

FEATURES  
VCAT



# Administrators at large in a legal labyrinth

WORK AS AN ADMINISTRATOR PRESENTS UNIQUE, COMPLEX AND INTELLECTUALLY ENGAGING CHALLENGES. IT IS A NICHE AREA OF LEGAL PRACTICE THAT SEEMS LIKELY TO GROW AND CREATE OPPORTUNITIES FOR EXPERIENCED LAWYERS WITH BROAD BASED EXPERIENCE.

BY ANTHONY BURKE

We live with increasing life expectancy,<sup>1</sup> when second and subsequent marriages are more common<sup>2</sup> and when dementia and other disabling conditions are more prevalent.<sup>3</sup>

Among those now cognitively adrift and bereft of legal capacity are the earlier adopters of discretionary family trust structures and self-managed superannuation funds, typically with corporate trustees.

These medical and economic demographics make for jurisdictional complexity and challenge for lawyers appointed as administrators by VCAT to manage the financial affairs of such people (Represented Persons).

## Appointment of administrator

Once incapacity is established, the grounds for the appointment by VCAT of a lawyer as an independent administrator vary greatly but common precipitating factors include:

- the failure before incapacity to appoint an attorney under an enduring power of attorney (financial)
- the death, resignation, disability or disqualification of the incumbent attorney
- the lack of a suitable family member or friend to take on the role

- concern at the estate being depleted by commission payable to a trustee company administrator if the cost of an independent administrator might be less
- rampant hostility within the extended family of the Represented Person, sometimes akin to factional warfare.

Measured consideration is required of an administrator as a simplistic application of legal principles and the prosecution of apparent causes of action is often not in the best interests of the Represented Person. The estate of the Represented Person is finite and vulnerable to depletion by an overly zealous administrator. Often the life expectancy of the Represented Person is uncertain (relative to the likely duration of a litigation process), there may be an intact marriage to be supported, and there may be testamentary arrangements that could be subverted by injudicious action.

## VCAT limitations

As a creature of statute VCAT does not have general jurisdiction and so its capacity to be effective in addressing multiple issues in multiple jurisdictions is statutorily constrained. It has power under the *Guardianship & Administration Act 1986* (Vic) (GAA) and various other statutes, but the GAA is silent on:

- companies controlled by a Represented Person, leaving the *Corporations Act 2001* to apply
- SMSFs controlled by a Represented Person, leaving the *Superannuation Industry (Supervision) Act 1993* to apply
- the consequences of a Represented Person being married and in an intact marriage, leaving the *Family Law Act 1975* (FLA) to apply
- mechanisms to set aside antecedent transactions that may be impeachable for lack of capacity, undue influence or fraud, leaving the civil courts with jurisdiction.

So the legal affairs of a Represented Person

### SNAPSHOT:

- With an ageing population, there are many disabled people with complex financial challenges.
- Sometimes family members and trustee companies are not appropriate as financial managers.
- Experienced lawyers have a role to play in managing the financial affairs of disabled people but there are some challenges for lawyers in such roles.

may reverberate well beyond VCAT and encroach upon the jurisdiction of other courts and tribunals.

## Scoping estate and avoiding harm

On appointment as an independent administrator by VCAT, the first challenge is to ascertain the extent of the estate. This task is analogous to the first steps of a newly appointed liquidator. It is a process of moving from little or no information to imperfect information, often bereft of a detailed familial back story and, therefore, a context. Decisions must be made in the absence of complete information because a period of dysfunction (attributable to disability) often precedes the appointment by VCAT.

Disparate provisions of the GAA require the administrator to consult the Represented Person (if that is possible given the extent of incapacity), to seek to restore the Represented Person to control and to act in the best interests of the Represented Person. This is akin to the ancient cardinal virtue, “First do no harm”. Sadly, harm must occasionally be done to achieve a measurable and certain starting position.

