

March 2020

Administration guide

A guide for people appointed as administrators under
the *Guardianship and Administration Act 2019*



About the Office of the Public Advocate

The Victorian Office of the Public Advocate (OPA) provides services to protect and promote the rights, interests and dignity of people with disability (specifically intellectual impairment, mental disorder, brain injury, neurological disorders, physical disability or dementia) living in Victoria.

The services include guardianship, advice, education, information, research, advocacy and support. They are delivered by the Victorian Public Advocate, OPA employees and more than 650 OPA volunteers.

For more information, visit publicadvocate.vic.gov.au or call 1300 309 337

About State Trustees

State Trustees is a fully state-owned company, providing public trustee services to the people of Victoria. It provides a broad range of legal and financial services.

State Trustee products and services include will writing, powers of attorney, executor services and trustee services, as well as financial administration for more than 9500 Victorians who, due to mental illness, injury or disability, are unable to fully manage their own affairs.

For more information, visit statetrustees.com.au or call 1300 138 672

About the cover design



The cover design was inspired by the artwork, 'House' by Ron Ellis, 2006. It is acrylic on canvas and was purchased by the Office of the Public Advocate from The Colour Gang, Noweyung Centre Inc, Bairnsdale. Started in 1989, the renowned group of artists The Colour Gang produces original and distinctive artworks evoking a strong sense of spontaneity and energy through the use of colour and bold forms. The program allows participants to learn and develop skills, and provides an opportunity for their works to be displayed and sold.

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Message from the Public Advocate and State Trustees

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

Sometimes, even with support, a person is not able to make decisions about one or more financial matters.

If there is no alternative to protect and promote the human rights of the adult with disability, the Victorian Civil and Administrative Tribunal (VCAT) may appoint an administrator.

Where to start

If you have been recently appointed by VCAT as an administrator for a person with disability, you may be wondering where to start and how to proceed.

This guide will help you to understand your powers and duties as administrator for the 'represented person'. (The represented person is the person who is the subject of the administration order).

If you have been appointed as an administrator on or after 1 March 2020, your authority comes from the *Guardianship and Administration Act 2019*. This Act sets out your powers and duties as administrator.

When you make decisions they must be made in accordance with the Act. In broad terms this means that you make decisions that give effect to the represented person's will and preferences ¹, unless this would cause serious harm to them.



Above
Public Advocate, Colleen Pearce and State Trustees CEO, Matt Carrick

Why the Office of the Public Advocate and State Trustee have worked together to bring you this guide

One of the roles of the Office of the Public Advocate is to provide information about the provisions of the *Guardianship and Administration Act 2019*.

State Trustees understands the role of administrator because it can be appointed by VCAT to be administrator for a person in some circumstances. This guide includes helpful information from its experience.

Other resources and help

The guide provides general information. You, however, may wish to obtain an up-to-date copy of the Act.

The Act can be accessed via the Victoria Law Today section of the Victorian Legislation and Parliamentary Documents website legislation.vic.gov.au

You should always ask for advice if you are unsure what to do in a specific situation. If you are writing to VCAT for advice, remember to quote the represented person's VCAT reference number (G...).

(1) For example, someone may express, through their words or actions, their will and preference that their house is not sold.

Understanding the order

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Introduction

The administration order is a legal document that sets out your powers as administrator and may include restrictions or limitations on your power.

If you have been appointed as an administrator you have legal authority to make decisions for the represented person about a specific **financial matter** or financial matters.

The order will specify:

- the name of the represented person
- your name, if you are appointed as administrator
- the financial matter(s) that you have power to make decisions about
- any restrictions or limitations on your powers as administrator
- the powers that you have in relation to the financial matter(s) in the order
- whether you have power to undertake a legal proceeding related to a financial matter(s) listed in the order (s.51)
- 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).

Joint administrators

Two or more people can be appointed joint administrators. If you have been appointed a joint administrator, see the information about joint administrators on page 33.

Financial matter

A financial matter, in relation to the represented person, means a matter relating to their financial or property affairs and includes a legal matter that relates to their financial or property affairs.

Examples include:

- making money available to the person for their personal expenditure
- paying any debts of the person
- insuring the person's property
- undertaking a real estate transaction for the person
- withdrawing money from or depositing money into an account of the person.

Identify your powers

The order gives you power, as administrator, to make decisions for the represented person about the financial matter(s) that are specified in the order.

The order may:

- set out the financial matter(s) that you have power to make decisions about
- specify that you have power to make decisions about all financial matters, except for some matters that are listed in the order.

When the order is made, you are also given other powers under section 46(1) of the Act.

These are a power to:

- make gifts on behalf of the represented person, but only as permitted by the order and the Act (see page 31)
- make investments on behalf of the represented person, but only as permitted by the order and the Act (see page 32)
- read the legal Will of the represented person if it is in your possession (see page 35) (An administrator does not have power to make or revoke a Will)
- sign and do anything necessary to give effect to a power that you have been given in the order or a duty that you have (see page 34)
- do things that are necessary or incidental to a power that you have been given in the order.

