manner which promotes the represented person's personal and social wellbeing;
 - (d) if the represented person has a companion animal, the person should act in a manner that recognises the importance of the companion animal to the represented person and any benefits the represented person obtains from the companion animal;
 - (e) the represented person's will and preferences should only be overridden if it is necessary to do so to prevent serious harm to the represented person.

Section 41

Exercise of power by guardian

- (1) A guardian —
 - (a) must act in accordance with the general principles set out in section 8 and the decision-making principles set out in section 9; and
 - (b) must act as an advocate for the represented person; and
 - (c) must encourage and assist the represented person to develop the person's decision-making capacity in relation to personal matters; and
 - (d) must act in such a way so to protect the represented person from neglect, abuse or exploitation; and
 - (e) must act honestly, diligently and in good faith; and
 - (f) must exercise reasonable skill and care; and
 - (g) must not use the position for profit; and
 - (h) must avoid acting if there is or may be a conflict of interest; and
 - (i) must not disclose confidential information gained as a guardian unless authorised to do so under the guardianship order or by law.
- (2) A guardian who has the power to make medical treatment decisions for a represented person must comply with the *Medical Treatment Planning and Decisions Act 2016* in relation to those decisions.



Office of the
Public Advocate

Office of the Public Advocate
Level 1, 204 Lygon Street, Carlton, Victoria 3053
Phone: 1300 309 337
TTY: 1300 305 612 NRS: 133 677
Fax: 1300 787 510
publicadvocate.vic.gov.au