Public Trustee

Freedom vs Protection

A guide to guardianship and administration orders, litigation and court trusts for people with impaired decision-making

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Freedom vs Protection

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A word of caution

The information in this book is of a general nature only. You may need to seek legal advice to deal with your own circumstances.

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PART A- INTRODUCTION

CHAPTER 1 – Freedom and protection

[1.1] What's the Latin phrase with a dubious history?

The phrase *parens patriae* comes up a lot in this book, so you might as well pronounce it right from the start. *Parens* rhymes with *Aaron's*. *Patriae* is pronounced *pat-ree-eye*.

Parens patriae literally means "parent of the nation". It's a power that exists to protect people who can't care for themselves because, for instance, they're too young, or they have mental impairments such as dementia, acquired brain injuries, mental illnesses, intellectual disabilities or the effects of a stroke.

This concept has a long history, which isn't necessarily a good thing, because it didn't have the best of beginnings. Justice Lionel Murphy, quoting from a US judge, said that "its historical credentials" were "of dubious relevance".[1] Their Honours may have been too kind, because in centuries past, English people with disabilities risked having their monarch look after their money.

The kings of England weren't always the nicest to be around. Edward the Fourth had his own brother, the Duke of Clarence, killed – perhaps by drowning him in wine. The duke left a son and daughter behind, but both were later beheaded: one on the orders of Henry the Seventh and the other on the orders of Henry the Eighth. Henry the Sixth seems to have been pleasant enough, but he himself was mentally unwell, and was deposed (twice) and murdered.

Were the queens any better? Mary the First could be kind and considerate, between ordering that people be burnt at the stake, though she just stopped short of executing her half-sister. That half-sister later became Elizabeth the First, who signed the death warrant of her cousin Mary, Queen of Scots.

It's therefore not surprising that English monarchs were known to misuse the money they were managing on behalf of those people with impairments, just as some of them helped inspire *Game of Thrones*.

[1] See *Johnson v Director-General of Social Welfare (Vic)* (1976) 135 CLR 92 at page 99, [1976] HCA 19 at paragraph [5].

Over time, the *parens patriae* jurisdiction evolved from a right enjoyed by the monarch, to a duty to protect vulnerable people. In WA, the Supreme Court was given the responsibility.[2]

It now extends to protecting children.[3] In some cases, it's been applied to people whose impairments were only physical,[4] though there's a question whether that should ever happen now.

The Supreme Court's *parens patriae* jurisdiction is very broad,[5] and so important and far-reaching, that an Act of Parliament can only abolish or suspend it if "clear and unambiguous language" is used.[6]

But just because the Supreme Court has broad powers doesn't mean that it will always use them. Parliament has passed laws to give the *parens patriae* jurisdiction to other people or organisations, subject to restrictions.[7]

In WA, the *Public Trustee Act 1941* used to allow the Public Trustee to manage the estates of people with disabilities – including at times physical disabilities – without the order of a court, board or tribunal, but on the basis of medical evidence. The *Mental Health Act 1962* used to allow the Supreme Court to appoint managers of the estates of people with mental disabilities. The law often, though not always, dealt "with absolutes". A person could be judged "competent or incompetent".[8]

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[2] For an overview of the history, see *Farrell v Allregal Enterprises Pty Ltd [No 2]* [2009] WASC 65 at paragraphs [21] to [27].

[3] See *Harold Joseph Martin Cadwallender by his next friend Stavroulla Cadwallender v The Public Trustee* [2003] WASC 72 at paragraph [27]. For the rest of this book, this decision will be referred to as *Cadwallender v Public Trustee*.

[4] See *Max Elio Naso by his next friend Sabatino Naso & Anor v Cottrell [No 2]* [2001] WADC 7 at paragraph [60].

[5] See *Cadwallender v Public Trustee* [2003] WASC 72 at paragraph [29] and *Perpetual Trustee Company Ltd v Cheyne* (2011) 42 WAR 209, [2011] WASC 225 at paragraphs [61] to [62].

[6] See *Director-General of the Department for Community Development v T'Hart & Ors* [2003] WASCA 110 at paragraph [37].

[7] See *Cadwallender v Public Trustee* [2003] WASC 72 at paragraph [27].

[8] See the Second Reading Speeches on the *Guardianship and Administration Bill* by the Minister for Health in *Parliamentary Debates (Hansard)*, Legislative Assembly, Wednesday, 6 June 1990, at page 1914; and by the Leader of the House in *Parliamentary Debates (Hansard)*, Legislative Council, Wednesday, 4 July 1990, at page 3610.

[1.2] How did the *Guardianship and Administration Act 1990* (GA Act) change things?

As a result of the GA Act, which mostly commenced operation in 1992:

- **Administration orders** could be made for people – usually adults – to manage their finances.[9]
- **Guardianship orders** could be made for adults, to make lifestyle decisions, such as where they should live or what medical treatment they should receive.[10]
- These orders couldn't be made when there was a less restrictive alternative.
- A person needed a mental disability before an administrator could be appointed. A physical disability wasn't enough. In theory, a guardian could be appointed, even if the person didn't have a mental disability, though in practice that was rare.
- Family members and friends could be appointed as administrators and guardians.
- Enduring powers of attorney were created, allowing a person (with a certain degree of mental capacity) to choose who'd manage their finances, including after they lost the capacity to make their own financial decisions.[11]
- A Public Guardian (now known as the Public Advocate) was established, whose two main functions were to act as guardian (generally as a last resort) and to investigate and report on whether someone needed an administrator or guardian.
- An independent body called the Guardianship and Administration Board decided (amongst other things) whether a guardian and/or administrator should be appointed, the scope of the appointment, and who the guardian and/or administrator should be. The board was also required to review guardianship and administration orders at least every five years. It generally met in a less formal way than the Supreme Court.

These changes were part of a trend across Australia, along with a trend for people with disabilities to live less in institutions, and more as part of the general community.

Later, there was a move, both in WA and other parts of the country, to merge existing boards and tribunals into super-tribunals, which were also given powers to overturn some government decisions. In 2005, the WA Guardianship and Administration Board was

[9] See Chapter 4.
[10] See Chapter 4.
[11] See Chapter 8.

abolished. A larger body called the State Administrative Tribunal (SAT) took over most, though not all, of its functions.

In 2010, the GA Act was amended to cover enduring powers of guardianship and advance health directives.[12]

Don't worry if you get "administration" and "guardianship" mixed up. You're in good company. At least one Supreme Court justice has done the same.[13]

It's confusing, because "administrator" has a different meaning when a person is dead; "guardian" is applied differently when talking about children. And just to complicate things, there's a term called "guardian *ad litem*",[14] which as we'll see, means something else again.

[1.3] How is civil litigation different if a person is under 18 or has a mental impairment?

Normally, the person needs someone to make decisions on their behalf.[15] That can extend to deciding whether or not to start litigation in the first place. In some ways, things haven't changed much since the War of the Roses, when kings had their relatives killed. There are still those who mismanage the money of people with impairments; there are still those who are cruel to their own relatives. The methods have changed. They can be as crude as taking a bank card, finding out the PIN and withdrawing large amounts of money from an ATM until there isn't much left.[16]

[12] See Parts 9A and 9B of the GA Act. This book doesn't discuss them much, but for enduring powers of guardianship, see Chapter 8 and the Office of the Public Advocate's website (www.publicadvocate.wa.gov.au); for advance health directives, see the Department of Health's website and the cases of *AL* [2017] WASAT 91 and *JH* [2022] WASAT 108.

[13] Tactfully, the case(s) are not mentioned here.

[14] The phrase *ad litem* is pronounced *add light-em*. Latin scholars might argue that it should be *add leet-em*, but that's not how it's commonly pronounced these days. Anyone who doesn't like that should consider pronouncing *margarine* with a hard "g".

[15] See Chapter 10.

[16] See Chapter 11.

[1.4] Does a court or assessor ever create a trust for a person under 18 or with a mental impairment?

Yes. This book discusses, in particular, what happens in personal injuries and criminal injuries compensation cases.[17] We won't go into trusts that are set up by wills or by family members.[18] We'll only briefly touch on the National Disability Insurance Scheme (NDIS).[19]

[1.5] What's the recurring theme of freedom versus protection?

People who exercise the *parens patriae* jurisdiction can be criticised for being paternalistic. This may not be surprising, given that *parens* means "parent". In a free society, adults generally have the right to own property and do what they want with it. But when, for instance, the District Court appoints a trustee for an adult with a head injury, or SAT appoints an administrator for someone with dementia, they are, in the name of protection, restricting the rights of those people to decide what to do with what they own.

Yet this is far from the only limit that the government imposes on financial freedom. You can own a car, but for safety reasons, you need a licence to drive it, and there are limits on how fast you can do so and how much alcohol you can drink before. If it starts to fall apart, you may be forced to repair it if you want to keep it on the road.

History, though, has shown that some acts carried out in the name of safety and protection can have quite different motives and results. In case the opening paragraphs of this chapter are perceived as anti-Royalist, it's worth mentioning that during the French Revolution, after the monarchy was abolished, a Committee of Public Safety was responsible for the execution of thousands of people.

When government intervenes in someone's life, the effects can be harmful, even if they're not as drastic as those in France in 1793. Some parents don't properly care for their children, but the government doesn't automatically take those children away. The act of doing so can cause greater harm. But the point can be reached where it has to happen.

In recent years, elder abuse, including of a financial nature, has become an increasingly prominent issue. The Australian Law Reform Commission[20] and a WA Legislative Council

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[17] See Chapter 13 and Chapter 14.

[18] Textbooks on trusts and/or deceased estates may be of assistance here.

[19] The NDIS website is www.ndis.gov.au. There's also a book called *The National Disability Insurance Scheme: An Australian Public Policy Experiment*, edited by Mhairi Cowden and Claire McCullagh, published by Palgrave Macmillan in 2021.

[20] See *Elder Abuse – A National Legal Response* (ALRC Report 131).

committee[21] have both published extensive reports on it. In March 2019, a national plan was launched.

But there is another prominent issue at present. The Australian Law Reform Commission and a Royal Commission have both recommended that existing regimes of *substituted decision-making*, where people with impairments often have decisions made for them, be changed to *supported decision-making*, where, by and large, those people make their own decisions with support.[22] There's probably more supported than substituted decision-making in WA at present, but the supported decision-making is largely informal.[23]

Should people with impairments be free to make their own decisions, even if those decisions are harmful? Or should they be protected from abuse, exploitation and in some cases, their own choices? Should they have freedom, even if that means being abused and exploited? Is that even freedom?

The UN Convention on the Rights of Persons with Disabilities states that such people should be given access to "the support they may require in exercising their legal capacity". It also says there should be appropriate safeguards to prevent abuse.[24] Is it always possible to have both?

Some people with dementia want their children to help them, but the same children have misused their assets, leaving them highly vulnerable. This is not a hypothetical academic proposition. It happens. There isn't much freedom in being destitute.

There are differing views in the community about how to balance freedom and protection, so with respect, it isn't surprising that some court and tribunal decisions referred to in this book don't always look at the broad issues in the same way.

[1.6] Why have a book like this?

This book isn't just for those who work in the guardianship and administration area.

People who are charged with serious criminal offences normally have a lawyer, even if they can't afford to pay. But most people who want a lawyer at guardianship or administration

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[21] See *'I Never Thought it Would Happen to Me': When Trust is Broken – Final Report of the Select Committee into Elder Abuse*, September 2018.

[22] See *Equality, Capacity and Disability in Commonwealth Laws* (ALRC Report 124), published in 2014, and the Final Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Volume 6, *Enabling autonomy and access* (September 2023).

[23] See **[7.14]**.

[24] See Article 12.

proceedings in SAT have to pay for one themselves. Plenty of hearings take place without anyone being legally represented. If you're a party to one of these proceedings, you'll probably have some questions. This book aims to answer some of them.

If you're a lawyer and want to specialise in criminal law, you can spend most if not all of your work time doing just that. But if you represent people in guardianship or administration hearings in SAT, you'll probably only do it every now and then. It's harder to specialise and build up your expertise. This book aims to make it easier.

Even if you don't intend to practice in this area, you still may need to know something about it. If you're a commercial lawyer, you're bound at some stage to encounter a client who's having difficulty giving you instructions. Maybe another party to a contract doesn't seem to understand what's going on. These situations can't be ignored. This book can help.

In civil litigation, most parties are mentally capable adults, a company or the government. When one of the parties has a mental impairment or is under 18, it creates extra challenges and complications for the lawyers in those proceedings. This book attempts to explain them.

If you're a health professional, you might be asked (or ordered) to provide a report for a court, tribunal or assessor about a person's mental capacity. This book may give you the legal background to the request or order.

The Public Trustee is known for writing wills and administering deceased estates, but its largest and fastest growing area of work is the financial management of people under 18 or with mental impairments. This book explains the principles behind some of its decisions and how it's accountable for what it does.

We only specifically cover WA. Other states, the Northern Territory and the ACT have their own systems. But this book covers some issues that are common throughout Australia. No matter what the law says, some problems with recovering money for people with dementia are the same, whether they live in Newcastle, Bendigo, Whyalla or Bunbury.

Anyone who wants to change the law should understand how it currently operates. This book should help people who want to make changes in WA.

When people in another state or territory consider changing their laws, the question can get asked, "What happens elsewhere?" This book can assist.

The emphasis is on financial management, rather than guardianship, but there's still plenty on the latter. And for more on guardianship, see the Office of the Public Advocate's website (www.publicadvocate.wa.gov.au).

[1.7] Why has this book been written in the way that it has?

The ongoing aim of a novelist is to make things interesting enough that the reader keeps reading until the end. Ian McEwan wrote a novel about a judge who decides whether a 17-year-old Jehovah's Witness with leukaemia should have a blood transfusion. It was compelling enough to be turned into a movie, with Emma Thompson in the lead role.[25]

The author of a reference book like this one, which doesn't have to be read from start to finish, has a different type of pressure. While some of the general themes in this book are very interesting, much of the detail is not. Emma Thompson is unlikely to appear in a movie that explains some of the exceptions to Order 66 rule 24 of the *Rules of the Supreme Court 1971*, but it's important that this book does. Also, for legal reasons and to keep things short, some illuminating cases haven't been used, or been described as fully as they might have.

In an attempt to redress the problem and to demonstrate different points, there are people and things you wouldn't expect to see in a book about financial and lifestyle management in twenty-first century WA. We've already had Henry the Eighth. In the chapters that follow, the Profumo Scandal, Snow White, Walt Disney, Doris Day, Mary Poppins, 10cc, *The Sound of Music* and Franklin D Roosevelt all get mentioned.

It can be a challenge to write for different audiences. In the chapters that follow, much of the technical detail is in the footnotes.

We began this chapter with one quote from Justice Lionel Murphy; we'll end it with another.

Law sometimes involves looking back at what our ancestors said and did and applying some of the principles that emerge. They may be, as Justice Murphy once put it, "the wisdom of centuries".[26] But it may not take long to read an old case and cringe at some of the language.

In 1908, the High Court accepted that a man who'd been declared incapable of managing his affairs had the right to use a lawyer to challenge that, and found that he had to pay for it out of his own money.[27] This general idea, with a few significant "ifs" and "buts", is still followed today. What doesn't stand up is the court's use of the words "lunacy order" and "insane", which wouldn't have raised any eyebrows at the time. But it's important not to reject a good idea, merely because it's expressed in a way that wouldn't be acceptable today.