VCAT may specify in the order other powers that you have, any restrictions on your powers, and any guidance when you are making decisions.

Check your order to see if you have any or all of the following powers from section 52 of the Act.

You may find it helpful to tick off the powers that you have from the list below.

VCAT may have specified that you have power, in relation to the financial matters in the order, to:

- collect, receive and recover:
 - income of the represented person
 - money due to them
 - compensation or damages (section 52(a))
- invest any money in any security in which a trustee may by law invest (s. 52(b))
- rent out property for a term of up to five years (or longer with the consent of VCAT) (s. 52(c))
- lease property (s. 52(d))
- end, or agree to the ending of, a lease, or renew a lease (s. 52(e))
- bring land (e.g. land with General law title) under the *Transfer of Land Act 1958* (s.52(f))
- sell real estate and other property (s. 52(g))
- sell other property (s. 52(g))
- take out a mortgage (s. 52(h))
- pay any debts and settle, adjust or compromise any demand made by or against the represented person estate (s. 52(i))
- carry on a trade, profession or business (s. 52(j))
- agree to alteration or dissolution and distribution of assets of a partnership (s. 52(k))
- sign legal documents (s. 52(l))
- complete a contract (s. 52(m))

- pay a sum for maintenance of the represented person, their spouse or domestic partner, their child or other dependent. or pay the education expenses of a child of the represented person, or pay funeral expenses of the represented person (s. 52(n))
- provide money to the represented person for their personal use (s. 52(o))
- give the represented person's personal property to them (s. 52(p)).

VCAT may have also specified in the order that the administrator has any other relevant power in relation to a specified financial matter (s. 52(q)).

Power to undertake legal proceedings

Check your order to see if you have power to:

- bring and defend a legal proceeding on behalf of the represented person in relation to a financial matter specified in the order (s.51).

Restrictions on your power

Check the order for any restrictions on your powers. This may include a restriction that some powers can only be used with VCAT's permission.

Some things you cannot do as an administrator

You cannot:

- make (or revoke) a legal Will for the represented person
- make (or revoke) an enduring power of attorney for the represented person ²
- manage the represented person's estate on their death³

Advice from VCAT

If you are an administrator, you may apply to VCAT for advice on any matter relating to the scope of the administration order or the exercise of any power under the order.

(2) Note: If you discover that the represented person themselves has made an enduring power of attorney after VCAT has made the administration order, contact the Office of the Public Advocate Advice Service for advice on 1300 309 337.

(3) If you have been appointed executor under the person's legal Will (the legal document used to transfer their estate to beneficiaries after their death) you will have a role in managing their estate on their death, but as executor, **not** as administrator.

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Introduction

When VCAT appointed you as an administrator for the represented person you agreed to take on the duties of the role.

If you are appointed as an administrator on or after 1 March 2020, the *Guardianship and Administration Act 2019* sets out your duties as administrator.

When VCAT reassesses the order, it will consider whether you have performed your duties under the Act.

Your duties under section 55 of the Act

You must:

- act as an advocate for the represented person
- encourage and assist the represented person to develop their decision-making capacity in relation to financial 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 or act if you have a conflict of interest (unless authorised by law or VCAT)
- not disclose confidential information gained as an administrator unless authorised to do so under the administration order or by law
- act in accordance with the general principles in the Act (see page 12)
- act in accordance with the decision-making principles in the Act (see page 12).

You also have duties that are set out in sections 56 to 63 of the Act (see the next page).

Your duty to manage property and financial affairs

As administrator for the represented person, you must:

- take possession and care of, recover, collect, preserve and administer, the property and estate of the represented person
- generally manage the property and financial affairs of the represented person.

This is subject to what the administration order says. For example, there may be restrictions in the order.

Your duty to keep records

As administrator, you must keep accurate records and accounts of all dealings and transactions you make in relation to the financial matters specified in the order.

Your duty to lodge accounts

Unless VCAT directs otherwise, each year you must lodge an account of your dealings and transactions in relation to the financial matters specified in the order. (See page 20 for more about this).

VCAT may also require you to lodge accounts at a different time.

Your duty to pay for examination or auditing of accounts

At the time that VCAT makes the administration order, it may also appoint someone to examine or audit the accounts for a fee approved by VCAT. You must pay an amount that has been certified as the reasonable cost for doing this.

This fee is paid from the represented person's estate and you must make this payment, unless VCAT waives payment of all or part of the fee.

Your duty to keep property separate

You must keep the property of the represented person separate from your property. However, this does not apply to property that you own jointly with the represented person.

Your duty in relation to conflict transactions

You must not enter into a transaction where there is, or may be, a conflict between your duty as administrator for the represented person and your interests (or the interests of your relative, business associate or close friend), unless authorised by VCAT, or

permitted by the Act, to do so.

This type of transaction is known as a conflict transaction. (See page 23 for more about conflict transactions).