The administrator must consider:

- what to do with jointly owned property, trust property and the member balance in an SMSF
- what regard the administrator should have to the finger pointing and suggestions of impropriety or incompetence by the ancient regime
- who the administrator believes in circumstances where anticipatory testator family maintenance claims have already evolved and some family members (often with their own lawyers in harness) are already positioning to advantage in the belief that their vesting date cannot be too far off.

## Joint property

It may be necessary for the administrator to sever the joint tenancy in bank accounts and property. This might be done:

- by agreement
- in relation to jointly owned land by a partition application to VCAT (in its Property List) pursuant to Part IV of the *Property Law Act 1958* which could be costly and slow
- by a possible application of the FLA which could also be costly and slow.

In each instance the reverberations can be manifold and cause the co-owner to agitate past contributions, current needs, uncertain future requirements and arrangements contemplated in wills that may be beyond changing. Until this is addressed the administrator has no clarity about the estate that he or she is charged to administer.

If there is an intact marriage, the administrator is vulnerable to accusations of barging in and upsetting longstanding arrangements put together in good faith. The administrator arrives and causes stress to a relationship already stressed by the incapacity of the Represented Person and the circumstances giving rise to the appointment.

## Corporations, trusts and deceased estates

While s58C of the GAA deals with powers held by the Represented Person, including powers held with respect to a trust, and enables their exercise by an administrator, the Act is otherwise silent on companies, trusts and deceased estates. There is no definition of the term “estate” that might be called on.

Many Represented Persons are directors (and often the only director) of companies either trading in their own right or acting as trustee of a discretionary trust or an SMSF. Many are also sole executors of deceased estates that have not been finalised.

The administrator can use the shareholding to take control of a company and be instituted as sole director, although care is required. While external accountants are usually helpful, they routinely disclaim any liability. It is worth noting that they are not auditors and rely on the taxpayer as to the accuracy of instructions and the availability of source documents. So a newly appointed administrator may have to deal with corporate and trust accounting and taxation issues going back years before the appointment. The issue of director guarantee requirements is also common.

In the case of a discretionary trust with a corporate trustee, sometimes the appointor of the trust is someone other than the Represented Person. That person holding the power of appointment may exercise it and remove control of the trust from the administrator.

Incomplete deceased estates raise quite separate issues. The role of an executor is a non-delegable role, like that of a director. Regard must be had to the terms of the will as often there will be provision for alternate executors if the proving executor is incapacitated and unable to continue. In such circumstances the administrator may be required to make application to the Supreme Court of Victoria pursuant to s34(1) of the *Administration and Probate Act 1958* for the discharge of the Represented Person on the basis that he or she is unfit to further act.

Insurance cover through the Legal Practitioners Liability Committee (LPLC) does not extend to acts as an employer and occasionally a Represented Person will be an employer (carers, bookkeepers, housekeepers, etc). Activity by the administrator in the realm of corporations and trusts is in a different realm and so the administrator should also establish directors and officers insurance before stepping into that role.

## Family Law Act implications

If the Represented Person is married and the marriage is intact the administrator may need to anticipate the respective future needs of both parties given the possibility that they could both live for decades.

In *Stanford*<sup>4</sup> the High Court in 2012 had occasion to determine some aspects of property settlement matters under the FLA. The marriage was said (by the husband) to

be “intact”, in the sense that separation was an involuntary one by reason of the fact that the wife had suffered a stroke, followed by dementia, causing her to require residential high level care outside the home. The husband still emotionally and practically cared for the wife in many ways, but the wife’s daughter from a previous marriage brought a property settlement proceeding against the husband as the wife’s case guardian, the wife no longer being capable of managing her own affairs.