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[25] Both the novel and the movie were called *The Children Act*.

[26] See *R v Darby* (1982) 148 CLR 668 at page 686, [1982] HCA 32 at paragraph [26] of his Honour's judgment.

[27] See *McLaughin v Freehill* (1908) 5 CLR 858, [1908] HCA 15.

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Disability in its various forms can still carry a stigma, which can be partly overcome by better use of language, although that needs to be backed up with actions. In this book, significant efforts have been made to keep the language respectful, at least by contemporary standards.

CHAPTER 2 – Legislation (if you're not a lawyer)

[2.1] How is legislation cited in Australia?

The Commonwealth, the six states of Australia (including WA), and the Northern Territory and Australian Capital Territory, all have their own Parliaments.

In WA, Acts of Parliament, rules and regulations are cited by giving:

- their name; and
- the year in which they were passed (which might be different to the year in which they commenced operation).

The *Public Trustee Act* was passed in 1941, although it didn't commence operation until the following year. It's the *Public Trustee Act 1941*.

In this book, unless otherwise indicated, Acts of Parliament, rules and regulations are Western Australian.

To save space:

- "GA Act" means the *Guardianship and Administration Act 1990*;
- "RSC" means the *Rules of the Supreme Court 1971*; and
- "SAT Act" means the *State Administrative Tribunal Act 2004*.

[2.2] Where do you look for Acts of Parliament, rules and regulations on the internet?

If they're from somewhere in Australia, you can search at www.austlii.edu.au. If they're from WA, you can also go to www.legislation.wa.gov.au. To save you time, this book contains a lot of links to legislation.

[2.3] What do "may" and "shall" mean?

Sometimes, a Western Australian Act of Parliament, rule or regulation says that a person "may" exercise a power. This normally means that the person has a choice about whether or not to do it. However, in some cases, the scope and purpose of the legislation mean that the person *must* exercise the power, and doesn't have a choice.[28]

A Western Australian Act of Parliament, rule or regulation instead can say that a person "shall" exercise a function. In at least most cases, this means that the person *must* do it, and doesn't have a choice.[29]

[28] See section 56(1) of the *Interpretation Act 1984*; the Supreme Court of WA cases of *Coughran v Newing* [1993] Library 930720 and *Re: City of Melville; Ex parte J-Corp Pty Ltd* (1998) 20 WAR 72 at page 77, [1998] Library 980563; and the Court of Appeal (WA) case of *Re Griffiths; Ex parte Homestyle Pty Ltd* [2005] WASCA 103 at paragraph [22].

[29] See section 56(2) of the *Interpretation Act 1984*. There might be small scope to argue that in some cases, the person or body has some choice. See *Re Estate of Vitalina Ferrari; ex parte The Public Trustee as Plenary Administrator of the Estate of Vitalina Ferrari* [1999] WASC 50 at paragraph [2].

CHAPTER 3 – Case law (if you're not a lawyer)

[3.1] What WA courts and tribunals are covered in this book?

We'll refer to different courts in WA, including:

- the Supreme Court;
- the District Court; and
- the Magistrates Court.

There is a Court of Appeal, which is part of the Supreme Court. Despite its name, it doesn't handle every appeal in WA.

WA also has the State Administrative Tribunal, which is commonly referred to, including in this book, as "SAT".[30]

There are also Assessors of Criminal Injuries Compensation in WA, whose main job is to decide whether to award compensation to victims of crime, and if so, how much.

[3.2] How do you look up case law?

Sometimes, the above courts, SAT or an Assessor of Criminal Injuries Compensation provide written reasons for their decisions. If so, they're often (but not always) publicly available for free on the eCourts Portal of Western Australia. Go to https://ecourts.justice.wa.gov.au.

Decisions from WA and other courts and tribunals in Australia can also be found at www.austlii.edu.au. Some databases on that website go back longer than others.

Again, to save you time, this book contains a lot of links to cases.

Every set of written reasons gets its own citation reference, so that it can be easily found. Take, for example, the case of *Re Estate of Vitalina Ferrari; ex parte The Public Trustee as Plenary Administrator of the Estate of Vitalina Ferrari* [1999] WASC 50. The "[1999]" means that the reasons were handed down in 1999. The "WASC" stands for the Supreme Court of Western

[30] The title "SAT" can get a little confusing because there's also a Salaries and Allowances Tribunal.

Australia. The number 50 distinguishes it from other cases that were handed down in that year.

Some written reasons also get reported in volumes of law reports, which are available (at a cost) in bound paper volumes or online. If so, they normally get at least two citations. See, for instance, *Perpetual Trustee Company Ltd v Cheyne* (2011) 42 WAR 209, [2011] WASC 225. The "(2011) 42 WAR 209" means that it was decided in 2011, and is found at Volume 42 of the Western Australian Reports, starting at page 209. The "[2011] WASC 225" means that it was decided in 2011 and is a decision of the Supreme Court of Western Australia. The number 225 distinguishes it from other cases that were handed down in that year.

Most cases referred to in this book are Western Australian, but some are from elsewhere. They have their own citation references.

In some cases, initials are used to protect the identities of children, adults with mental impairments or victims of crime. An example is *Public Trustee of Western Australia and VV* [2012] WASAT 170.[31]

If more than one judge sits in a court case, they may write different reasons for decision and come to different conclusions. The majority view prevails. If more than one member sits in a SAT case, there is only one written set of reasons. Any difference of opinion is generally not recorded in those reasons.[32]

A word of warning. Some cases were decided on the basis of legislation that has since been changed, or doesn't apply in WA. There may be limits to how useful those cases are today in WA.

[31] For more on this, see **[4.12]**.

[32] For examples where it was, see *IL* [2006] WASAT 357 at paragraph [84] and *LM and MM* [2008] WASAT 106 at paragraph [43].

PART B – GUARDIANSHIP AND ADMINISTRATION ORDERS AND ENDURING POWERS

CHAPTER 4 – How guardianship and administration orders are made

[4.1] What's this chapter about?

The State Administrative Tribunal (SAT) has the power to appoint an administrator of the estate of a living person and a guardian for a person who is over 18, or is about to turn 18. Its website (www.sat.justice.wa.gov.au) contains information on how it handles these applications.[33] We won't repeat everything there.

Rather, this chapter discusses the requirements before such orders are made, answers questions about the process and explains how the orders can be changed. There's also a comparison with the way things were done in the past, which helps explain the strengths of the current system.

The 2018 High Court case of *Burns v Corbett*[34] brought into question the power of state tribunals like SAT to make decisions in at least some cases where a party lives interstate. That's a complicated constitutional issue. This chapter, and those that follow, don't go right into it.[35]

[33] There's also a book called *Guide to Proceedings in the Western Australian State Administrative Tribunal*, written by Judge David Parry (a Deputy President of SAT) and Bertus De Villiers (a Member of SAT), published by Lawbook Co in 2012, and available online as part of the *Lawyers Practice Manual WA*. SAT is also covered in the looseleaf and online service *Civil Procedure Western Australia: Magistrates Court*, published by LexisNexis.

[34] [2018] HCA 15.

[35] But see the case of *GS v MS* [2019] WASC 255.

[4.2] What Acts of Parliament govern applications for guardianship and administration orders?

There are two main Acts:

- The SAT Act[36] governs SAT generally.
- The GA Act[37] specifically relates to guardianship and administration orders (and other things).[38]

If there's any inconsistency between the two, the GA Act prevails.[39]

[4.3] Who can apply for these orders?

Anyone,[40] including family members, friends, social workers or the Public Advocate. The Public Trustee may occasionally do so, but would normally already have some involvement in the person's life.

[4.4] How do you apply?

In theory, applications can be made orally.[41] In practice, they're normally done online via the eCourts Portal of Western Australia.

Normally, SAT also requires a Medical Report and a Service Providers Report. Fillable and print versions can be downloaded from the website.

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[36] *State Administrative Tribunal Act 2004.*
[37] *Guardianship and Administration Act 1990*.
[38] For some issues with the GA Act, see the then-Department of the Attorney General's *Statutory Review of the Guardianship and Administration Act 1990*, November 2015.
[39] Section 5 of the SAT Act says that if there is any inconsistency between the SAT Act and an enabling Act, the latter prevails. The GA Act is an "enabling Act" because it confers jurisdiction on SAT (see the definition of "enabling Act" in section 3(1) of the SAT Act).
[40] See section 40 of the GA Act.
[41] See section 40 of the GA Act.

[4.5] Does SAT conduct a hearing before deciding whether or not to make an order?

Yes. There may be more than one. Sometimes, there's a directions hearing, at which interim orders may be made, before the final hearing.[42] The hearing may get adjourned.[43] Sometimes, a person attends by telephone[44] or video-link. During COVID-19, tele-hearings have become the norm.

If necessary, SAT can arrange for an independent, qualified interpreter to be present.[45]

In some rare cases, SAT holds a formal mediation,[46] but even if the parties agree to a set of orders, SAT still has to decide whether those orders should be made.[47] Sometimes, informal negotiations take place over the course of a hearing. The matter may be stood down or adjourned to allow that to happen.

SAT can require some evidence or arguments to be in writing.[48] It doesn't always hold hearings when deciding applications for costs[49] or directions.[50] Applications for access to documents or material[51] are more commonly decided "on the papers" than at a hearing.

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[42] See, for instance, *MT* [2018] WASAT 80 at paragraphs [4] to [7] and *GD* [2022] WASAT 33 at paragraphs [11] to [12].
[43] SAT's power to adjourn proceedings comes from section 32(7)(e) of the SAT Act. See also clause 13(2)(b) of Schedule 1 of the GA Act. For examples of when SAT refused an adjournment of proceedings under the GA Act, see *SA* [2010] WASAT 186 at paragraph [55], *FC* [2012] WASAT 61 at paragraphs [7] to [18] and *WD* [2022] WASAT 12 at paragraphs [13] to [17]. In *CB* [2021] WASAT 67 at paragraphs [14] to [15], SAT adjourned the proceedings so that the represented person could have surgery.
[44] Such as in *LA* [2012] WASAT 6 at paragraph [19].
[45] See *JS and CS* [2016] WASAT 14 at paragraphs [88] to [99] and [123] to [126] for issues with that when the interpreter is for a person with a cognitive impairment and there is conflict between some of the parties.
[46] See section 54 of the SAT Act. For examples, see *LM and MM* [2010] WASAT 110 at paragraphs [15], [29] and [42] and *KB* [2016] WASAT 100 at paragraphs [16] to [18].
[47] Mediations are more common in some of SAT's other areas of work.
[48] See section 32(7)(b) of the SAT Act.
[49] See section 87 of the SAT Act, section 16(4) of the GA Act and **[5.5]**.
[50] See, for instance, *Re KRL* [2011] WASAT 172 at paragraph [20].
[51] See section 112 of the GA Act and **[4.12]**.

[4.6] Who hears the matter?

SAT has the following types of members:[52]

- the President, who is a Supreme Court judge;[53]
- at least one Deputy President, who is a District Court judge;[54]
- senior members; and
- ordinary members.

An application for a guardianship or administration order is usually heard by one member sitting alone, but is sometimes heard by three sitting together.

A large proportion of SAT members are lawyers, but some have other backgrounds and qualifications.

[4.7] Who is a party to an application for a guardianship or administration order?

The law about this is a little complicated, and we won't go right into it, but a "party" includes:

- the applicant;[55]
- the person in respect of whom the application is made;[56]

[52] See section 107 of the SAT Act. In addition, section 116 says that a magistrate is an *ex officio* member of SAT.
[53] See section 108(3) of the SAT Act.
[54] See section 112(3) of the SAT Act.
[55] The definition of "party" in section 36(1) of the SAT Act includes the applicant and a person who is specified by an "enabling Act" to be a party to the proceeding. The GA Act is an "enabling Act" because it confers jurisdiction on SAT (see the definition of "enabling Act" in section 3(1) of the SAT Act). The definition of "party" in section 3(1) of the GA Act includes the applicant.
[56] See the definition of "party" in section 3(1) of the GA Act.

- a person to whom SAT gives notice of the proceedings, who would normally include at least some close relatives of the person in respect of whom the application is made;[57] and

- the Public Advocate.[58]

The Public Trustee is a party to virtually all applications for an administration order,[59] and at times may be a party to an application for a guardianship order.[60]

There could be a long list of parties to the proceedings. Chapter 5 discusses how they may be represented and who might pay for it.

[4.8] If a party files documents at SAT, do they have to give copies of the documents to the other parties?

Only if SAT orders this. No party, not even the person in respect of whom the application is made, has an automatic right to inspect what's filed in SAT, though access is regularly given. This is discussed more at **[4.12]**.

[4.9] Can SAT obtain its own evidence and information?

Yes. SAT doesn't have to rely solely on the evidence and information provided by the parties. For instance, it can and regularly does obtain medical reports itself. It may be necessary to do this to determine whether a guardianship or administration order can and should be made, and if so, the terms of such an order.

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[57] The definition of "party" in section 3(1) of the GA Act includes a person to whom the Act requires notice of an application to be given. Section 41(1)(a)(iii) of the GA Act normally requires notice to be given to the "nearest relative", which in turn is defined in section 3(1). Normally, more than one relative is notified.

[58] Section 41(1)(a)(iv) of the GA Act requires notice to be given to the Public Advocate. For roles that the Public Advocate might play in the proceedings, see **[5.2]**.

[59] Section 41(1)(c)(ii) of the GA Act requires notice to be given to the Public Trustee, though section 41(3)(b) says that in "exceptional circumstances", that can be dispensed with. For roles that the Public Trustee might play in the proceedings, see **[5.2]**.

[60] If, for instance, the Public Trustee is the administrator [see section 41(1)(b)(ii) of the GA Act] or the application is being heard at the same time as an application for an administration order. For roles that the Public Trustee might play in the proceedings, see **[5.2]**.

In *'G' v 'K'*,[61] the Supreme Court allowed an appeal against a decision to appoint a guardian. This was in part because SAT could have obtained better evidence and did not do so.[62] In that case, though, the person who was the subject of the hearing had a multi-million-dollar court settlement, so there was money available for an independent professional assessment. And even then, the Supreme Court said that SAT wasn't bound to order or obtain such an assessment if, after further enquiry, it considered that the cost would have outweighed the benefits or there was good reason why the cost could not have been paid from his estate.[63]

The extent to which SAT should make its own enquiries is also discussed in the cases of *A and J*,[64] *Ms G*[65] and *LP*.[66]

[4.10] What are the four requirements of an administration order?

SAT has said:[67]

> "The GA Act is often characterised as a form of protective legislation. It provides for the appointment of a guardian for personal decision-making and an administrator for financial decision-making in situations where a person has a degree of impaired cognition and who might therefore be at risk of making decisions contrary to their best interests or be vulnerable to the decision-making of others.
>
> Despite a determination that a person is in need of protection by the making of guardianship and administration orders, it should nonetheless not be forgotten that in making those orders, the person loses the right to make fundamental decisions which affect their life.
>
> It is important therefore to ensure that orders are only made when incapacity is found and need is determined.
>
> In order to achieve this balance between protection and autonomy, the GA Act establishes a process that the Tribunal must follow to get to a point where orders might be made. This process can be described as the need to respond to a number of questions in respect to the person for whom an application has been made, which questions are

[61] [2007] WASC 319.
[62] See paragraph [156].
[63] See paragraph [157]. See also the discussion on the right to autonomy in *KAB and KB* [2015] WASAT 65 at paragraph [26].
[64] [2006] WASAT 287 at paragraph [15].
[65] [2017] WASAT 108 at paragraphs [49] to [60].
[66] [2020] WASAT 25 at paragraphs [84] to [98].
[67] See *SM* [2015] WASAT 132 at paragraphs [7] to [10].

bound up with a set of principles that the Tribunal must observe in making its decisions…."