Your duty to report the death of the represented person

If the represented person dies, you must report this in writing to VCAT as soon as practicable.

Legal consequences

If an administrator fails to comply with their duties and this results in a loss to the represented person, the administrator may be ordered to compensate the represented person for the loss. The administrator can be charged with a criminal offence if they dishonestly use the administration order to obtain financial advantage for themselves (or 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, ask VCAT for advice. Approval by VCAT protects administrators from legal action, unless the administrator acts fraudulently or misrepresents facts.

General principles

Section 8 of the Act says that when you act as an administrator 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 administrator.
- You should exercise your powers as administrator 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

Section 9 of the Act says that when you make a decision, you must have regard to the following decision-making principles.

In broad terms, section 9 says that when making decision(s) as an administrator you should:

- give all practicable and appropriate effect to the represented person's will and preferences if these are known and, if not, to what you 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, you may not be able to identify the represented person's likely will and preferences. If this is the case, your decision should promote the represented person's personal and social wellbeing.

The decision-making steps you need to follow are described in the next section.

Decision-making

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Introduction

There are steps to follow to make sure that you act in accordance with the general principles and decision-making principles in the Act.

Step 1: Do you have authority to make the decision?

The first step is to check whether the administration order gives you authority to make the particular financial decision. This will depend on whether the decision is about a financial matter in the order.

The next step depends on whether the represented person has **decision-making capacity** to make the decision.

When thinking about whether the represented person has capacity to make the decision, keep in mind the following.

Support to make the decision

The Act says that a person has decision-making capacity in relation to a matter if it is possible for them to make the decision with practicable and appropriate support.

On the next three pages read more about:

- decision-making by the represented person
- decision-making by the administrator.

Decision-making capacity

The Act says a person has capacity to make a decision if they are able to:

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

Decision-making by the represented person

□ Step 2: Can the represented person be supported to make the decision?

Depending on the decision that needs to be made, the represented person may be able to make it.

However, if you think the decision has serious adverse consequences, they may lack the ability to weigh them up and, thus, lack decision-making capacity.

When faced with such difficult choices and decisions, you may seek the advice of VCAT, especially as you are bound by your duties as administrator which include preserving the represented person's estate, and protecting the represented person from neglect, abuse and exploitation.

Why is supporting the represented person important?

The United Nations Convention on the Rights of Persons with Disabilities, which is recognised in the Act, says that people have the right to have the support they need to make their own decisions.

One of the duties of an administrator is to encourage and assist the represented person to develop their decision-making capacity.

For these reasons it is important to support the represented person, as far as practicable and appropriate in the circumstances, to make their own decision.

In addition, the represented person may have capacity to make a decision with the support of another person (which you might advocate for them to have), or without needing support.

Examples of support

Some examples of support include:

- additional time for the represented person to make a decision
- information explained in an appropriate way, using modified language or visual aids
- helping the represented person with obtaining and explaining information
- helping the represented person to think about the likely outcome(s) of a decision
- helping the represented person by breaking up the decision into steps
- helping the represented person to communicate their decision
- technology that assists the represented person.

Written consent

You may need to provide written consent for the represented person to be able to act on their decision.

This is because under the Act there are restrictions on the powers of the represented person in relation to the financial matter(s) set out in the order.

Unless you provide written consent to the represented person, for the financial matter(s) in the order, the represented person is taken **not** to have decision-making capacity in relation to:

- entering into a contract
- selling or transferring property or money, or taking out a mortgage or other loan.

When considering providing your written consent, you may wish to seek advice from VCAT. Remember you remain bound by your duties.

Decision-making by the administrator

Step 3: Making a decision for the represented person

If the represented person cannot be supported to make their own decision about the matter, you make the decision for them as administrator.

Keep in mind that when you make a decision you must also comply with your duties (see pages 10-11).

Step 3a: Do you know the represented person's will and preferences?

- If yes, you make a decision that:
 - gives all practicable and appropriate effect to their **will and preferences**, unless:
 - this would cause **serious harm** to them.

If the represented person has a companion animal, you should also act in a way that recognises the importance of it to them and any benefits they obtain from it.

- If no, proceed to step 3b (overleaf).

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.

Step 3b: Are you able to form a belief about the represented person's likely will and preferences?

If you do not know the person's will and preferences, you may be able to form a belief about what they are. The Act says you should form this belief based on all information available, including from consulting the represented person's relatives, close friends and carers.

- If you are able to form this belief, you 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 not, proceed to step 3c.

Step 3c: If you cannot form a belief about the represented person's likely will and preferences

In some circumstances you may not be able to identify the represented person's likely will and preferences.

If this is the case, you make a decision that promotes the represented person's personal and social wellbeing.

The Act says that the represented person's personal and social wellbeing 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.

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Accommodation

Administrators are not responsible for making decisions about where a represented person lives. This responsibility falls either to the represented person, a guardian, or an attorney (under an enduring power of attorney) if a guardian or attorney has been appointed with power to make accommodation decisions.

