

Elder Financial Abuse

VCAT – Proceedings in the Guardianship List

The Guardianship list at VCAT makes decisions about appointing guardians and administrators and supervises their conduct.

What is the Guardianship List?

The Victorian Civil and Administrative Tribunal (VCAT) is organised by specialist lists.

VCAT's Guardianship List has broad jurisdiction over the affairs of people who are unable to make their own financial, personal and medical decisions because of a disability.

As part of VCAT's Human Rights Division, the list is responsible for protecting their rights by supervising the conduct of substitute decision makers (such as attorneys, Administrators and Guardians) and appointing Administrators and Guardians for people who haven't appointed a substitute decision maker for themselves and now lack decision making capacity to appoint one.

The List is a forum where many issues of elder abuse and elder financial abuse are raised and determined, but its remit extends far beyond that and provides substitute decision makers with a range of options and supports when complex and difficult situations arise as they carry out their roles.

Studies suggest that elder abuse affects one in six older Australians and more than one in three in aged care settings. With an ageing population and many Australians living for long periods with diminished capacity, the Guardianship List plays a crucial role in safeguarding the rights of those who cannot look after themselves.

Legislation in relation to Power of Attorneys

The *Powers of Attorney Act 2014* provides VCAT wide ranging powers to supervise the conduct of attorneys. This can include:

- Ordering the attorney to produce accounts about their management of the Principal's finances and to audit those accounts.
- Suspending or revoking the appointment of an attorney and, if appropriate, appointing an administrator or guardian.
- Imposing a "freezing order" to restrict access and use of bank accounts (where for instance there are serious allegations of fraud or misappropriation of assets).
- Ordering that an attorney pay compensation to the Principal (or to their estate if the Principal has died) for any loss caused by the attorney breaching the Act.
- Ruling on the validity of a Power of Attorney.
- Providing an advisory opinion to an attorney on any matter relating to a Power of Attorney.
- Compelling the production of, or opening, a person's will.
- Subpoenaing documents or compelling witnesses to give evidence about any matter that is before it.
- Ruling that a transaction conducted by an attorney is invalid where they have not complied with their obligations.
- Ruling that an Enduring Power of

VCAT – Proceedings in the Guardianship List continued

Attorney is valid, even though it has not been executed in accordance with proper formalities.

- Making any other order about any other matter that VCAT considers necessary in relation to an Enduring Power of Attorney.
- Imposing criminal sanctions for breaches of the Act by an attorney.

Legislation in relation to Guardians and Administrators

The *Guardianship and Administration Act 2019* allows VCAT to appoint Guardians and Administrators for persons who do not have 'decision making capacity' to manage their affairs. This will often occur when a person does not have (and cannot make) a valid power of attorney, but can also occur where an attorney has been removed from their role or is unable or unwilling to continue as attorney.

An Administrator is responsible for making financial and legal decisions for a person under administration, whereas a Guardian is empowered to make lifestyle decisions, such as where a person lives and who they live with, who can visit them, what support services the person needs and, in some cases, medical decisions.

Guardians and Administrators' appointments are reviewed at least every three years, and often annually. An administrator is required to file accounts with VCAT every year for auditing.

The List has powers to:

- Appoint an administrator or Guardian (or supportive administrator and/or Guardian) for a person who cannot manage their own affairs.
- Appoint an administrator to handle the financial affairs of a missing person.
- Specify the powers that the Administrator or Guardian has, or the specific matters they are empowered to make decisions for – for instance, the power to commence or defend legal proceedings on the person's behalf.
- Compel the production of, or open, a

person's will.

- Authorise the use of the represented person's funds to provide for the maintenance of a dependent of theirs.
- Authorise an administrator to exercise certain powers that the represented person has in respect of a trust.
- Provide private advice to an Administrator or Guardian about the scope of their powers or about how they should act, resulting in the administrator or guardian being protected from liability if they act in accordance with that advice.
- Consent to special medical procedures on behalf of a represented person.
- Issues "enforcement orders" against a person or organisation that does not comply with the valid direction of an Administrator or Guardian, which have criminal consequences if not followed.

In addition to the above, the appointment of an Administrator may result in the administrator commencing investigations into allegations of financial abuse and/or commencing legal proceedings to recover assets or enforce other legal rights on behalf of the represented person.

Sometimes, the appointment of an administrator will be required so legal proceedings, such as family law proceedings, or a claim against a deceased estate, can be made on the represented person's behalf.

In the Guardianship context, the consequence of a Guardian being appointed may be that a disputed decision can be resolved by the Guardian, such as where a person should live (or whether they should enter or exit nursing care), who should be allowed to visit them, or whether they should or should not receive particular medical treatment or services.

VCAT – Proceedings in the Guardianship List continued

Medical Treatment Planning and Decision Act

Under this act, the Guardianship List supervises the actions of Medical Treatment Decision Makers (sometimes known as medical powers of attorney) or can give directions about medical treatment for persons who do not have a decision maker.

The list can make orders about matters such as:

- The validity of the appointment of a Medical Treatment Decision Maker;
- Whether to suspend or revoke a Medical Treatment Decision Maker's appointment;
- Give advisory opinions to medical treatment decision makers;
- Authorise certain medical procedures where there is no medical treatment decision maker available;
- adjudicate on the meaning or consequences of the content of an advanced care directive.

How we can help

While parties can, and often do, appear in VCAT without the benefit of legal assistance, the results can be disappointing for them.

Proceedings in the list can be complex, requiring not only specialist legal advice in what remains a niche area, but the input of a diverse range of specialists including forensic accountants, financial planners, neuropsychologists, social workers and doctors.

Our dedicated team helps older clients, their loved ones and substitute decisions makers navigate the system and can advise you on your rights.

Contact Us

Need assistance with elder financial abuse? Please don't hesitate to contact us on (03) 9843 2171.