With that in mind, the four requirements for an administration order are:

1. ***The person has a "mental disability".***[68]

SAT has said that this term "sounds quite harsh, but it is a legal term with a legal definition for the purposes of the GA Act".[69]

It isn't enough to be vulnerable,[70] or only to have a physical disability.

Section 3(1) of the GA Act says that "***mental disability*** includes an intellectual disability,[71] a psychiatric condition, an acquired brain injury and dementia".

Note the word "includes". In addition to the conditions that are specifically mentioned, a person can have a "mental disability" if they have some other condition that comes within the ordinary meaning of the term.[72]

What, then, is the ordinary meaning of "mental disability"? SAT says it "contemplates that a person's mind is affected by an impairment, incapacity or inability to function in a manner, or within a range, considered normal, or which is objectively measurable".[73]

A "mental disability" can, for instance, manifest in:

- a disturbance or limitation in a person's thought processes or cognitive ability;
- their perceptions of reality, emotions or judgments;

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[68] See section 64(1)(a) of the GA Act.
[69] See *NA* [2022] WASAT 118 at paragraph [44].
[70] See *Public Trustee and KMH* [2008] WASAT 171, *FH* [2016] WASAT 95 at paragraph [69] and *PP* [2016] WASAT 133 at paragraph [101]. In *GC* [2017] WASAT 80 at paragraph [109], SAT indicated that being vulnerable also isn't enough, by itself, to show that a person lacks capacity. It followed the Supreme Court case of *The Public Trustee (WA) v Brumar Nominees Pty Ltd* [2012] WASC 161 at paragraph [16]. In *NB* [2023] WASAT 88 at paragraph [40], a person's vulnerability to scammers was evidence that she had a mental disability, but it was not the only evidence upon which SAT relied.
[71] For the meaning of "intellectual disability", see *FY* [2019] WASAT 118 at paragraph [29].
[72] See *FY* at paragraph [26]. The legal meaning of "disability" may also be relevant. See also *SM* [2015] WASAT 132 at paragraph [44] and *K* [2018] WASAT 96 at paragraph [12].
[73] See *FY* at paragraph [27]. See also *Ms G* [2017] WASAT 108 at paragraphs [15] to [21] and *K* at paragraphs [12] to [17].

- disturbed behaviour; or
- learning difficulties.[74]

This doesn't mean, for instance, that any learning difficulty is a sign of a "mental disability". A person might have trouble reading because of an intellectual disability, or it could be because of poor eyesight.

Something can be a "mental disability", even if it's only temporary or short-lived.[75] This doesn't mean that every person with a temporary "mental disability" will end up with an administration order. It's normal, after major surgery, to have disturbed thought processes, due to the effects of the anaesthetic and painkillers. Many people, though, recover mentally within a few days.

A "mental disability" can be a fluctuating condition, such as bipolar affective disorder.[76]

A person doesn't have to be born with the "mental disability". It can arise later in life, for instance, from a disease or an accident.[77]

In *S and SC*,[78] SAT found that an alcoholic who was intoxicated daily had a "mental disability" under the GA Act. That involved an extreme set of circumstances.[79]

In *JL*,[80] SAT found that substance use disorder was a psychiatric condition and a "mental disability".

SAT has also said that autism spectrum disorder is a "mental disability", even though that condition also isn't specifically mentioned in section 3(1) of the GA Act.[81]

In *MH*, [82] SAT discussed senile squalor syndrome, though this was an application for guardianship, rather than administration.

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[74] See *FY* at paragraph [27].
[75] See *FY* at paragraph [30].
[76] See *BJS* [2009] WASAT 246.
[77] See *FY* at paragraph [30].
[78] [2015] WASAT 138 at paragraphs [94] to [95].
[79] For other cases on excessive use of alcohol, see *BB* [2014] WASAT 2, *DC* [2019] WASAT 110 and *DG* [2020] WASAT 90.
[80] [2023] WASAT 20 at paragraph [106].
[81] See *H* [2020] WASAT 75 paragraph [82]. See also *MM* [2015] WASAT 78.
[82] [2022] WASAT 74 at paragraphs [93] to [96] and [118] to [119].

In *MW*,[83] SAT found that a short-term memory impairment (in the circumstances of that case) was a "mental disability".

The degree of disability doesn't have to meet some precise benchmark.[84] The GA Act doesn't, for instance, talk about someone having less than 60% of an average person's mental functioning.

SAT doesn't need to give a label to the person's cognitive impairment, nor determine its origin.[85]

A person may have more than one type of "mental disability".[86]

2. ***As a result of that "mental disability", the person is unable to make reasonable judgments in respect of matters relating to all or any part of their estate.***[87]

A person is presumed to be capable of making reasonable judgments in respect of matters relating to their estate, until the contrary is proved to the satisfaction of SAT.[88] To rebut the presumption, there must be "clear and cogent evidence".[89] In other words, the evidence needs to be compelling.

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[83] [2022] WASAT 107 at paragraph [78].
[84] See *FY* [2019] WASAT 118 at paragraph [31].
[85] See *FY* paragraph [32]. For cases that demonstrate one or both of these points, see *NL and TKT* [2012] WASAT 121 at paragraphs [36] to [38], *PL and SL* [2012] WASAT 167 at paragraphs [123] and [124] and *FH* [2016] WASAT 95 at paragraphs [66] and [74] to [81].
[86] In *JN and TD* [2016] WASAT 9 at paragraph [1], the person's primary diagnosis was autism, but he also had a significant mental illness.
[87] See section 64(1)(a) of the GA Act.
[88] See section 4(3)(d) of the GA Act. For a discussion on the presumptions under section 4(3), see *CD* [2020] WASAT 41 at paragraphs [140] to [152].
[89] See:

- *GC and PC* [2014] WASAT 10 at paragraph [36]
- *SM* [2016] WASAT 49
- *BC and NR* [2016] WASAT 67 at paragraphs [54] to [74]
- *JNS* [2017] WASAT 162
- *PG* [2021] WASAT 81 at paragraphs [96] to [97].

See also the discussions in:

- *S v State Administrative Tribunal of Western Australia [No 2]* [2012] WASC 306 at paragraph [105]
- *AQ* [2015] WASAT 139 [also cited as *Re AQ* (2015) 88 SR (WA) 243] at paragraphs [117] to [120]
- *LP* (2020) 99 SR (WA) 123, [2020] WASAT 25 at paragraphs [48] to [51] and [99] to [110]
- *MH* [2022] WASAT 74 at paragraphs [130] to [131],

JF and MF[90] was an application for an administration order for a young woman who sustained a brain injury in a motor vehicle accident as a child. SAT said:[91]

> "The Tribunal is not satisfied from the evidence currently before it that the presumption of capacity has been displaced. The Tribunal accepts that MF may be slower than some in processing complex information but finds that, provided she is given adequate time and appropriate explanations, MF is able to do so and make reasoned decisions accordingly. MF has the support of her trusted friend JF to ensure that these requirements are met."

It isn't enough for a person to have a "mental disability" and be unable to make "reasonable judgments". There must be a "causative link" between the two.[92]

Take, for instance, memory loss. SAT has said it is "a trite observation that we use the memory of earlier decisions to inform decisions on proposed matters…. We in part judge a proposed decision on our understanding and experience of earlier, similar decisions."[93] Profound short-term memory loss might impair a person from making at least some reasonable judgments.[94]

One person with a mental illness may manage it well with medication and be capable of making "reasonable judgments". Another person with the same illness may not comply and/or exacerbate things by taking illicit drugs.[95]

The GA Act doesn't define **"estate"**. It incorporates both a person's assets and liabilities.[96] A person's assets include some legally enforceable claims, such as a claim for damages arising from a motor vehicle accident.[97]

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which all refer to the case of *Briginshaw v Briginshaw* (1938) 60 CLR 336, [1938] HCA 34. See also *JNS* [2017] WASAT 162.

[90] [2009] WASAT 163.

[91] See paragraph [25].

[92] See *FS* [2007] WASAT 202 at paragraph [101].

[93] See *CB* [2021] WASAT 67 at paragraph [67].

[94] See *MW* [2022] WASAT 107 at paragraphs [78], [81] and [90] and *K* [2023] WASAT 32 at paragraph [26].

[95] See *AL* [2016] WASAT 113.

[96] See *SAL and JGL* [2016] WASAT 63 at paragraphs [22] to [23] and *FY* [2019] WASAT 118 at paragraph [54].

[97] With respect, a contrary view was given in *JD* [2007] WASAT 80 at paragraph [35]. However, item 2 of Part A of Schedule 2 of the GA Act contemplates it. For more on how Part A of Schedule 2 operates, see **[6.1]**.

The GA Act also doesn't define **"reasonable judgments"**. The meaning of that phrase involves both **objective** and **subjective** elements.

SAT must consider 'the extent to which a person with a mental disability is able to engage in the cognitive process that culminates in an ability to make a "reasonable judgment" (which will vary from person to person and may include a lack of any observed ability)'.[98] That is the **objective** element.

SAT must "set that ability against the requirements of the person's individual estate and circumstances"[99]. That is the **subjective** element. The person must be unable to make reasonable judgments about their own estate, rather than the estate of an ordinary person.[100]

The size and complexity of the estate might be factors.

A person with an acquired brain injury and a simple estate might still be able to make reasonable judgments with respect to their own estate. Another with a less pronounced brain injury, but a more complicated estate, might not be able to make reasonable judgments with respect to at least some of their own estate.

A person might be capable of handling $1,000 in the bank and Centrelink pension, but not $3 million. If a person with $3 million gives it all away, that could be disastrous. Centrelink's deeming provisions could stop them getting a pension and having any means to live.

On the other hand, a person with $3 million can afford to make some bad financial decisions that the person with $1,000 cannot. If the person with $3 million spends $900 on a coffee machine that they never end up using, it's not going to make any significant difference to their financial position. If a person with $1,000 does the same, they have very little left. In *T*,[101] SAT appointed an administrator for a person who had, for instance, bought two massaging armchairs which apparently cost more than he could reasonably afford.

Returning to the objective element, it can sometimes be difficult to determine whether a judgment is "reasonable".

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[98] See *FS* at paragraph [110], but see also paragraphs [106] to [109]. *FS* was approved in *The Public Trustee (WA) v Brumar Nominees Pty Ltd* [2012] WASC 161 at paragraph [45].
[99] See *FS* at paragraph [110]. *FS* was approved in *The Public Trustee (WA) v Brumar Nominees Pty Ltd* [2012] WASC 161 at paragraph [45].
[100] SAT followed Victorian, rather than New South Wales authority. See *FS* at paragraphs [102] to [105]. For some matters that SAT has said are requirements to make reasonable judgments about an estate, see *FY* [2019] WASAT 118 at paragraph [53].
[101] [2020] WASAT 46 at paragraph [22].

SAT has said: "Individuals without a mental disability are entitled to make choices in respect of their estate which others might regard as unreasonable."[102] A lot of the world's most brilliant innovations are the result of judgments that seemed manifestly unreasonable to a lot of people when they were first made.

Take, for instance a man who made a series of very popular and successful short cartoons. In 1934, he decided to make a feature-length animated movie. People said no-one would want to see a cartoon that was more than ten minutes long. What's more, he decided to make it in colour, which was unusual and expensive at the time. He could have taken out some insurance by having well-known stars voice some of the characters, but he didn't request the services of Clark Gable or Carole Lombard. He ran out of money. He had to mortgage his house. He had to coax reluctant investors.

That man was Walt Disney. In 1937, *Snow White and the Seven Dwarfs* was released. It became the highest grossing movie ever, up to that time. Sixty-eight years later, it was still in the top ten, after adjustments were made for inflation.[103] Maybe this was not such an unreasonable judgment after all. The next time you see a feature-length cartoon, remember what a terrible idea that type of movie was. Until it wasn't.[104]

Then there are some judgments that seemed like a good idea at the time. The movie that knocked *Snow White and the Seven Dwarfs* off its number one pedestal was *Gone with the Wind*.[105] Victor Fleming directed it (well, a large proportion of it, as it actually had four directors). It won him the 1939 Oscar® for Best Director. In the same year, he also directed *The Wizard of Oz* (or again a large proportion of it, as it also had four directors). Clearly, he was very talented and accomplished, and at the top of his game.

And yet, when taking on the assignment of directing *Gone with the Wind*, he chose to take a flat fee, rather than a share of the profits. Apparently, he said: "This picture is going to be one of the biggest white elephants of all time." Someone, it seemed, had convinced him that no civil war movie had ever made money.

The author of this book may have been too young to buy a Betamax video recorder, but thought that Ansett Frequent Flyer points were a good investment, and that fixing mortgage interest rates in June 2008 was wise, just before they halved.

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[102] See *PB* [2020] WASAT 121 at paragraph [46].
[103] See *George Lucas's Blockbusting* (2010, HarperCollins, edited by Alex Ben Block and Lucy Autrey Wilson) at pages xvi and 207.
[104] Walt Disney also had trouble convincing people that building a large theme park was a good idea. Hmmm…
[105] See *George Lucas's Blockbusting* at pages xvi, 207 and 221.

The case of *SG & Anor and GLG*[106] dealt with the more "mundane". SAT found that a woman with dementia was unable to make reasonable judgments in relation to her estate, in part because she'd:

- forget that a bill and been paid and, without help, was likely to pay it a second time;
- misplace cash; and
- refuse to pay for care services.[107]

In the case of *MH*,[108] SAT said that accumulating possessions "is hardly unusual human behaviour, nor, of itself, does it constitute any justification for criticism, ridicule or adverse judgment".[109] However:

> "… when the accumulation and retention of possessions reaches such an extent that a person's home environment becomes unusable, unsafe or unsanitary, or even perhaps uncomfortable (if there is nowhere to sit, or to sleep, because furniture and beds are covered in possessions), or is pursued to such an extent that their personal or financial wellbeing is neglected, or jeopardised, then that may raise concerns about a person's mental health, or their ability to make reasonable judgments about their personal care needs, or about financial matters."[110]

While family, friends or experts can help, SAT has to consider whether, at the end of the day, the person can make a decision themself.[111]

3. ***There is a need for an administrator.***[112]

A woman with dementia may be able to manage her day-to-day income and expenses with the help of family, but what if she goes into a nursing home? She may need to sell her house to pay the fees, but not have the capacity to sign a contract for such a large amount of money and deal with the proceeds.[113]

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[106] [2011] WASAT 178.
[107] See paragraph [73].
[108] [2022] WASAT 74.
[109] See paragraph [118].
[110] See paragraph [119].
[111] See *DL* [2023] WASAT 66 at paragraph [17], which was an application for guardianship, though the same principle would apply to applications for administration orders.
[112] See section 64(1)(b) of the GA Act. In *PR* [2021] WASAT 32 at paragraph [26], SAT quoted two meanings of "need" from the *Macquarie Online Dictionary*.
[113] For an example of when a person's property needed to be sold, to pay for accommodation in a nursing home, see *NA* [2022] WASAT 118 at paragraph [51].