Administrators are responsible for determining if the represented person can afford the costs of the proposed accommodation.

If the represented person has a guardian, or enduring attorney for personal matters, it is important the administrator works with the guardian and that attorney.

If you have the legal power, you can buy or sell a house for the represented person. The power to buy a dwelling is regarded as an exercise of the power of investment under s.48(c) of the Act (see also the Trustee Act s.11). The power to sell is found in section 52(g) of the Act.

As for all decisions, you follow the decision-making steps in the Act (see pages 14 to 17) and must comply with your duties.

The represented person's name must be on the contract of sale, or on any legal documents such as the certificate of title. (See page 34 on signing documents for the represented person).

You must ensure any property is insured and that all relevant expenses, such as rates, are paid.



Remember to follow the decision-making steps (pages 14–17)

Accounts

Do I have to keep accounts and lodge accounts with VCAT?

Each year you must lodge an Account by Administrator (ABA) with VCAT for examination or auditing by a person appointed by VCAT. In exceptional circumstances, this may not be required.

The ABA is an account of all dealings and transactions relating to the financial matter(s) specified in the administration order, and a statement of assets and liabilities.

ABAs are now lodged online via the *Guardians and Powers of Attorney* section of the VCAT website vcat.vic.gov.au

VCAT directs when in the order the ABA must be lodged.

It is very important that you lodge the ABA in time and pay the annual administration fee (if required).

If you fail to do so, VCAT may reassess the administration order and appoint another administrator.

If there are exceptional circumstances which prevent you from lodging the ABA, you can write to VCAT to request an extension, explaining the reasons why.

Are fees charged by VCAT, and for examination of the ABA?

VCAT charges a flat annual administration fee which is waived upon application for represented persons on a low income.

In addition, when VCAT appoints State Trustees or another examiner to examine the ABA, the examiner may charge a fee, that is certified by that person as being the reasonable cost of examining the accounts. The fee is calculated based on the time it takes to complete the examination. You can contact the examiner's company for information about fees charged.

Fees are paid out of the estate of the represented person.

Free workshops

VCAT holds regular free ABA workshops.

Visit the VCAT website

Visit the *Account by Administrator* page of the VCAT website (vcat.vic.gov.au) to:

- register for a free ABA workshop
- access the online ABA form
- find more information about how to complete the ABA, including what supporting documents and receipts need to be included
- find more information about fees.

Advice from VCAT

As an administrator, you may apply to VCAT for advice on any matter relating to the scope of the administration order or the exercise of any power under it.

Examples of when you may choose to get advice from VCAT include:

- before you sell real estate owned by the represented person. Sometimes the order may require that you seek approval from VCAT before selling real estate owned by the represented person
- before loaning the represented person's money to another person
- before giving a gift of more than \$100 from the represented person's money or property to another person
- before renovating the represented person's property
- if you have a potential conflict of interest
- if you have a dispute with a guardian or joint administrator that cannot be resolved
- if circumstances have made it impossible for you to continue to administer the estate under the terms of the order.

Availability of the administrator

What should I do if I am travelling interstate or overseas?

If you are planning on going interstate or overseas for a significant period of time and you cannot make adequate arrangements for the represented person while you are away, you should notify VCAT in writing as soon as possible. VCAT may appoint another person as administrator until you return.

Can I delegate my powers?

No, you cannot delegate (give to another person) your powers to make decisions and act on behalf of the represented person.

Depending on the powers you have been given, you may have authority to engage a service provider on behalf of the represented person, such as a real estate agent, to manage or arrange the sale of a property.

Centrelink

In managing the represented person's financial affairs, you should actively pursue all benefits and income the represented person is entitled to and ensure they do not suffer financial detriment.

Benefits the represented person may be entitled to include Centrelink payments and overseas pensions.

Is it my job to contact Centrelink for the represented person?

In most circumstances it is your job to ensure that the represented person receives any social security benefit to which they are entitled, unless the administration order is very limited.

This includes ensuring that all the represented person's relevant assets and income is disclosed to Centrelink, so that the correct payment can be determined.

The person may be entitled to additional payments, for example, rent assistance.

It is important to remember that Centrelink payments may be affected by the income and assets of the represented person.

Further information is available at humanservices.gov.au



Remember to follow the decision-making steps (pages 14–17)

Change in circumstances

What if there is a change of address?

Write to VCAT if you or the represented person changes address.

What if the represented person is able to make their own decisions?

Write to VCAT if you believe the represented person can administer their own affairs. For example, they may be able to make decisions with support.

VCAT will then consider reassessing the order.

If there is someone willing to support the represented person to make decisions, VCAT may consider appointing a **supportive administrator**.

The role of a 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 financial matter(s) set out in the supportive administration order.

Can I stop being an administrator?

If you are unable or are unwilling to continue as administrator, write to VCAT immediately. A hearing will be scheduled to appoint a new administrator. You will remain the administrator until any new order is made.