*Stanford* was a seminal case and stands for the proposition that before embarking on an adjustment of property interests in circumstances of what might be regarded as an intact marriage (notwithstanding separation necessitated by infirmity) the Court must first be satisfied that it is just and reasonable to do so after examination of a range of potentially competing considerations. The High Court adumbrated a series of considerations to inform the assessment of this threshold jurisdictional criterion that warrants close reading. *Stanford* has particular relevance in this realm and so to achieve a division of matrimonial property and, therefore, certainty as to the estate to be administered, can often be complex, slow and expensive.

## Procedural and evidentiary limitations

It is also appropriate to highlight some procedural and evidentiary constraints:

- while s58B(2)(l) of the GAA enables an administrator to bring and defend actions and other legal proceedings in the name of the Represented Person, in some jurisdictions there is often still a requirement that application be made for the administrator to be appointed litigation guardian or its jurisdictional equivalent. In some jurisdictions the litigation guardian may be liable for costs in the event of an adverse outcome
- in more complex and substantial litigation an administrator may be subject to criticism in commencing any proceeding on behalf of a Represented Person without first seeking VCAT approval under s55 of the GAA. That usually necessitates obtaining supporting advice from counsel
- if a cause of action depends on the evidence of the Represented Person, its prosecution is fraught because of capacity concerns
- the Represented Person may not survive to judgment and the cause of action may not survive beyond death
- no compromise of a proceeding involving a disabled person can be reached without court or tribunal approval and sometimes VCAT also wants to be consulted
- the obligations on the administrator under the *Civil Procedure Act 2010* and like enactments are commensurately greater and so also are the risks on costs.

Given the jurisdictional and procedural challenges, the administrator must often chart a different and more practical course. The best interests of the Represented Person will often be served by the early establishment and participation in a facilitated process or mediation with multiple parties to achieve a practical financial management regime that

incorporates a budgetary and financial planning process. It should also aim to achieve the cessation of hostilities and streamlined processes for regular review and dispute resolution. Transparency in financial management, regular reporting protocols and the adoption of contemporary governance concepts can change the dynamic, build trust and bring about relative peace.

## Skill set for an administrator

In more complex situations the task for an administrator may require an ongoing relationship with not just the Represented Person but also his or her family and advisers, and sometimes also employees. It is not transactional and episodic in the way that much other legal work is and may continue for many years.

To be effective in such work an administrator should have at least the following skills:

- experience across a broad range of practice areas
- confidence to make decisions in circumstances of imperfect data
- business management and financial planning expertise
- the ability to work collaboratively with accountants, financial planners, neuropsychologists and a range of other experts
- the ability to withstand pressure from a range of opportunists and self-interested family members and friends
- a keen eye for the practical, the commercially sound and the defensible outcome.

## Changes to legislation

At the time of writing, a Bill to amend the GAA had just been introduced to parliament. If enacted without substantial amendment, the revised legislation will make for additional challenges. In place of a “best interests” criterion there will be a requirement to have regard to the “will and preferences” of the Represented Person if known or capable of being ascertained. Failing that, action by the administrator must seek to promote the personal and social wellbeing of the Represented Person, a concept defined to include multiple broad attributes. While the philosophical rationale for these changes is praiseworthy, given the practical challenge of giving expression to these principles the author predicts more dispute in an already challenging area of practice. ■

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1. [www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/3101.0Feature%20Article1Jun%202016?opendocument&tabname=Summary&prodno=3101.0&issue=Jun%202016&num=&view](http://www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/3101.0Feature%20Article1Jun%202016?opendocument&tabname=Summary&prodno=3101.0&issue=Jun%202016&num=&view).
2. [www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3310.0Main%20Features112015?opendocument&tabname=Summary&prodno=3310.0&issue=2015&num=&view](http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3310.0Main%20Features112015?opendocument&tabname=Summary&prodno=3310.0&issue=2015&num=&view).
3. [www.austlii.edu.au/au/journals/ElderLawRw/2002/11.html](http://www.austlii.edu.au/au/journals/ElderLawRw/2002/11.html).
4. *Stanford v Stanford* [2012] HCA 52 (15 November 2012).