Sometimes, the need arises when a parent dies. The case of *ZJ*[114] concerned a middle-aged man with an intellectual disability, but who could manage his day-to day finances with family support. The application for an administration order was made just before his father's death. The father:

> "… had changed his will in the months prior to his death when he was gravely ill and the application from the social worker was brought in the belief that the represented person may not have been adequately provided for in the will. This raised issues of where he was to live and the proper protection of his interests. In particular, there was concern about where he would live as he had always lived in the family home with both parents, up until the death of his mother some years before and then with his father prior to his death."[115]

There was conflict between his two sisters. The Public Trustee was appointed limited administrator, in particular to represent the person's interests in respect of his father's deceased estate.[116]

In *WP*,[117] the represented person owed a lot of money to place where he'd lived. SAT found that without an administrator, he couldn't have met his "lawful obligation" to pay that debt.[118]

In another instance, the need for an administrator arose from the represented person's impaired decision-making in relation to expensive legal proceedings and the potential risk to her estate from starting and continuing them.[119]

In *NB*,[120] the need arose because the person had fallen victim to scams, which was, in SAT's view, likely to continue without an order.

In other cases, there may not be a need because the person has no assets that require administration, or the assets are managed under some other legal authority.[121]

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[114] [2007] WASAT 179.
[115] See paragraph [4].
[116] See paragraph [5].
[117] [2008] WASAT 170.
[118] See paragraphs [98] to [101].
[119] See *KSC* [2012] WASAT 1 at paragraphs [29] to [30], *KSC* [2012] WASAT 51 at paragraphs [12] to [17] and *KSC* [2013] WASAT 56 at paragraphs [14] to [16].
[120] [2023] WASAT 88 at paragraphs [47] to [50].
[121] See *MM* [2001] WAGAB 2 [also cited as *Review of Guardianship and Administration Orders in respect of MM* (2001) 28 SR (WA) 320] at paragraph [54].

For instance, a substantial portion of the person's finances may be in a trust, and beyond the reach of an administrator,[122] though it may not always be as simple as that. Sometimes, without an administration order, the beneficiary of a trust may be able to demand that the trustee transfers all the assets of the trust to them.[123]

For what might happen if the person doesn't live in WA, see **[4.25]** under "Not living in WA".

4. ***There is no alternative to making an order that is less restrictive of the person's freedom of decision and action.***[124]

In some cases, SAT took this as a separate step to considering the need for an administrator.[125] In others, it seems to have considered both together.[126] Ultimately, it may not make any difference either way.

In *BJ and DJ*,[127] SAT found that the person's mother had managed the person's financial affairs in a way that ensured that the accounts and household expenses were paid, and had put in place "a workable and satisfactory system" while the mother was out of the state. It found that whenever money was required for her necessities, it was "appropriately and readily accessible". It accepted that her living conditions were "appropriate to her situation and requirements". SAT concluded that there was "no reason to change a system" which was a less restrictive alternative to an administration order, was working in the person's best interests and was likely to remain so. It dismissed the application for such an order.[128]

The degree to which a person retains a measure of such freedom will vary according to the type of impairment. In turn, the availability of a less restrictive alternative will also vary.[129]

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[122] See, for instance, *A and J* [2006] WASAT 287, *ZJ* [2007] WASAT 179 and *GM* [2018] WASAT 71.

[123] For court trusts, see Chapter 13. For how such trusts are terminated, see **[13.16]** to **[13.20]**.

[124] See section 4(4) of the GA Act, which was previously section 4(2)(c).

[125] See, for instance, *AS* [2018] WASAT 1 at paragraphs [51] to [58] and *FY* [2019] WASAT 118 at paragraphs [91] to [92]. See also *MM* [2001] WAGAB 2 [also cited as *Review of Guardianship and Administration Orders in respect of MM* (2001) 28 SR (WA) 320] at paragraph [55], which was a decision of the old Guardianship and Administration Board.

[126] See, for instance, *FS* [2007] WASAT 202 at paragraphs [125] to [129], *NA* [2022] WASAT 118 at paragraphs [41] to [57] and *LM* [2023] WASAT 15 at paragraphs [33] and [43].

[127] [2006] WASAT 143.

[128] See paragraphs [54] to [58].

[129] See *AS* [2018] WASAT 1 at paragraphs [51] to [53], referred to in *T v State Administrative Tribunal* [2021] WASC 67 at paragraph [26].

If, for instance, a person is in a coma, with little hope of recovery, it's unlikely that any alternative informal arrangements would be less restrictive of the person's freedom of decision and action.

If there are informal alternative arrangements, such as a spouse operating a joint bank account, SAT must be satisfied that the interests of the person are adequately protected by them. "It is a serious question whether a person's needs can be met by having his or her finances managed informally by a service provider who has no legal authority to hold and manage that person's funds".[130]

In the case of *FZ*,[131] SAT was satisfied that the person's psychiatric hostel was managing his finances "for many years in a manner that provides adequately for all his needs".[132]

In some cases, a less restrictive alternative may be an enduring power of attorney;[133] in other cases, not.[134] We'll discuss enduring powers of attorney further in Chapter 8.

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[130] See *MM* at paragraph [55]. See also *AS* [2018] WASAT 1 at paragraphs [51] to [53], referred to in *T v State Administrative Tribunal* [2021] WASC 67 at paragraph [26].

[131] [2007] WASAT 308.

[132] See paragraph [28]. For more examples of informal arrangements that SAT was happy with, see:

- *ET* [2012] WASAT 3
- *SM* [2015] WASAT 132 at paragraphs [73] to [74]
- *N* [2019] WASAT 134 at paragraph [47]
- *KZ* [2021] WASAT 24.

On the other hand, in *MW* [2022] WASAT 107 at paragraphs [92] to [96], SAT did not consider that the recent informal supports by a sister and nephew were a less restrictive alternative to an administration order.

[133] See, for instance:

- *VS* [2008] WASAT 160 at paragraphs [110] to [125]
- *PG and KRL* [2010] WASAT 30 at paragraphs [40] to [43]
- *VAM* [2010] WASAT 183 at paragraphs [4] to [8]
- *MRH* [2015] WASAT 17 at paragraph [46]
- *GB* [2020] WASAT 61 at paragraph [47]
- *RK* [2021] WASAT 13
- *ET* [2021] WASAT 36
- *KYL* [2021] WASAT 51
- *AR* [2021] WASAT 137 at paragraphs [65] to [80]
- *RK* [2022] WASAT 112 at paragraphs [143] to [162]
- *NA* [2022] WASAT 118 at paragraphs [53] to [57]
- *DJJ* [2023] WASAT 17 at paragraph [64].

[134] See, for instance:

- *MS and YS* [2008] WASAT 72 at paragraphs [43] to [49]

In theory, administration orders can be made for a person under 18.[135] It happens reasonably often for minors who are about to come of age, but rarely for children much younger than that. It could be difficult to show that mental disability, rather than age, is why a child can't make reasonable judgments. It could be hard to establish a need. Usually, there are viable alternatives to an administrator, such as parents or people acting in place of parents.

What if at least one requirement isn't met?

If at least one requirement isn't met, an administration order can't be made. For completeness, or perhaps in case there's a further review or appeal, SAT might say whether the other requirements are met, but not always.[136]

What if the person dies before a guardianship order is made?

SAT will close the application,[137] as a guardianship order can only be made for a living person. It will still have the power to make some orders, such as costs orders.[138]

- *SA* [2010] WASAT 186 at paragraph [47]
- *GSW and HSH* [2011] WASAT 40 at paragraph [7]
- *MT* [2018] WASAT 80 at paragraphs [26] to [43]
- *GG* [2019] WASAT 4 at paragraphs [157] to [160]
- *JW No 2* [2019] WASAT 117 at paragraphs [80] to [123]
- *LP* (2020) 99 SR (WA) 123, [2020] WASAT 25 at paragraphs [210] to [223]
- *ES* [2020] WASAT 98 at paragraphs [45] to [48]
- *AM* [2020] WASAT 162 at paragraphs [205] to [206]
- *SR* [2021] WASAT 75 at paragraph [66]
- *BJT* [2022] WASAT 73 at paragraphs [38] to [48]
- *LM* [2023] WASAT 15 at paragraph [44]
- *NE* [2023] WASAT 30 at paragraphs [39] to [42].

[135] Section 43 of the GA Act contains specific age restrictions on appointing guardians under that Act. There are no such specific age restrictions in section 64 on appointing administrators. Section 77(4) contemplates that some people under administration orders could be under 18.

[136] See *N* [2019] WASAT 134 at paragraphs [46] and [47]. In *PB* [2020] WASAT 121 at paragraphs [94] to [95], SAT found that the person didn't have a mental disability, but said that even if it was wrong on that, it wasn't satisfied that he was unable, by reason of such a disability, to make reasonable judgments in respect of his estate. That meant that it couldn't make an administration order. It didn't consider the other two requirements.

[137] See *MD* [2022] WASAT 45 at paragraph [16], which dealt with an application for an administration order.

[138] In *MD*, SAT accepted that it had the power to make costs orders, but declined to do so.

Does SAT have a discretion?

Even if all four requirements are met, SAT could still choose not to make an administration order.[139] The best interests of the person are the "key consideration".[140]

[4.11] What are the four requirements of a guardianship order?

The requirements for a guardianship order are:[141]

1. ***The person is at least 17 years of age.***[142]

If the person is only 17, the order can only take effect once they turn 18.[143]

2. ***The person is (or will be, on turning 18):***[144]

   (i) incapable of looking after their own health and safety; or

   (ii) unable to make reasonable judgments in respect of matters relating to their person; or

   (iii) in need of oversight, care or control in the interests of their own health and safety or for the protection of others.

There is a presumption in the GA Act that a person is capable of looking after their own health and safety[145] and of making reasonable judgments in respect of matters relating to their

[139] See *SAL and JGL* [2016] WASAT 63 at paragraphs [29] to [30], which noted the use of the word "may" in section 64(1) of the GA Act. See also *PR* [2021] WASAT 32 at paragraphs [33] to [36]. That case concerned the appointment of a guardian, and interpreting section 43(1) of the GA Act, but section 64(1) has similar wording.
[140] See *PR* at paragraphs [33] to [36].
[141] For a background to these steps, see *SM* [2015] WASAT 132 at paragraphs [7] to [10] and the right to autonomy, referred to at the start of **[4.10]**. As we'll see, generally speaking, people with guardians lack at least some capacity to make their own lifestyle decisions, but in limited cases, a guardian can be appointed for someone who has this capacity.
[142] See sections 43(1a) and 43(2a)(a) of the GA Act.
[143] See section 43(2c).
[144] See sections 43(1)(b) and 43(2a)(b).
[145] See section 4(3)(a).

person,[146] until SAT is satisfied to the contrary. As per administration orders, this presumption isn't overcome lightly.[147]

The GA Act makes a clear distinction between matters relating to a person's "estate", which are covered by administration orders, and matters relating to their "person", which are covered by guardianship orders. To put it another way, administration orders deal with financial matters; guardianship orders deal with lifestyle matters. In reality, the two can't always be neatly separated.

What if, for instance, a person needs a hip replacement, but doesn't have private health insurance? It may be a choice between paying to have the surgery now, or waiting to have it done on the public system. Is that a financial or a lifestyle decision? It may be both. If the person has $10 million and no other substantial expenses, it's partly a financial decision, but not to a great extent. It may be different if the person only has just enough to pay for the operation and has other competing financial needs.

The same evidence may point to a person's ability or inability to make both financial and lifestyle decisions. See, for instance, the case of *MH*,[148] which discussed "the excessive accumulation and retention of possessions", sometimes referred to as "hoarding".

While family, friends or experts can help, SAT has to consider whether, at the end of the day, the person can make a decision themself.[149]

What if someone can look after their own health and safety and make reasonable judgments in respect of matters relating to their person, but is in need of oversight, care or control in the interests of their own safety or for the protection of others? A three-member SAT panel,

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[146] See section 4(3)(b). For a discussion on the presumptions under section 4(3), see *CD* [2020] WASAT 41 at paragraphs [140] to [152].

[147] See the discussions in:

- *S v State Administrative Tribunal of Western Australia [No 2]* [2012] WASC 306 at paragraph [105]
- *AQ* [2015] WASAT 139 [also cited as *Re AQ* (2015) 88 SR (WA) 243] at paragraphs [117] to [120]
- *LP* (2020) 99 SR (WA) 123, [2020] WASAT 25 at paragraphs [48] to [51] and [99] to [110]
- *MH* [2022] WASAT 74 at paragraphs [130] to [131],

which all refer to the case of *Briginshaw v Briginshaw* (1938) 60 CLR 336, [1938] HCA 34. See also *JNS* [2017] WASAT 162.

[148] [2022] WASAT 74 at paragraphs [118] to [119].

[149] See *DL* [2023] WASAT 66 at paragraph [17].

including the then-President, has said that a guardianship order can still be made, and did indeed make one.[150] A "mental disability" isn't a specific requirement of a guardianship order.

That raises the question as to when the government should decide that a mentally capable adult needs "oversight, care or control". It would only happen in a small portion of cases, and involves balancing freedom and protection. In the case of *T*,[151] SAT said:[152]

> "There is a common maxim in the jurisdiction that people have a right to make bad or unwise decisions. Competent people make them all the time. It will be for the Tribunal in each instance to ensure that any order under subsection (iii) is appropriate and that the subsection is not simply being used in an attempt to override what are capably made albeit bad or unwise decisions with which others engaged with or close to the proposed represented person simply disagree."

In *T*, SAT made a guardianship order for a person who'd been diagnosed with multiple sclerosis about 20 years earlier and whose capacity was starting to diminish.

3. There is (or will be, on the person turning 18) a need for a guardian.[153]

There may be "some other statutory provision which gives legal authority for the decision-making in question",[154] or there may not be a "live issue or foreseeable conflict in relation to the personal affairs of the represented person so as to give rise to the need … to intervene in the life of the represented person by making a formal order".[155] The need doesn't have to be immediate, but can be within the "foreseeable future".[156]

This involves knowing what a guardian can do.

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[150] See *Public Advocate and CEF* [2010] WASAT 54. See also the discussions in *PVS* [2012] WASAT 233 at paragraphs [32] to [39], *Ms G* [2017] WASAT 108 at paragraphs [25] to [48], *T* [2018] WASAT 128 at paragraphs [24] to [36] and *C* [2019] WASAT 98 at paragraphs [25] to [29]. With respect, a contrary view was expressed in *KRM* [2017] WASAT 135 at paragraphs [19] to [20]. In *GG* [2021] WASAT 133 at paragraphs [51] to [63], SAT also looked at section 43(1)(b)(iii) of the GA Act and discussed the differences between *Ms G* and *KRM*. In *IZ* [2022] WASAT 85 at paragraph [75], SAT said that as the presumption of capacity was not rebutted, it could not appoint a guardian.

[151] [2018] WASAT 128.

[152] See paragraph [35].

[153] See sections 43(1)(c) and 43(2a)(c). In *PR* [2021] WASAT 32 at paragraph [26], SAT quoted two meanings of "need" from the *Macquarie Online Dictionary*.

[154] See *MM* [2001] WAGAB 2 [also cited as *Review of Guardianship and Administration Orders in respect of MM* (2001) 28 SR (WA) 320] at paragraph [54].