Conflict transactions

You must not enter into a transaction where there is, or may be, a conflict between your duty as administrator for the represented person and your interests (or the interests of your relative, business associate or close friend), unless authorised by VCAT to do so.

This type of transaction is known as a conflict transaction.

The above does not apply to gifts from the represented persons property where these are in accordance with the Act (see 'Gifts' on page 31) or maintenance of a dependant of the represented person where this is in accordance with the Act (see page 26).

If the administrator and represented person own joint property it is not a conflict transaction merely because the property is jointly owned.

An administrator, who enters into a conflict transaction that VCAT has not authorised, may be liable to pay compensation or, if the administrator acts dishonestly, could be charged with an offence.

If you are uncertain, seek VCAT's advice (see page 21).

Contracts

Can the represented person be liable under a contract?

In relation to the financial matters set out in the VCAT order, the represented person is taken not to have decision-making capacity to become liable under a contract, unless you provide written consent, or it is allowed in the VCAT order.

What does this mean?

It means that if the represented person has entered into a contract without your consent and without this being allowed for in the VCAT order, you may be able to recover any money spent, or have the contract declared invalid by a court.

You may need to do this where the represented person has entered into an agreement that requires payment for goods (e.g. a car) or services (e.g. a gardening service) or creates a future financial liability (e.g. a loan, insurance contract or tenancy agreement).

If you explain the situation, the merchant or trades person may refund any money paid and cancel the contract.

If the represented person has bought goods or made a contract with someone who could not reasonably have known that they had an administration order, the transaction may be valid and enforceable.

In this situation, you may want to seek legal advice. It may be helpful to start by seeking free advice over the phone, or by email. The Consumer Action Law Centre may be able to help. It provides free advice to Victorians with fair trading or consumer finance problems (see consumeraction.org.au)

Day-to-day living expenses

Depending on the order, you may have power to make decisions for the represented person about day-to-day living expenses including general budgeting.

The represented person may be able to make many decisions about what they spend their money on. Sometimes they may need support to do this.

If they do not have capacity to make the decision, you make the decision.

It is important that reasonable needs that are within the represented person's budget are met. For example:

- all accommodation expenses, including rent, supported accommodation fees, rates, maintenance costs, electricity, phone and other utilities and insurance
- all medical, optical, dental, and pharmaceutical needs
- mobile phone, computer, laptop and other electronic devices
- all reasonable clothing needs
- recreation, education and transport.

If appropriate, you should budget for holidays. It may be appropriate to save for, or pre-pay, funeral expenses.

If there is extra money, you should ask the represented person what they want to do with it. You may also need to talk to their primary carer(s), family and friends, social workers and other professionals who are involved in their daily life to help you understand their will and preferences, or likely will and preferences.

Depending on the will and preferences of the represented person, it may be appropriate to spend more than they receive as income on their living needs even though it means reducing their savings — as long as they can afford to and it does not impact on their future wellbeing.

For example, it may be appropriate to use some of their savings or sell an asset to provide the represented person with more services or better care or holidays. A budget isn't necessarily restricted to forcing their lifestyle into what their income can provide if they have ample other savings or assets to call on.



Remember to follow the decision-making steps (pages 14–17)

Death of the represented person

What are my responsibilities if the represented person dies?

Your authority to administer the legal and financial affairs of the represented person ceases immediately on their death. The law relating to the administration of a deceased person's estate then applies.

If you are the executor of the deceased represented person's legal Will, you will have separate though similar obligations in that role.

You must notify VCAT if the represented person has died, in writing (either via email or letter), and provide proof, such as a death certificate.

You will be responsible for the estate to the date of death. Therefore, you should complete and keep an ABA for the period to the date of death, in the event that an executor, or other authorised person, requires it.

It may be prudent to lodge the final ABA with VCAT.

After the represented person's death, the executor or other authorised person will become responsible for administering the represented person's assets and estate.

If you promised to do certain things (for example, handle the funeral arrangements), you should speak to the executor. You should tell the executor if there is anything which it is important for them to know, especially the location of the legal Will or any changes to the legal Will.

If the person dies without a legal Will, you should consult a solicitor or State Trustees.

If you intend to prepare a final ABA, you should tell the executor about that, advising the executor that the examiner may charge an examination fee.

Debts

You may need to contact someone who owes the represented person money and attempt to recover the debt. This may also include overpayments to companies and service providers.

In order to bring legal proceedings to recover a debt you would need to have power to do so in the order (see page 8).

Dependants

You may have power to provide for the dependants of the represented person.

VCAT may specify in the order that you have power to pay a sum for:

- the maintenance of the represented person's spouse or domestic partner or any child, parent or other person dependent on the represented person
- the education of any child of the represented person.

Check the order to see if you have this power.

Although you must generally not enter into a transaction where there is, or may be, a conflict between your duty as administrator for the represented person and your interests (or the interests of your relative, business associate or close friend), this does not apply to maintenance of a dependant of the represented person where this is in accordance with the order and the Act.