[155] See *MM* at paragraph [54] and *A and J* [2006] WASAT 287 at paragraph [76].

[156] See *G and N* [2009] WASAT 99 at paragraph [100].

Subject to some limits (see **[6.4]**), section 45(1) of the GA Act says a **plenary guardian** has the same functions "in respect of the person of the represented person" as someone who's been given a parenting order with parental responsibility of a "child lacking in mature understanding".[157] The phrase "in respect of the person of the represented person" is a little confusing, but it means functions concerning the represented person's lifestyle, rather than the person's estate.[158]

Section 45(2) of the GA Act specifically sets out some of those functions, but they're not the only functions a plenary guardian has.

A **limited guardian** has whatever powers or functions SAT gives them, but they can only be powers or functions that a plenary guardian could have.[159]

When dealing with a particular case, it may be worth:

- going through the list of functions in section 45(2);
- going through some of the other functions that a guardian can have;
- seeing if there's a need for any of these functions; and
- considering the limits on a guardian's functions.

The **list of functions in section 45(2)** is as follows:

(a) *Decide where the person is to live.*
(b) Decide with whom the person is to live.

There may not be a need for a guardian to make these types of decisions if, for instance, the person is living within their means in their own home, with others coming in to provide support, and it all seems to be working out well.

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[157] See:
- *MS* [2020] WASAT 146 at paragraphs [97] to [105]
- *LGW* [2004] WAGAB 4 at paragraphs [26] to [40]
- *KE and CPJ* [2006] WASAT 45 at paragraphs [66] to [69]
- *AS and AA* [2007] WASAT 54 at paragraphs [53] to [64]
- *LJH* [2007] WASAT 139 at paragraphs [28] to [29].

[158] See *Re: RSMS & Anor* [2005] WASAT 162.

[159] See section 46 of the GA Act.

The case of *Re: RSMS & Anor* [160] concerned a person who had an intellectual disability, epilepsy and was legally blind. She was living at home with her parents. There were no "imminent decisions" to be made about her accommodation. Her parents were happy to have her continue to live with them for the foreseeable future. SAT found that there was no need for a guardian to make accommodation decisions.[161]

Even if there's a need for a move, there may not be a need for a guardian. In *KK*,[162] SAT said:[163]

> "Most residents enter residential aged care without the appointment of a guardian if there is no dissent to the proposed move. Frequently such decisions are made between family members working cooperatively with hospital treating teams or community based aged care services to identify appropriate accommodation and care. An appointed administrator can complete the assets information required by Centrelink for the assessment of the costs of care and can on behalf of the represented person execute a contract with a residential aged care provider."

In *LM and MM*,[164] SAT found that there was a need for a guardian to make decisions about accommodation. The represented person's daughter wanted to move her mother from her nursing home, despite acknowledging that such a move would be detrimental to her mother. The represented person's son and the nursing home staff didn't support such a move.[165]

In *EE and ME*,[166] SAT found the same because it had concerns that the represented person and her companion had an unrealistic view of the level of independent living that she could sustain.

(c) *Decide whether the person should work and, if so, the nature or type of work, for whom, etc.*[167]

A person with advanced dementia is unlikely to be working.

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[160] [2005] WASAT 162.
[161] See paragraphs [21] and [31].
[162] [2021] WASAT 85.
[163] See paragraph [40].
[164] [2010] WASAT 110 at paragraph [49].
[165] See also *RK* [2022] WASAT 112 at paragraph [117], which referred to "the complexity of the aged care system".
[166] [2012] WASAT 147 at paragraphs [99] to [106].
[167] The guardian was given this function in *AT and LT* [2014] WASAT 21, *MF* [2016] WASAT 46, *LB* [2016] WASAT 126 and *DC* [2019] WASAT 110. In *AT and LT*, the order also specifically covered entering into a workplace agreement.

(d) Make treatment decisions for the person.

This is one area where care needs to be taken when looking at old cases, because the provisions in the GA Act concerning treatment have changed more than once over the years.[168]

SAT may need to consider whether the person can give informed consent to medical treatment.[169]

If a person can only make simple treatment decisions, SAT may need to assess the chances of any complex treatment decisions being needed in the foreseeable future.[170]

Parts 9C and 9D of the GA Act allow other people, such as family members, to make some treatment decisions, even if there isn't a guardian.[171] In some cases, the decision-maker may have a conflict of interest. The person may be estranged from their relatives. The relatives may be fighting or unwell themselves, or not want to make these sorts of decisions.[172]

Sometimes, the person may have already expressed some medical wishes in an advance health directive.[173]

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[168] Old cases on medical treatment include:

- *BTO* [2004] WAGAB 2
- *Re: RSMS & Anor* [2005] WASAT 162
- *PG* [2006] WASAT 256
- *RJC* [2006] WASAT 279
- *G AND J* [2006] WASAT 324
- *JCH and CH* [2007] WASAT 4
- *FZ* [2007] WASAT 308
- *DMS* [2008] WASAT 14.

[169] See *DG* [2020] WASAT 90 at paragraphs [41] to [44] and *CB* [2021] WASAT 67 at paragraphs [62] to [73]. There are specific laws in relation to abortion (see **[6.4]**).

[170] See *DL* [2023] WASAT 66 at paragraphs [17] to [23].

[171] See *KK* [2021] WASAT 85 at paragraphs [26] to [31]. The District Court case of *Turner v Hunter* [2023] WADC 93 at paragraphs [95] to [123] discusses such a treatment decision. The case of *Chief Executive Officer, Department for Child Protection and DJC* [2011] WASAT 190 at paragraphs [36] to [62] discusses Parts 9C and 9D, which came into effect in 2010, and the old section 119 which it replaced. It deals with whether paid carers can make treatment decisions under Parts 9C and 9D. See also *GB* [2017] WASAT 86 at paragraphs [81] to [82].

[172] Parts 9C and 9D are mentioned further below in the discussion on the fourth requirement for a guardianship order.

[173] See Part 9B of the GA Act, the cases of *AL* [2017] WASAT 91 and *JH* [2022] WASAT 108 and the Department of Health's website.

In the case of *Re IPK; ex parte DK*,[174] SAT said that a guardian with the power to make treatment decisions had the power to decide what the represented person should eat or drink, due to her problems with swallowing. It was "a sensitive balancing act" between her safety, due to the risk of aspiration, and her "pleasure in having the foods and drinks of her preference".

In *K*,[175] one of the functions that SAT gave to the guardian was:

> "To facilitate and consent to an assessment of the represented person's capacity to consent to proposed dental and facial surgery and to make decisions about her personal and financial affairs…."[176]

SAT may give a guardian a specific health-related function, including:

- to consent to contraception in women;[177]
- to consent to the administration of sex drive control medication in men;[178]
- to consent to physical examination, the taking of samples and the screening for sexually transmitted infections where there is an allegation of sexual assault;[179]
- (in an extreme case) to seek to control a person's smoking.[180]

For a case on what duties a health provider might have towards a guardian (and administrator), see *Medical Board of Australia and Panegyres*,[181] which went on appeal in *Panegyres v Medical Board of Australia*.[182]

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[174] [2011] WASAT 211 at paragraphs [43] to [52].
[175] [2018] WASAT 27.
[176] This quote corrects a typo in the word "affairs" that appeared in the reasons for decision.
[177] See *P* [2016] WASAT 144 at paragraph [97].
[178] See *P* at paragraph [97].
[179] See *P* at paragraph [97] and *PG* [2014] WASAT 66. There may be ways for an examination to happen without a guardian being appointed. See sections 73 to 90 of the *Criminal Investigation Act 2006*. The Sexual Assault Resource Centre is one of the available services for people who have been sexually assaulted.
[180] See *P*.
[181] [2017] WASAT 146.
[182] [2020] WASCA 58.

(e) *Decide what education and training the represented person is to receive.*[183]

A person with advanced dementia is unlikely to need an order covering this.

(f) *Decide with whom the represented person is to associate.*[184]

In rare cases, when the family in-fighting reaches extreme heights, there may be a need for a guardian, who can set a roster when particular relatives can and can't visit the person.[185] As the Supreme Court once said: "If you need a protocol for family members to visit the represented person, there is plainly a problem."[186]

In the case of *EE and ME*,[187] SAT heard concerns about a man in the represented person's life, but didn't think there was enough evidence "to warrant an overt intrusion" into that relationship by appointing a guardian to decide with whom she was to associate.

In *LM and MM*,[188] SAT found a need for such a function because the represented person's nursing home had banned her daughter from visiting. Efforts to mediate the situation had failed.[189]

(g) *As the next friend of the person, commence, conduct or settle any legal proceedings on behalf of the person, except proceedings relating to their estate.*
(h) *As the guardian* ad litem *of the person, defend or settle any legal proceedings taken against the person, except proceedings relating to their estate.*

The terms "next friend" and "guardian *ad litem*" are discussed in Chapter 10. The types of matters for which this function is authorised include the following:[190]

- care and protection proceedings, brought by the child welfare authorities, with respect to the represented person's children;[191]

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[183] The guardian was given this function in *MF* [2016] WASAT 46 and *LB* [2016] WASAT 126.
[184] For the meaning of "associate", see *CDM* [2007] WASAT 282 at paragraphs [51] to [55].
[185] See *GB* [2020] WASAT 61 at paragraph [68] and *RK* [2022] WASAT 112 at paragraphs [118] to [122].
[186] See *TL v Office of the Public Advocate* [2020] WASC 455 at paragraph [88].
[187] [2012] WASAT 147 at paragraphs [99] to [103].
[188] [2010] WASAT 110 at paragraphs [42] and [47].
[189] For another example, see *VF and MLW* [2015] WASAT 97 at paragraphs [19] to [20].
[190] The courts involved may use terms other than "next friend" or "guardian *ad litem*".
[191] See, for instance, *EC* [2021] WASAT 74 and *GEG* [2022] WASAT 121 at paragraph [99].

- care arrangements in the Family Court for the represented person's children;
- making or defending applications under the *Restraining Orders Act 1997*;[192] and
- immigration proceedings.[193]

A guardian would not act as next friend in personal injuries proceedings, because those proceedings would relate to the person's estate.[194]

(i) If the plenary guardian is a research decision-maker for the represented person — subject to subsection (4A)(a) and sections 110ZR and 110ZT, make research decisions in relation to the represented person.

We won't go through that here.

Other functions that a guardian can have include the following:

Services

A guardian might be needed to decide what services to which the person should have access.[195] SAT has noted "the complexities of the NDIS system",[196] which can create the need for a guardian.

Restrictive practices

A guardian might be needed to consent to "restrictive practices", such as the use of chemical restraints on a person. That's a complicated issue. The NDIS's requirements around such practices can create the need for a guardian.[197]

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[192] See, for instance, *SJ* [2021] WASAT 119 at paragraphs [32] and [34], *GEG* [2022] WASAT 121 at paragraph [99] and *NE* [2023] WASAT 30 at paragraph [48].
[193] In *BZ* [2019] WASAT 14, SAT appointed the guardian to deal with immigration proceedings for a person from another country who was in Australia on a temporary protection visa.
[194] With respect, a contrary view was given in *ID* [2007] WASAT 80 at paragraph [35]. However, item 2 of Part A of Schedule 2 of the GA Act contemplates an administrator exercising this power and a claim for personal injuries forming part of the person's estate. For more on how Part A of Schedule 2 operates, see **[6.1]**.
[195] See, for instance, *SJ* [2021] WASAT 119 at paragraphs [32] and [34].
[196] See *TM* [2021] WASAT 92 at paragraph [117], but see also paragraph [96]. See also *GEG* [2022] WASAT 121 at paragraph [101] and *DL* [2023] WASAT 66 at paragraphs [24] to [26].
[197] For WA cases on restrictive practices, see:
- *MS* [2020] WASAT 146, which also dealt with the NDIS, at paragraphs [86] to [106] and [134] to [136]

Travel

Sometimes, SAT gives guardians the function of deciding whether the represented person can travel interstate and/or overseas, and on what terms.[198] In the case of *SH*,[199] this was done to stop the represented person's brother taking her overseas to have a hysterectomy, and included the authority to take possession of all her passports.

Advocacy and assistance

If, for instance, a guardian has the function of deciding where a person should live, that might involve advocating on their behalf, such as by asking a housing authority to put them on a priority list. The GA Act contemplates that a guardian acts as an advocate in that way.[200] Being an advocate in such a case is connected to the function that they've been given.

- *BCB* [2002] WAGAB 1 [also cited as *Re BCB; Application for Guardianship Order*, (2002) SR (WA) 338]
- *JP* [2008] WASAT 3 at paragraphs [46] to [75]
- *PN* [2008] WASAT 158
- *TS* [2019] WASAT 56 at paragraph [38]
- *MW* [2022] WASAT 107 at paragraph [100].

For a NSW case on restrictive practices, the NDIS and aged care, see *SZH* [2020] NSWCATGD 28. That case dealt in part with NSW legislation, which is not the same at WA legislation. The NDIS website is www.ndis.gov.au. There's also a book called *The National Disability Insurance Scheme: An Australian Public Policy Experiment*, edited by Mhairi Cowden and Claire McCullagh, published by Palgrave Macmillan in 2021.

[198] See:

- *Re: AC* [2005] WASAT 139
- *HH* [2014] WASAT 142 at paragraph [73]
- *GB* [2017] WASAT 86 at paragraph [86]
- *BZ* [2019] WASAT 14 at paragraphs [56] and [59]
- *SJ* [2021] WASAT 119 at paragraphs [32] and [34].

[199] [2019] WASAT 87 at paragraph [107].

[200] See section 51(2)(a).

The GA Act, though, also allows a guardian to do more than just make decisions and advocate in relation to those decisions. Advocacy can be a stand-alone function of a guardian.[201] For instance, in *LGW*,[202] a guardian was appointed, in part, to make representations to a board.

In *JK*,[203] one of the guardian's functions was "to assist the represented person to obtain the necessary psychological and/or psychiatric intervention concerning the diagnosis of gender identify disorder", rather than to make decisions concerning that diagnosis.

In *RW*,[204] SAT considered that the represented person could consent to medical matters and about where he lived, but needed assistance "by way of prompts and structure". It appointed a guardian to "consult, liaise and advocate on [the represented person's] behalf with his medical practitioners and allied health professionals, and to obtain information, reports or copies of any documents relating to his treatment or healthcare".

Apart from the reasons given above, **there may not be a need for a guardian to perform any of these functions** because, for instance:

- The person is in custody. Prison or hospital authorities may have the power to make the sorts of decisions that a guardian might. In other cases, a guardian might be needed, such as to perform an advocacy role, or because the person might soon be released.[205]

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[201] See:
- *LGW* [2004] WAGAB 4 at paragraphs [26] to [40]
- *NCK* [2005] WASAT 283 at paragraphs [57] to 58]
- *KE and CPJ* [2006] WASAT 45 at paragraphs [66] to [69]
- *AS and AA* [2007] WASAT 54 at paragraphs [54] to [64]
- *LJH* [2007] WASAT 139 at paragraphs [28] to [29]
- *Public Advocate and CEF* [2010] WASAT 54 at paragraphs [39] to [41]
- *PVS* [2012] WASAT 233 at paragraphs [51] to [54]
- *RC* [2014] WASAT 25 at paragraph [54]
- *KH and NH* [2015] WASAT 45 at paragraphs [44] to [45].

In *RC* and *KH and NH*, the orders included a specific power to get information.

[202] [2004] WAGAB 4.

[203] [2021] WASAT 139.

[204] [2014] WASAT 120 at paragraphs [94] to [101].

[205] See:
- *LGW* [2004] WAGAB 4
- *Department of Corrective Services and AP* [2011] WASAT 213
- *Department of Corrective Services and GY* [2012] WASAT 225
- *KS and DC* [2014] WASAT 90
- *MGP* [2020] WASAT 65
- *PR* [2021] WASAT 32.

- The person is (or will be) living in the community and is subject to orders under mental health legislation.[206]

For **limits on a guardian's functions**, see **[6.4]**. There can only be a need for a guardian to do something if it's something that the guardian actually has the power to do.

Does a guardianship order have to be workable? Not necessarily. What if, for instance, the represented person won't co-operate with the guardian or take advantage of the services that they might arrange? Depending on the circumstances, there still might be a need for a guardian.[207]

For what might happen if the person doesn't live in WA, see **[4.25]** under "Not living in WA".

4. ***There is no alternative to making an order that is less restrictive of the person's freedom of decision and action.***[208]

This is the same as the fourth requirement for an administration order. Is it a separate step to considering the need for a guardian? Or should these two steps be considered together?[209] Ultimately, it may not make any difference either way.

Again, the degree to which a person retains a measure of such freedom will vary according to the type of impairment. In turn, the availability of a less restrictive alternative will also vary. If there are informal alternative arrangements, SAT must be satisfied that the interests of the person are adequately protected by them.[210]

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[206] See *FC and Public Trustee* [2006] WASAT 133, in particular at paragraph [66]. Since that case was decided, WA got the *Mental Health Act 2014*. The case of *P* [2017] WASAT 54 discusses the relationship between a Community Treatment Order (CTO) under that Act and a guardianship order under the GA Act.

[207] See:

- *PR* [2021] WASAT 32 at paragraph [32]
- *A and J* [2006] WASAT 287 at paragraph [78]
- *JC* [2016] WASAT 83 at paragraph [60]
- *EC* [2021] WASAT 74 at paragraphs [163] to [164].

For more on workability, see *NCK* [2004] WAGAB 6 at paragraphs [63] to [64] and *JL* [2023] WASAT 20 at paragraphs [139] to [140].

[208] See section 4(4) of the GA Act, which was previously section 4(2)(c).

[209] See the discussion in **[4.10]** on the third and fourth requirements for an administration order.

[210] See *MM* [2001] WAGAB 2 [also cited as *Review of Guardianship and Administration Orders in respect of MM* (2001) 28 SR (WA) 320] at paragraph [55]. This was a decision of the old Guardianship and Administration Board and dealt with both guardianship and administration. See also *AS* [2018] WASAT 1 at paragraphs [51] to [53], which was an

In the case of *TR*,[211] for instance, SAT found that the person's needs were "being met in their best interests" and could "continue to be so without the need for a formally appointed guardian".[212]

Again, if, for instance, a person is in a coma, with little hope of recovery, it's unlikely that any alternative informal arrangements would be less restrictive of the person's freedom of decision and action.

In some cases, a less restrictive alternative could be an enduring power of guardianship;[213] in other cases, not.[214] The Office of the Public Advocate's website (www.publicadvocate.wa.gov.au) has information on that.

Parts 9C and 9D of the GA Act, which allow other people, such as family members, to make some treatment decisions, may be a less restrictive alternative to a guardianship order.[215]

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application for an administration order, referred to in *T v State Administrative Tribunal* [2021] WASC 67 at paragraph [26], which in turn concerned an application for both guardianship and administration orders.

[211] [2009] WASAT 157 at paragraph [18].

[212] See also, for instance, *Re: RSMS & Anor* [2005] WASAT 162, *N* [2019] WASAT 134 at paragraph [47] and *KZ* [2021] WASAT 24. On the other hand, in *MW* [2022] WASAT 107 at paragraphs [92] to [102], SAT did not consider that the recent informal supports by a sister and nephew were a less restrictive alternative to a guardianship order.

[213] See Part 9A of the GA Act and Chapter 8. It was a less restrictive alternative in:

- *MRH* [2015] WASAT 17 at paragraph [45]
- *FC* [2016] WASAT 2 at paragraph [61]
- *KYL* [2021] WASAT 51
- *AR* [2021] WASAT 137 at paragraphs [81] to [154]
- *NA* [2022] WASAT 118 at paragraphs [34] to [40].

[214] It wasn't in:

- *JW* [2019] WASAT 115
- *JW No 2* [2019] WASAT 117 at paragraphs [126] to [157]
- *ES* [2020] WASAT 98 at paragraphs [45] to [48]
- *SR* [2021] WASAT 75 at paragraph [66]
- *BJT* [2022] WASAT 73 at paragraphs [38] to [48]
- *NE* [2023] WASAT 30 at paragraphs [39] to [41].

[215] See *KK* [2021] WASAT 85 at paragraphs [26] to [31]. It wasn't a less restrictive alternative in *MW* [2022] WASAT 107 at paragraph [102], *RK* [2022] WASAT 112 at paragraph [116] or *GEG* [2022] WASAT 121 at paragraph [100]. See also *Re: RSMS & Anor* [2005] WASAT 162 and *PG* [2006] WASAT 256 at paragraph [35], which were decided when section 119 of the GA Act covered this. See also the discussion of the third requirement for a guardianship order under "*Make treatment decisions for the person*".

Sometimes, it may benefit the represented person if their spouse is formally appointed guardian.[216]

Are service providers an appropriate alternative? In the case of *ZJ*,[217] Senior Sessional Member Leslie said:[218]

> "… the Tribunal has long taken the view that it is not appropriate for service providers to be the de facto guardians for vulnerable disabled persons who are in their care. There will always be conflicts for service providers between the interests of their various clients. There will be resource and funding issues, staffing pressures and other such matters which impact upon the systems of service provision as between clients, despite the most altruistic and beneficent of intentions towards an individual client. In a time of such intense demand for, and such pressure on, limited resources, someone independent of 'the system' needs to be 'in the represented person's corner', ensuring that his legitimate share of the available resources is obtained and is best used to meet his needs as they are independently determined."

What if at least one requirement isn't met?

If at least one requirement isn't met, a guardianship order can't be made. For completeness, or perhaps in case there's a further review or appeal, SAT might say whether the other requirements are met, but not always.[219]

What if the person dies before a guardianship order is made?

SAT will close the application,[220] as a guardianship order can only be made for a living person. It will still have the power to make some orders, such as costs orders.[221]

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[216] See *A* [2018] WASAT 33 and *A* [2018] WASAT 46.
[217] [2013] WASAT 12.
[218] See paragraph [28]. See also *T* [2018] WASAT 128 at paragraphs [9] and [41].
[219] See *N* [2019] WASAT 134 at paragraphs [46] and [47].
[220] See *MD* [2022] WASAT 45 at paragraph [16]. This case concerned an application for an administration order, but the same should apply to an application for a guardianship order.
[221] In *MD*, SAT accepted that it had the power to make costs orders, but declined to do so.

Does SAT have a discretion?

Even if all four requirements are met, SAT could still choose not to make a guardianship order. The best interests of the person are the "key consideration".[222]

[4.12] How formal and confidential are SAT's hearings?

The short answer is, generally speaking, SAT hearings are less formal, but more confidential, than court proceedings.

Formality

The SAT Act gives SAT considerable powers of coercion. SAT can, for instance (with some exceptions and qualifications):

- summons a person to attend and/or produce documents;[223]
- call a person to give evidence;[224]
- examine a witness on oath or affirmation;[225] and
- compel a witness to answer questions.[226]

[222] See *PR* [2021] WASAT 32 at paragraphs [33] to [36]. See also *SAL and JGL* [2016] WASAT 63 at paragraphs [29] to [30], which noted the use of the word "may" in section 64(1) of the GA Act. That case concerned the appointment of an administrator, and interpreting section 64(1), but section 43(1) has similar wording.

[223] See section 66 of the SAT Act and the case of *GD* [2022] WASAT 33 at paragraphs [41] to [51]. In *MD* [2022] WASAT 45 at paragraph [14], SAT declined to issue summonses because they "were not required to inform the Tribunal about the issues to be determined".

[224] See section 67(1)(a).

[225] See section 67(1)(b). If a witness swears an oath or makes an affirmation, they promise to tell the truth. An oath involves holding a Bible and swearing by Almighty God. An affirmation does not involve religion.

[226] See section 67(1)(d).

Before it makes particular orders, SAT may require a party to give an undertaking.[227] If you don't obey a SAT order, there are procedures to enforce it as though it were a court order.[228] SAT might make further orders to achieve what it wanted.[229]

You may be committing an offence if you fail to comply with some SAT orders,[230] a summons[231] or a requirement to give evidence,[232] or if you give false or misleading information to SAT,[233] or misbehave or obstruct it.[234] In a serious case, the Supreme Court could punish you as though it were a contempt of the Supreme Court. The same could happen if you breach an undertaking given to SAT.[235] If you don't obey a summons, SAT has the power to issue an arrest warrant.[236]

However, one of SAT's main objectives is "to act as speedily and with as little formality and technicality as is practicable, and minimise the costs to the parties".[237]

For a time, it was normal for people giving evidence in SAT, in proceedings under the GA Act, to make an affirmation. That is no longer so.

In the case of *MH*,[238] SAT had to decide whether to make a guardianship order for a Mrs MH (and if so, in what terms), and what to do with an existing enduring power of guardianship.

Mrs MH and her daughter strongly contested some of the evidence that SAT received. The evidence "raised sensitive issues against the backdrop of strained relationships" between Mrs MH's son and daughter. SAT required all parties to give their evidence under oath, noting that this was "a procedure not ordinarily adopted in proceedings under the GA Act".[239]

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[227] See *MK* [2014] WASAT 119 at paragraph [60], *AM* [2020] WASAT 162 at paragraph [13] and *DC* [2021] WASAT 130.
[228] See sections 85 and 86 of the SAT Act and the case of *NM and SGF* [2014] WASAT 103 at paragraphs [37] to [46].
[229] See section 73(1) of the SAT Act and the case of *NM and SGF* at paragraphs [40] to [42] and [47].
[230] See section 95 of the SAT Act and the case of *NM and SGF* at paragraphs [37] to [46].
[231] See section 96 of the SAT Act.
[232] See section 97 of the SAT Act.
[233] See section 98 of the SAT Act.
[234] See section 99 of the SAT Act.
[235] See section 100 of the SAT Act. The cases of *DC* [2021] WASAT 130 and *Attorney General v Morrison [No 2]* [2022] WASC 295 dealt with a breach of an undertaking to SAT. SAT also considered section 100 in the case of *Re Ruah Legal Services Limited trading as Mental Health Law Centre* [2021] WASAT 28.
[236] See sections 101 to 104 of the SAT Act.
[237] See section 9(b) of the SAT Act.
[238] [2022] WASAT 74.
[239] See paragraphs [6] and [16].

SAT also gave Mrs MH and her daughter, on the one hand, and the son on the other hand, the chance to challenge or clarify the evidence given by each other and by other witnesses. It required that "any questions by way of cross-examination be put by the Tribunal itself, rather than by them directly, in order to ensure that the questions were relevant to the issues the Tribunal is required to determine, and to maintain the civility of proceedings".[240] SAT found some of the witnesses to be truthful and reliable, but others less so.[241]

Natural justice (procedural fairness)

Section 32(1) of the SAT Act[242] requires SAT, generally speaking, to observe natural justice. This is sometimes known as procedural fairness, and consists of two basic rules:[243]

- *The hearing rule*, which is a person's right to present their case, and to know, and have a chance to respond to, the case presented against them.

- *The bias rule*, which is the right of a person to have their case determined by a tribunal which isn't biased and doesn't appear to be biased.[244]

These rules are flexible. The extent to which they apply can depend on the nature and circumstances of the case.[245]

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[240] See paragraphs [6] and [16].

[241] See paragraphs [31] to [38].

[242] *State Administrative Tribunal Act 2004*.

[243] See *Jetpoint Nominees Pty Ltd and Lee* [2021] WASAT 10 at paragraph [41]. This was a decision of SAT, but the proceedings weren't under the GA Act. See also *AG* [2022] WASAT 4 at paragraph [14], which refers (in the footnotes) to the Council of Australian Tribunals *Practice Manual for Tribunals*. For an example of natural justice (or procedural fairness) working in practice in a hearing under the GA Act, see *FC* [2012] WASAT 61 at paragraph [50] to [52].

[244] In *FH* [2016] WASAT 95 at paragraph [11], the Presiding Member was asked to disqualify herself from hearing the matter on the basis of reasonable apprehension of bias, but declined to do so. A member did disqualify herself in *KRM* [2017] WASAT 135 at paragraph [14] and *GYM* [2017] WASAT 136 at paragraph [16]. Expressing a tentative view isn't enough to show bias, as explained in *HB v His Honour Judge T Sharp* [2016] WASC 317 at paragraphs [12] to [15]. See also *S v State Administrative Tribunal of Western Australia [No 2]* [2012] WASC 306 at paragraphs [135] to [137].

[245] See *S v State Administrative Tribunal of Western Australia [No 2]* [2012] WASC 306 at paragraphs [89] and [100] and *Jetpoint Nominees Pty Ltd and Lee* [2021] WASAT 10 at paragraph [43].

Section 32(1), in any event, isn't expressed in absolute terms. If there is an inconsistency between the SAT Act and the GA Act, the latter prevails.[246]

Section 4 of the GA Act lists principles that SAT must observe in dealing with proceedings commenced under that Act.

One of them is set out in section 4(2), which says:

> "The primary concern of the State Administrative Tribunal shall be the best interests of any represented person, or of a person in respect of whom an application is made."

This could have said that SAT shall act in the "best interests" of any represented person (or a person in respect of whom an application is made). It doesn't. Rather, the "best interests" of such a person is the "primary concern" of SAT. It isn't SAT's only concern.

The "best interests" of the person might at times override or reduce the need to observe natural justice, or maybe affect what constitutes natural justice in the circumstances of the case. The GA Act also allows SAT, in exceptional circumstances, to reduce the notice period for holding hearings and not to tell everyone.[247] SAT can also refuse parties access to documents and exclude parties from hearings.[248] That said, SAT can't exercise these powers whenever it wants. It needs to consider the rights of both the person who's the subject of the hearing and other people who might be affected by it.[249]

Rules of evidence

SAT isn't bound by the rules of evidence.[250] That said, it can't simply throw them all away, as they've been developed as a means to prevent error and get to the truth.[251]

For instance, courts only allow hearsay evidence in limited circumstances. The maker of the statement can't be cross-examined as to its truth. It's at least second-hand evidence and stories

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[246] See section 5 of the SAT Act, which says that if there is any inconsistency between the SAT Act and an enabling Act, the latter prevails. The GA Act is an "enabling Act" because it confers jurisdiction on SAT (see the definition of "enabling Act" in section 3(1) of the SAT Act).
[247] See section 41(3) of the GA Act.
[248] See the discussion below under "Confidentiality".
[249] For a case in which the Supreme Court considered that SAT had observed natural justice, see *SG v AG* [2008] WASC 123 at paragraphs [183] to [187]. See **[4.24]** for ways a decision can be changed if there's a denial of natural justice.
[250] See section 32 of the SAT Act.
[251] See the Administrative Appeals Tribunal decision of *Pochi and Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482 at pages 492 to 493, [1979] AATA 64 and the discussion in *Ms G* [2017] WASAT 108 at paragraphs [49] to [60].

can get lost in translation. SAT may be freer than a court to allow it, but in at least some cases, it may be too unreliable to use.