If you need to, you can seek advice from VCAT.



Remember to follow the decision-making steps (pages 14–17)

Expenses of the administrator

Can I be reimbursed for out-of-pocket expenses?

You can only claim expenses specifically related to your obligations and actions as the represented person's administrator. If you would incur those same expenses in the normal course of your personal activities (for example, parking costs to visit your relative who is also the represented person) then you cannot claim them.

You can deduct expenses for carrying out your duties as an administrator (if there are enough funds in the estate) in the same way that you withdraw funds for other expenses, that is, by noting the details in the accounts and keeping receipts.

Can I claim a fee?

Generally, only a professional administrator will be entitled to a fee. In exceptional circumstances, VCAT may consider an application for a fee. Explain your reasons and the basis on which you say the fee should be calculated, for example, an hourly rate or a percentage of the estate or its income. Fees for non-professional administrators are very rare.

Financial advisers

Should I consult a financial adviser?

It is your responsibility to make informed decisions about the financial affairs of the represented person.

You may seek advice from a professional adviser about the financial matters specified in the administration order.

A professional adviser includes a financial adviser, legal practitioner and an accountant.

You are entitled to be reimbursed from the represented person's estate for any costs you pay in the course of obtaining this advice.

If the represented person has limited assets (such as their home and some savings) and a simple income stream (such as a pension or annuity), it is less likely you will need to engage a financial advisor.

However, depending on the size and nature of the represented person's assets, it may be wise to consult a professional financial adviser.

How do I find the right adviser?

Find information about choosing a financial advisor and working with a financial adviser on the Australian Government's Money Smart website (moneysmart.gov.au)

You can use the Money Smart financial advisers register to check your adviser is licensed.

You should ensure the financial adviser has professional indemnity insurance.

What information should I give to the adviser?

Some of the information that is useful to prepare before your first meeting includes:

- the age of the represented person and the nature of their disability
- any income
- any further entitlements, such as settlement for an accident, inheritance, superannuation, insurance, and NDIS entitlements
- all assets and liabilities
- current living expenses
- future expenses, for example, accommodation, travel and renovations
- estimated financial cost of treating future health problems (including any forecasts by health professionals)
- your aims for the standard of living of the represented person.

Also bring to the meeting:

- a copy of the VCAT order appointing you as administrator.

It may also be helpful to bring a copy of this publication.

Ensure the adviser is aware if VCAT has placed any restrictions on the types of investments that can be made.

When you meet with the adviser, you should emphasise the following:

- the requirement to invest safely, especially if the disability is permanent
- best possible quality of life for the represented person
- security of investment
- ability to meet everyday expenses
- flexibility for unforeseen events
- adjustment of investments, to take account of social security entitlements
- capital growth for future needs
- taxation implications.

If the adviser does not seem interested in these details, you should look for another adviser.

Should the advice be in writing?

The law requires that advisers provide written advice. You should read the advice carefully, and ensure you understand what it means and how it will affect the represented person.

What else should I be aware of?

- Beware of suggestions to place all or most of the funds in one investment, or with one investment company. However, this does not preclude considering having an investment company managing investments of other companies on your behalf. Discuss how this works with your adviser.
- Consider the length of time you may be committed to any one investment. For example, it is unwise to invest in a ten-year bond if you know the represented person will need a substantial lump sum in three years, or their medical condition is unstable.
- Be cautious of any suggestion of borrowing against assets to create investment opportunities or income streams. Always seek a second opinion and, if in doubt, seek VCAT's approval before agreeing to this type of investment. However, be aware that it may be entirely appropriate for some people later in life to enter into a 'reverse mortgage' or similar scheme to fund their living needs and improve their wellbeing.



Remember to follow the decision-making steps (pages 14–17)

Financial Statement and Plan

In the order VCAT will generally require that you lodge a Financial Statement and Plan by a specified date. You usually have six weeks to do this.

The FSP indicates to VCAT how you will manage the financial affairs of the represented person.

You should keep a copy of the FSP once completed.

VCAT will provide you with the FSP form, but it is also available on the *Financial Statement and Plan* page of the VCAT website (vcat.vic.gov.au)

The FSP has the following sections:

- income
- expenditure
- assets
- liabilities and debts
- financial summary
- future steps.

The FSP also asks a series of questions about:

- what measures are in place to ensure the represented person's daily needs are being met
- their legal affairs
- what has happened since your appointment as an administrator.

You must ensure that the plan:

- meets the needs of the represented person
- takes care of everything they own
- is the best way of managing their property.

Prior to completing the plan, you may need to consider if you should choose a financial adviser to assist you.

If you have any questions about the FSP, you can phone or write to VCAT for advice. See 'Contacts' on page 37.

Funds for the represented person

Should the represented person have control of money?

Unless specified in the order, it is up to you to decide whether the represented person should have control of money.