In some cases, a person's mental disability may affect how reliable their evidence is.[252]

Should guardianship and administration applications be intimidating?

There may be a public interest in some court proceedings being intimidating, at least up to a point. For many people who plead guilty to a criminal offence, the mere act of appearing before a judge or magistrate is enough to deter them from re-offending. The thought of having to give evidence at trial is enough for some people to settle defended proceedings in a civil court, or not even take the matter there in the first place. The justice system shouldn't have to resolve every feud or argument. It couldn't cope with the workload.

Guardianship and administration applications in SAT are different. Generally, they can't be settled "out of court". If your mother has dementia, depending on the circumstances, applying to SAT might be the only way to have her finances properly managed and to keep her money safe. But you might not want to do that if the process were intimidating. Or indeed, if you thought that your mother's face, and her dementia diagnosis, would end up on the six o'clock news. Which brings us to confidentiality.

Confidentiality

Not so long ago, the lurid details of divorces, replete with motels and mistresses, used to titillate the readers of Australian newspapers. It may have been a lucrative business for private detectives and spicy for lawyers, but it was also messy and embarrassing, and deterred unhappy people from getting out of destructive marriages.

The Commonwealth *Family Law Act 1975* abolished adultery as grounds for divorce. Nowadays, people need to be separated for twelve months.[253] Marriage breakdown is seen as a largely private matter, to be treated with some dignity, although sadly, some of the grief towards getting the divorce has spilled over into fights over money or children.

Originally, the *Family Law Act 1975* required that all proceedings in the Family Court of Australia be held in closed court.[254] It was found that this "bred suspicion concerning the administration of justice in the Family Court".[255] The law was changed so that these

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[252] See *SMYM (also known as SMPM, SMY and MYM)* [2007] WASAT 131 at paragraphs [51] to [52].

[253] See section 48.

[254] We won't go here into the original situation with the Family Court of WA.

[255] See *Family Law* (3rd ed, 1997) by Anthony Dickey QC, published by LBC Information Services, at page 87, which also explains the situation in more detail.

proceedings are now generally held in open court,[256] but the law also places restrictions on what the media can report in family law cases.[257] Some of the law on confidentiality that applies in those cases also applies in SAT proceedings under the GA Act.

The starting point is that generally speaking, all SAT hearings, whether under the GA Act or otherwise, are open to the public.[258]

Schedule 1 of the GA Act[259] says that if it's in the best interests of the proposed represented person, SAT can exclude some people from attending,[260] though not the media, which can report on what happens at a hearing, though they rarely (if ever) attend. Clause 11(3) of Schedule 1 of the GA Act says:

> "Any person bona fide engaged in reporting or commenting upon the proceedings of the State Administrative Tribunal commenced under this Act for dissemination through a public news medium shall not be excluded from the place where the hearings are being held."[261]

SAT is required to give reasons when it makes a final decision.[262] A member can't just say, "I'm appointing the Public Trustee as administrator, and that's that." In an application for guardianship or administration, SAT usually gives its reasons orally, at the end of the hearing, or sometimes at a later date. As we've seen, it may publish its reasons in writing on the internet.

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[256] See section 97 of the Commonwealth *Family Law Act 1975*. See also section 212 of the WA *Family Court Act 1997*.

[257] See section 121 of the Commonwealth *Family Law Act 1975*. See also section 243 of the WA *Family Court Act 1997*.

[258] See section 61(1) of the SAT Act.

[259] Section 17(1) of the GA Act says that Schedule 1 has effect with respect to SAT proceedings commenced under that Act. Section 17(2) says that those provisions operate in addition to the provisions of the SAT Act.

[260] See clause 11(2) of Schedule 1 of the GA Act. It happened in *GCR* [2011] WASAT 44 at paragraph [58] and *K* [2018] WASAT 96 at paragraphs [21], [70] to [71] and [88].

[261] That said, sections 61(2) to (4) of the SAT Act give SAT other grounds on which it can exclude people from a hearing, including the media. One ground, for instance, is "to avoid endangering the physical or mental health or safety of any person". There may be a question as to how section 17 and clauses 11(2) and (3) of Schedule 1 of the GA Act interact with sections 61(2) to (4) of the SAT Act. Section 5 of the SAT Act says that if there is any inconsistency between the SAT Act and an enabling Act, the latter prevails. The GA Act is an "enabling Act" because it confers jurisdiction on SAT (see the definition of "enabling Act" in section 3(1) of the SAT Act).

[262] See section 77 of the SAT Act. Section 80 provides for reasons to be restricted in some rare circumstances.

This may be in place of oral reasons,[263] or in addition to oral reasons.[264] But as per family law cases, clause 12 says the media normally can't identify the parties, their relatives or the witnesses in any account of any proceedings, nor of any part of any proceedings, commenced under the GA Act, though they can apply for permission to do so.[265]

The Supreme Court has said that the provisions in clause 12 "indicate the need to exercise sensitivity and to respect the privacy of any person associated with such proceedings".[266] As discussed earlier, people may not want to apply to SAT if they thought that their family member's face and dementia diagnosis would end up on the news.

It's a partial exception to the principle of open justice and is a restriction on speaking openly, though it isn't unique. We've seen what happens in family law proceedings, but there are other examples. If a person is charged with a sexual offence, the criminal court may suppress the name of the alleged victim. An assessor of criminal injuries compensation can – and regularly does – restrict the publication of proceedings under the *Criminal Injuries Compensation Act 2003*.[267] Children in the Children's Court of WA usually can't be identified publicly.[268]

Section 112 of the GA Act governs access to documents (or material) lodged with or held by SAT for the purposes of an application made under that Act. There are three broad situations:[269]

1. The person who's the subject of the proceedings, or the represented person, can access these documents for the purposes of the proceedings, unless SAT orders otherwise.[270]

2. Apart from medical opinions, any other party to the proceedings can access these documents for the purposes of the proceedings, unless SAT orders otherwise. There are more restrictions on the release of medical opinions if they don't concern that party.[271]

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[263] See, for instance, *AG* [2022] WASAT 4.
[264] See, for instance, *KZ* [2021] WASAT 24.
[265] See clause 12 of Schedule 1 of the GA Act.
[266] See *S v State Administrative Tribunal of Western Australia [No 2]* [2012] WASC 306 at paragraph [3].
[267] See section 64.
[268] See section 35 of the *Children's Court of Western Australia Act 1988*.
[269] See *KWD* [2011] WASAT 4 at paragraphs [86] to [88] and *CD* [2020] WASAT 41 at paragraphs [38] to [41].
[270] See section 112(1) of the GA Act.
[271] See section 112(2) of the GA Act. For an example, see the order made in *RC [No 2]* [2008] WASAT 180.

3. SAT also has the power to release the documents for other purposes, including to other people, but anyone who applies must give "very cogent reasons and demonstrate a particular need as to why the inspection should be allowed".[272]

If SAT grants access, it can place restrictions on who gets to see and use the documents or material, for what purposes and for how long.[273]

Section 112 is not the only provision in WA that restricts access to the documents of a court or tribunal.[274]

Before it's appointed as administrator, the Public Trustee may not have had anything to do with the represented person. To help, SAT normally gives the Public Trustee a copy of the application and sometimes other documents. SAT can make formal orders about this.[275] The Public Trustee in turn is subject to confidentiality provisions, which brings us to section 113.

Section 113 of the GA Act places limits on what guardians, administrators and other people performing functions under that Act can divulge to others. There are exceptions, such as if they're acting in the course of duty, the represented person consents (and is capable of consenting), or if the information can't reasonably be expected to lead to the identification of any person to whom it relates.[276]

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[272] See section 112(4) of the GA Act and *CD* [2020] WASAT 41 at paragraph [43]. Sometimes after a represented person's death, there's doubt about whether they had the capacity to make their will. The medical records held by SAT may help with that, even if they don't directly address that type of capacity. SAT has received multiple applications for access to documents or material for that reason. See *Public Trustee & Anor* [2005] WASAT 199, *LT (Deceased) and JTW* [2005] WASAT 264, *PV and AEV (Deceased)* [2006] WASAT 252, *Re VAH; ex parte DBH* [2006] WASAT 274, *Re RET (Deceased) and TT and RT* [2006] WASAT 327, *GF and MA* [2007] WASAT 28, *MW* [2007] WASAT 125, *EML* [2009] WASAT 191 and *JM* [2010] WASAT 194. In almost all of these published decisions, SAT did not grant access. Other decisions on access to SAT documents or material include *JH* [2005] WASAT 243, *JH* [2005] WASAT 245, *Re CH; ex parte ED* [2008] WASAT 94, *PJB* [2008] WASAT 190, *Re: NCK* [2009] WASAT 158, *Re WA and IA; ex parte AA* [2011] WASAT 60, *SH and EJH* [2013] WASAT 176, *KB and EB* [2014] WASAT 47, *KN* [2015] WASAT 104, *MS* [2015] WASAT 112 and *K* [2018] WASAT 27. SAT also considered section 112 in *AB and Public Trustee* [2015] WASAT 68, *LFG and Public Trustee* [2015] WASAT 71 and *Public Trustee* [2022] WASAT 63. In *JH* [2008] WASAT 119, SAT authorised the Public Advocate to release information to a community guardian.

[273] See *CD* at paragraphs [13] to [21] and *MG* [2015] WASAT 50 at paragraphs [66] to [70].

[274] See, for instance, Order 67B of the *Rules of the Supreme Court 1971*, discussed in *Woods v Alan John Anderson as executor of the estate of Beverley Dawn Chamberlain* [2023] WASC 136.

[275] See *JS* [2018] WASAT 120.

[276] Further exceptions, and the law relating to the Public Trustee, are not discussed here.

The President of SAT, Justice Pritchard, has explained further why there are such strict requirements of confidentiality in the GA Act:

> "The nature and extent of these protections for information held by the Tribunal under the GA Act is not surprising. The jurisdiction of the Tribunal under the GA Act is one in which the Tribunal receives personal information of the most sensitive kind. The provisions of the GA Act relating to the confidentiality of that information reinforce two important policies. The first is the protection of the privacy of the persons involved in the proceedings before the Tribunal, and in particular, of the proposed represented person or the represented person (as the case may be). The second is the public interest in the integrity of the Tribunal's processes, which relies on the ability to obtain sensitive information from a variety of sources.
>
> One of the sources of information available to the Tribunal under the GA Act is the proposed represented person himself or herself. The views of the proposed represented person are one of the considerations to which the Tribunal is obliged to have regard, to the extent that it is possible to obtain those views. If the willingness of proposed represented persons to be frank with the Tribunal in hearings were to be eroded by a lack of confidence in the privacy of their sensitive personal and health information, that would compromise the integrity of the Tribunal's processes.
>
> Furthermore, medical professionals and service providers (such as social workers, or aged care workers) are regularly asked to provide their opinion in relation to matters relating to the Tribunal's exercise of its functions under the GA Act, such as the capacity of a proposed represented person to make decisions relating to their personal care, or relating to their estate. The Tribunal's ability to exercise its functions under the GA Act is dependent on the willingness of those persons to provide their opinions on such matters. There is no doubt that the candour with which those opinions are expressed, and the willingness of those persons to provide their opinions other than by compulsion, would be jeopardised if the confidentiality of such information was not able to be protected by the Tribunal."[277]

It appears that in WA, a media outlet has only once applied for permission to identify parties in proceedings under the GA Act. In that case, the Supreme Court of WA allowed it to do so.[278] Justice Hill considered the reasons for the confidentiality provisions and said that the Supreme Court had "a broad discretion". Her Honour referred to "careful attention to be given as to

[277] See *CD* [2020] WASAT 41 at paragraphs [35] to [37]. Footnotes omitted.
[278] See *Australian Broadcasting Corporation v Public Trustee* [2022] WASC 85 and clause 12(8)(d) of Schedule 1 of the GA Act.

whether the identity of someone and their private information should be disclosed to the public and whether this is the right thing to do".[279]

Justice Hill identified some of the relevant factors as:

- the public interest in personal privacy;
- the public interest in freedom of communication;
- the position (if known) of the person who is the subject of any application;
- whether there is any opposition to the application;
- whether the publication is in the best interests of the party the subject of the application;
- whether the party consents to the application;
- whether the welfare of the person will improve or suffer if the publication is allowed;
- how publication will impact on any relevant relationships;
- whether there is any opposition to orders being made; and
- whether there is public interest in the publication.[280]

Justice Hill gave permission for a number of reasons. In part, it was because the represented person had died some years earlier, her adult children had consented to the application and neither the Public Trustee, nor anyone else, appeared before her Honour to object to it.[281] The court required the media outlet to give an undertaking that it would not, in broadcasting any report of the SAT proceedings, disclose medical or any other personal information about the represented person beyond that which was necessary to provide a fair and accurate report.[282]

SAT also has the power to grant permission.[283] Presumably, it would apply similar considerations.

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[279] See paragraph [36].
[280] See paragraph [37].
[281] See paragraphs [39] to [41].
[282] See paragraph [41].
[283] See clause 12(8)(d) of Schedule 1 of the GA Act. We won't go here into the extent that courts other than the Supreme Court might use this provision.

SAT has noted that the confidentiality provisions in the GA Act:

- contain criminal sanctions for their breach, which emphasises their seriousness;[284] and
- have been the subject of general criticism.[285]

[4.13] Does SAT have to accept all medical evidence it receives?[286]

At common law, the body that has to make the findings of fact must form its own judgment upon all of the evidence presented to it. It must have regard to the expert opinions before it, but these are not conclusive. Although SAT isn't bound by the rules of evidence, the same considerations should apply.[287]

The case of *TJC*[288] concerned a young adult who had a brain injury at birth. His mother, father and grandmother all wanted to be his guardian. A psychologist made a report and gave evidence before SAT that was favourable to the mother. SAT, at least generally speaking, accepted what he said.[289] The grandmother appealed.[290] The Supreme Court was critical of the weight SAT placed on this evidence. Amongst other things, the psychologist only saw the young adult for an hour, which seemed highly unlikely to be enough for someone with his disabilities. There was no formal assessment of his ability to express a view about where and with whom he wished to live. He was also with his mother, which may have given him a sense of security, and may have been likely to colour any responses he gave.[291]

Also, at common law, a finder of fact can prefer direct evidence given by an eye-witness over the opinion of an expert.[292] For example, in a personal injuries case, a doctor may give an expert opinion that a person can't lift heavy objects, but there may be video footage of the person

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[284] See *NE* [2023] WASAT 30 at paragraph [89].
[285] See *NE* at paragraph [107]. For a criticism made after that decision, see the Final Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Volume 6, *Enabling autonomy and access* (September 2023) at [2.6].
[286] The phrase "medical evidence" is used here in its broadest sense. It could include, for instance, evidence from a psychologist or occupational therapist.
[287] See *LGM* [2016] WASAT 45 at paragraph [89].
[288] [2007] WASAT 105.
[289] See paragraph [86] of SAT's original decision.
[290] See *'G' v 'K'* [2007] WASC 319.
[291] See paragraph [86] of the Supreme Court's decision.
[292] See *Hollingsworth v Hopkins* [1967] Qd R 168 at page 172 and the Supreme Court of WA case of *Bartlett-Torr v Madgen* [1993] Library 930310 at page 10.

doing just that. A court is free to accept the video and reject the doctor's opinion. SAT should be free to do the same.[293]

The High Court has said that "opinion evidence can never have the same weight as direct evidence of an objective fact, evidence which must depend entirely upon the credibility of the witness".[294]

SAT can therefore take into account its own observations of, and interactions with, the person who is the subject of the hearing, and the evidence of friends and family and other people in the person's life.[295] Their credibility needs to be assessed. Sometimes, their actions might taint what they say. In the case of *PP*,[296] SAT noted that as recently as five months before the hearing, the children of the person who was the subject of the hearing "must have at least found him capable of distributing a large portion of his inheritance to them because that particular transaction is not under challenge".