You should act in a way that develops the represented person's decision-making capacity.

It is important to allow the represented person to have the maximum level of independence that is appropriate for their ability. If they have decision-making capacity to make the decision, they should be able to do so.

Having decision-making capacity to make a decision about how to spend money includes understanding the effect of the decision. For example, a person may not have decision-making capacity for a significant financial transaction such as buying a house, but may have decision-making capacity to decide how they spend their weekly grocery shopping money.

If the represented person does not have decision-making capacity to make some decisions about how they spend their money, or they are at risk of being taken advantage of, you should not allow them to have unlimited access to their funds.

You can make any reasonable arrangements. For example, you may wish to set up a new account with a relatively low balance that the person can access for personal spending.

These types of arrangements can allow represented persons to have limited control of their money while protecting their financial wellbeing.

For the represented person to carry out a decision that they have capacity to make, they may need your written consent (see page 15).

Can other people control some of the represented person's money?

Depending on the order and the circumstances, it might be sensible to allow other authorised people to control some funds. For example, you could authorise the manager of a supported accommodation service to use funds you've provided them to pay for everyday items such as toiletries. You might provide another family member with an allowance to pay for other everyday needs.

Where there is more than one administrator, you are both equally responsible for managing the affairs of the represented person. You can divide minor responsibilities if it is convenient and you both agree. For example, if frequent withdrawals have to be made from the bank and it is more convenient, and you both agree, one of you can deal with minor withdrawals from a working account (an account with a limited balance used only for day-to-day expenses).

Remember, the control of funds is in your hands. You are responsible for financial decision-making.



Remember to follow the decision-making steps (pages 14–17)

Gifts and charitable donations

Can the represented person make gifts or charitable donations?

When an administration order is made you are also given the power to make gifts on behalf of the represented person.

You must only make gifts as permitted by the order and the Act.

The Act says that, if the order allows, you may give a gift, on the represented person's behalf, of their property (including money) to a:

- relative or close friend of theirs (which may include you) or
- charity (which may include a charity that you are connected with).

The gift must be reasonable in the circumstances, including the person's financial circumstances. You must not accept or allow a gift that affects the represented person's financial security or would not be in keeping with the types of gifts they previously usually made.

If the gift is to a relative or close friend of the represented person (which may include you), it must also be of a seasonal nature or for a special event (for example, birth or marriage). If the gift is a donation, it must be a type of donation which the person made when they had capacity to make the decision, or might reasonably be expected to make.

It is recommended that you seek VCAT's advice about any proposed gifts of more than \$100.

In your annual accounts that you lodge with VCAT you are required to include details of any gift you make of the represented person's property (including their money) that has a value of, or over, \$100⁴ if it is made to:

- yourself
- a relative or close friend of yours
- an organisation that you have a connection with.

Can the represented person make loans to family members?

If there is no restriction in the VCAT order and the order means that you have power to do so, you may be able to make a loan on behalf of the represented person.

For example, if the represented person can afford to, and the decision gives effect to their will and preferences, you might make a decision to loan their children money to assist them, for example, in completing a tertiary degree.

You should write to VCAT to seek approval for this type of decision. Include information about the terms of the proposed loan: the name of the borrower and that person's relationship to the represented person, the amount of the loan, the repayment date, interest payable, and any security for the loan.



Remember to follow the decision-making steps (pages 14–17)

(4) This figure may change if a different amount is prescribed. The VCAT ABA form that you complete should guide you about this figure.

Guardians

If a guardian has been appointed by VCAT to make decisions about personal matters, such as accommodation, medical treatment or accessing services, you must consult and work closely with them. (See also 'Accommodation' on page 19).

If you and the guardian disagree

If there is disagreement between you and a guardian about the exercise of their powers, you must:

- first seek to resolve the disagreement by informal means or mediation
- if the disagreement continues, seek advice from VCAT about how to resolve the disagreement.

Keep in mind that, unless the effect of a decision of a guardian would be likely to seriously deplete the represented person's estate, a decision of a guardian generally prevails over a decision of an administrator.

Investments

Do I need VCAT's approval for investments?

If you have power to invest money or securities on behalf of the represented person, you do not need to get VCAT's approval, unless the order requires such an approval.

There are limits on the investments you can make. You can continue the investments previously made by the represented person and, in the case of money deposited in an authorised deposit-taking institution (ADI) you can re-deposit it after it becomes payable.

In the case of property, you only have the same powers you would have if you were a trustee of that property under the Trustee Act. This includes the power to buy a dwelling for the represented person.

You have duties to act honestly, diligently and in good faith, and to exercise reasonable skill and care.

This means you cannot invest the represented person's money in a speculative investment, that is, any investment involving an unreasonable financial risk to their assets.

It is important that you get proper investment advice. This is not available from VCAT.

See page 27, 'Financial advisers'.



Remember to follow the decision-making steps (pages 14–17)

Joint administrators

VCAT can appoint two or more people as joint administrators. If you are unsure whether a joint administrator has been appointed, check the administration order or contact VCAT.

Do I have to consult with a joint administrator?

If you share the responsibilities of administration equally with a joint administrator, you must make decisions together.

You can divide minor responsibilities if it is convenient and you both agree. For example, if frequent withdrawals have to be made from the bank and it is more convenient, and you both agree, one of you can deal with minor withdrawals from a working account (an account with a limited balance used only for day-to-day expenses).

Sometimes VCAT may appoint administrators jointly and severally. Both administrators are responsible for all decisions made.

What if I disagree with the joint administrator?

If there is disagreement between you and a joint administrator about the exercise of their powers, you must:

- first seek to resolve the disagreement by informal means or mediation
- if the disagreement continues, seek advice from VCAT about how to resolve the disagreement.

Legal issues

In some circumstances, a decision may need to be made about whether to engage legal representation for the represented person.

Remember to check your order to see if you have power to bring and defend a legal proceeding on behalf of the represented person in relation to a financial matter specified in the order (s.51).

Some things to keep in mind:

- Does the represented person already have a relationship with a lawyer?
- If so, is that lawyer appropriately skilled to represent the person in this matter?
- Is there any real or potential conflict of interest in the lawyer acting for the represented person?
- What are the costs and fees payable?

If the represented person is a beneficiary of a deceased estate and you are also a beneficiary you should refer this to an independent lawyer or to VCAT (as there may be a real or perceived conflict of interest).

If you are unsure about whether or not to engage a lawyer to act for the represented person, write to VCAT for advice.



Remember to follow the decision-making steps (pages 14–17)

Reassessments

The administration order will state when the reassessment will be.

If this is not stated on the order, it will be within 12 months of VCAT making the order.

When VCAT reassesses the order, it will consider whether you have performed your duties under the Act.

If you believe the represented person is now able to make their own decisions with support, write to VCAT.

VCAT will then consider reassessing the order earlier.

If there is someone willing to support the represented person to make decisions, VCAT may consider appointing a supportive administrator.

Signing documents

Can I sign a document for the represented person?

Yes, you can sign a document for the represented person if it is necessary to fulfil your responsibilities under the terms of the administration order.

You should sign the document in the following manner:

Signed by [name of represented person] by his/her administrator, [name of administrator], appointed by order of the Victorian Civil and Administrative Tribunal made on [date of order] (VCAT file number: G...)

(Signed)

(Dated)

If there is a joint administrator, their signature must appear on the document with your signature.



Remember to follow the decision-making steps (pages 14–17)

Tax

Who is responsible for paying tax?

If the represented person is required by law to lodge a tax return, it is usually your responsibility to ensure this is done, unless the order is very limited.

The represented person may be required to pay tax or may be entitled to claim a refund of pre-paid tax. You are responsible for organising this.

If the represented person was previously lodging tax returns or has sufficient income and investments to require them to lodge a tax return, then they must continue to do so — even though they now have an administrator appointed.

You can access an online tool on the Australian Taxation Office website at ato.gov.au to determine if they need to lodge a return or seek advice from a tax accountant or tax agent.

If the represented person was previously using an accountant, wishes to continue using that accountant, and you are satisfied with them, you may continue to use their services.

Tax returns are lodged in the name of the represented person, with their tax file number.

Wills

A Will is a legal document that describes how a person's property will be distributed after their death.

Should I know the contents of the represented person's legal Will?

A legal Will is a confidential document and its confidentiality must be respected.

You should always know where an existing will is kept, or seek to determine its location, and ensure that it is safe and secure.

There may be circumstances in which the contents of a legal Will are relevant to your role. For example, if you are considering selling the represented person's house, it is important to know if they have expressly left that house to someone in their legal Will. If they have, this potential beneficiary will have a special interest in the proceeds of the sale.

You may (either before or after the death of a represented person) open and read any document deposited with you that is, or may be, the legal Will of the represented person. VCAT also has power to open and read a legal Will. This does not necessarily mean that VCAT will disclose the contents of the legal Will, even to the administrator.

Can I make a legal Will for the represented person or instruct a solicitor about making one?

No. You do not have the power to make a Will for the represented person or instruct a solicitor about a Will for them.

Contacts



Office of the Public Advocate

Level 1, 204 Lygon Street
Carlton VIC 3053
OPA Advice: 1300 309 337
Fax: 1300 787 510
TTY: 1300 305 612
Email: opa_advice@justice.vic.gov.au
publicadvocate.vic.gov.au

State Trustees Limited

1 McNab Ave
Footscray VIC 3011
Phone: 1300 138 672
statetrustees.com.au

**Victorian Civil and Administrative
Tribunal (VCAT)**

William Cooper Justice Centre
223 William Street
Melbourne 3000
Phone: 1300 018 228
Email: humanrights@courts.vic.gov.au
vcat.vic.gov.au

Victoria Legal Aid

Phone: 1300 792 387
legalaid.vic.gov.au



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