In the case of *K*,[297] SAT considered the formal testing on the person by professionals and his brain imaging, but also took into account that he'd had rotting food in his house, a mixture of dirty and clean clothing strewn on the floor, troubles maintaining a hygienic home and adequate nutrition, bills unpaid or double-paid, and episodes of getting lost in the community.

Medical evidence may not always go one way.[298] The person who's the subject of the hearing may have both a GP and a specialist (such as a geriatrician), who may express different views. The geriatrician may have more specialised skills, but the GP may (and it's only a "may") have known the person much longer and seen the person far more often.[299] The specialist may not

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[293] In *W* [2018] WASAT 61 at paragraphs [48] and [86] to [87], though, SAT decided not to view a video-recording of someone signing an enduring power of attorney and an enduring power of guardianship, preferring instead to rely on medical evidence.
[294] See *Beim v Collins* (1954) 28 ALJ 331 at page 332.
[295] See *LGM* [2016] WASAT 45 at paragraphs [89] to [105], *LS* [2018] WASAT 64 (in particular at paragraphs [84] to [93]) and *PG* [2021] WASAT 81 at paragraphs [79] to [95].
[296] [2016] WASAT 133 at paragraph [88].
[297] [2023] WASAT 32 at paragraphs [7] and [15].
[298] See, for instance, *RC and LP and AC* [2006] WASAT 370 at paragraphs [68] to [71], *TL* [2011] WASAT 42 at paragraph [41] and *MT* [2017] WASAT 132 at paragraphs [111] to [134]. In *MH* [2022] WASAT 74 at paragraph [106], SAT found that a doctor had not known the represented person for long, had uncertain opinions as to her mental capacity and had not undertaken any assessment of her cognitive capacity. SAT preferred the evidence of two other doctors.
[299] In *LM* [2023] WASAT 15 at paragraph [36], SAT preferred the opinions of two people with greater expertise in relation to cognitive capacity than the opinion of a GP.

have seen the person for some time, if at all.[300] In *BC and NR*,[301] SAT preferred the evidence of a neurologist who'd seen the person over a number of years to a consultant psychiatrist who'd assessed her only once as an acute patient in hospital.

One medical expert may change their view in light of what another medical expert says.[302]

A person's condition can change, so it can be hard to rely solely on assessments that were done some years ago, even if the disability is considered to be "static".[303] SAT may refer to older medical evidence in conjunction with more recent evidence.[304]

It's wrong to assume that anyone is infallible. Not so long ago, homosexuality was considered a mental disorder that could be "treated" with electroconvulsive therapy or electric shocks. If today's medical profession had all the right answers, it would be the first generation in history that did.

That all said, SAT does place special weight on medical evidence. In *MH*,[305] SAT said:[306]

> "In so far as the GA Act requires the Tribunal to determine whether a person is incapable of looking after their own health and safety or unable to make reasonable judgments in respect of matters relating to their person, that judgment does not depend upon whether the Tribunal agrees or disagrees with a person's decisions. As the Tribunal has observed on many occasions, people with the capacity to make decisions as to their personal and financial affairs are entitled to make decisions which others may regard as unreasonable or unwise. Consequently, the Tribunal will ordinarily look to medical evidence, or evidence from service providers experienced in dealing with people who lack decision-making capacity, in order to make a determination as to whether a person lacks the capacity to make decisions about their personal or financial affairs."

While medical evidence produced to SAT in guardianship and administration proceedings is regularly obtained for the purpose of those proceedings, SAT may also rely on evidence that

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[300] See *AM* [2015] WASAT 87 at paragraph [80], citing *Edna May Collins by her next friend Glenys Lesley Laraine Poletti v May* [2000] WASC 29 at paragraph [63], and *IZ* [2022] WASAT 85 at paragraph [22].
[301] [2016] WASAT 67 at paragraphs [27] to [45] and [58] to [59].
[302] See, for instance, *PG* [2021] WASAT 81 at paragraph [73] and *GEG* [2022] WASAT 121 at paragraph [53].
[303] See *JNS* [2017] WASAT 162 at paragraphs [25] to [26].
[304] See, for instance, *GEG* [2022] WASAT 121 at paragraphs [41] to [56].
[305] [2022] WASAT 74.
[306] See paragraph [120]. Footnote omitted.

was originally sought for a different purpose.[307] Caution must be exercised when a health professional has not been specifically asked to address the issues that SAT needs to decide.

Here are some questions to consider, when evaluating an expert medical opinion:

- Has this expert seen the person?
- If so, when and how often?
- Were others present at the time, and if so, who?
- How thorough is the expert's assessment?
- Was the expert independently appointed?
- Does the expert's report tally with the observations of people who are close to the person?
- To what extent is the expert's opinion based on the notes of others?
- How long ago was the opinion given?
- Could there have been a change in circumstances since the opinion was given?
- Was the opinion obtained for the purpose of the proceedings?
- If not, to what extent does the opinion address the issues that SAT needs to decide?

[4.14] How useful is the Mini-Mental State Examination (MMSE)?

SAT has described the MMSE as "a broad brush screening test very commonly used by general practitioners to screen patients for signs of the onset of cognitive decline".[308]

In an MMSE, the person may be asked to subtract 7 from 100 and then 7 from the result four more times. A wrong answer could mean that the person is bad at maths, rather than be a sign of dementia. Alternatively, a person could be asked to spell a word backwards. A lot of people have difficulty spelling words forwards. They may not have had much education. And what

[307] See, for instance, *GEG* [2022] WASAT 121 at paragraphs [73] and [91], in which the evidence was originally obtained to determine the represented person's fitness to stand trial in criminal proceedings.
[308] See *TM* [2021] WASAT 92 at paragraph [44].

about those for whom English is not their native language?[309] On the other hand, people with well-developed language skills and more education may be judged to have a greater level of capacity than they actually do.[310]

It also may be possible to "prime" some people for an MMSE. Conversely, some people may get nervous when they do tests, particularly if they think (perhaps correctly) that a lot rides on the results.

The MMSE needs to be considered in the context of other evidence and may require close scrutiny.[311] It may be worth checking what questions the person got wrong.

Once at a professional development seminar, a person who may or may not have written this book performed the MMSE on a group of lawyers, asking different questions to different people. Between them, these lawyers only scored 25 out of 30.[312]

The usefulness of this test may also depend on the type of mental disability of the person being examined. In *MGP*,[313] the person who was the subject of the hearing was diagnosed with chronic paranoid schizophrenia. SAT acknowledged that formal cognitive assessment such as an MMSE might be used to assess dementia or an acquired brain injury, but that it "is not a useful test for the assessment of capacity" for a person diagnosed with a mental illness.[314]

In *BSL*,[315] the represented person did an MMSE and performed within the normal range, but other evidence indicated that he still had cognitive difficulties from an acquired brain injury. He was also hearing "voices". SAT considered that he still met the requirements for an administration order.[316]

In *PB*,[317] the person who was the subject of the hearing got 24 points on an MMSE out of a possible 30, but he couldn't undertake parts of the test because of physical disabilities, so in

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[309] See the discussion in *ES* [2020] WASAT 98 at paragraph [40].
[310] See *NB* [2023] WASAT 88 at paragraph [29].
[311] For a case on the limited use of an MMSE, see *GG* [2019] WASAT 4 at paragraphs [155] to [156]. For discussions of the Addenbrooke's Cognitive Examination (ACE) test and its relationship to the MMSE, see *TM* [2021] WASAT 92 at paragraphs [46] to [48] and *K* [2023] WASAT 32 at paragraph [8].
[312] Tactfully, the organisation for which these lawyers worked is not mentioned here, but it makes frequent appearances in SAT.
[313] [2020] WASAT 65.
[314] See paragraph [34]. See also paragraph [40].
[315] [2021] WASAT 69.
[316] See also *K* [2023] WASAT 32 at paragraphs [8] to [9], in which the person's relatively good language skills and normal MMSE score did not reflect his dementia.
[317] [2020] WASAT 121 at paragraph [74].

reality, his score was 25 out of 30. This helped SAT decide that the person didn't have a mental disability, though it wasn't the only evidence.[318]

In *BC and NR*,[319] the person who was the subject of the hearing only scored 18 out of 30 when she took an MMSE in hospital. SAT didn't think that this was a reflection of her true capacity. It noted that she scored 27 in another MMSE five months later, and had achieved scores relatively consistently since 2013.

Other tests that may be available include the Kimberley Indigenous Cognitive Assessment (KICA),[320] Rowland Universal Dementia Assessment Scale (RUDAS)[321] and Montreal Cognitive Assessment (MoCA).[322] The case of *LS*[323] goes through tests that were given to a young person with a brain injury.

In theory, it would be more accurate for a clinician to spend a month with a person, to see how they function in the real world, but in practice, that would be hard to do.[324]

[4.15] If SAT makes a guardianship or administration order, can they be limited or plenary?

They can be either.[325] A plenary order gives broad powers, though they have some in-built restrictions. A limited order is confined to the functions that SAT specifies.[326]

SAT has to impose the least restrictions possible on the person's freedom of decision and action,[327] though again, in some cases, the person may not have any measure of such freedom.

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[318] For other examples of SAT taking into account the result of an MMSE, see *JCM* [2018] WASAT 126 at paragraphs [31] and [66] and *IF* [2021] WASAT 59 at paragraph [13].
[319] [2016] WASAT 67 at paragraph [59].
[320] See *SA* [2020] WASAT 96.
[321] Used in *JCM* at paragraphs [31] and [66].
[322] Used in *JCM* at paragraphs [31] and [66] and *MH* [2022] WASAT 74 at paragraphs [108] and [110].
[323] [2018] WASAT 64 at paragraphs [60] to [77].
[324] See *NB* [2023] WASAT 88 at paragraph [30].
[325] For guardians, see section 43 of the GA Act. For administrators, see sections 69, 71(1) and 71(3).
[326] For more on the powers of guardians and administrators, see Chapter 6.
[327] See sections 4(5) and (6) of the GA Act. Section 4(6) is discussed in *TL v Office of the Public Advocate* [2020] WASC 455 at paragraph [68].

Section 4(5) of the GA Act specifically states that SAT can't appoint a plenary guardian if SAT thinks that a limited guardian would meet the person's needs. There isn't an equivalent provision for administrators, but "any order made should reflect the needs of the person".[328]

Plenary administration orders are much more common than plenary guardianship orders.[329] There usually isn't a need for guardianship orders to be as broad as that. The extent of an order doesn't necessarily reflect the level of a person's disability. In some cases, it might reflect the opposite. A nursing home resident with advanced dementia is unlikely to need a guardian to decide whether they should work. A person living in the community with a milder disability might need one.

In the case of *HDB*,[330] SAT made plenary guardianship and administrations orders for an elderly woman with dementia because the behaviours of one of her sons were "sufficiently unpredictable to warrant an authority to deal with any situation" that may have arisen for her.

It's quite common for guardianship orders to be limited to deciding:

- where, and with whom, the represented person should live (accommodation);
- medical and dental treatment; and
- access to services.[331]

Every case that SAT hears, though, is different. The circumstances of every person who's the subject of a SAT hearing are different. In *RV and PL*,[332] SAT made a guardianship order. It didn't include consenting to medical or dental treatment, as there was a less restrictive alternative in place, but did include determining the contact the represented person should have with others.

[328] See *GSW and HSH* [2011] WASAT 40 at paragraph [13].
[329] For examples of when SAT made plenary guardianship orders, see *MH and HH* [2013] WASAT 59 and *LN* [2014] WASAT 168.
[330] [2014] WASAT 108 at paragraph [75].
[331] See, for instance, *I* [2018] WASAT 29, *JW* [2019] WASAT 115 and *DP* [2020] WASAT 37.
[332] [2006] WASAT 91 at paragraphs [59] to [61].

At times, it may be easier to say what an administration order doesn't cover, rather than say what it does. Sometimes, when making such orders, SAT doesn't include the represented person's pension[333], wages[334] or both.[335]

[4.16] Who can SAT appoint as guardian or administrator?

Guardians

SAT can appoint:

- one guardian;
- two or more guardians to act jointly;[336]
- one guardian to perform some functions and another to perform other functions;[337] or
- a combination of the above.[338]

Generally speaking, a guardian must be an adult individual who has consented to act and who, in SAT's opinion, will act in the best interests of the represented person and is otherwise suitable to act.[339] As far as possible, SAT must take into account the desirability of preserving

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[333] See *AL* [2012] WASAT 206 at paragraph [79], *KB* [2013] WASAT 108 at paragraph [48] and *NM* [2020] WASAT 134 at paragraphs [80] and [82]. Sometimes, SAT makes a direction or request about such matters (see **[9.5]**).

[334] See *Office of the Public Advocate and GC* [2009] WASAT 250 at paragraphs [12], [32] and [34].

[335] See *JH* [2014] WASAT 175 at paragraph [46].

[336] As contemplated by section 53 of the GA Act. See, for instance, *KB* [2013] WASAT 108 at paragraphs [49] to [54]. This is done "usually only in circumstances where the Tribunal can be confident that the guardians are likely to be able to work together, and to reach unanimous views about the decisions which need to be made for a represented person" (see *LM* [2023] WASAT 15 at paragraph [52]).

[337] This happened, for instance, in:

- *DB & DB* [2007] WASAT 2005
- *TJC* [2009] WASAT 130
- *HL and HS* [2012] WASAT 118
- *VM* [2013] WASAT 154
- *AM* [2015] WASAT 87
- *GB* [2020] WASAT 61
- *RK* [2022] WASAT 112.

[338] See, for instance, *JH* [2016] WASAT 20.

[339] See section 44(1) of the GA Act.

existing relationships within the represented person's family, the compatibility[340] of the proposed guardian with the represented person and any administrator, the represented person's wishes and whether the proposed guardian will be able to perform the role.[341]

Administrators

SAT can appoint:

- one administrator;
- two or more administrators to act jointly;[342]
- one administrator to perform some functions and another to perform other functions;[343] or
- a combination of the above.

Generally speaking, an administrator must be an adult individual or a corporate trustee who has consented to act and who, in SAT's opinion, will act in the best interests of the represented person and is otherwise suitable to act.[344] As far as possible, SAT must take into account the compatibility[345] of the proposed administrator with the represented person and any guardian, the represented person's wishes and whether the proposed administrator will be able to perform the role.[346]

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[340] In *PV* [2020] WASAT 40 at paragraph [115], SAT quoted two meanings of "compatible" from the *Macquarie Online Dictionary*.

[341] See section 44(2) of the GA Act. In *TM* [2021] WASAT 92 at paragraphs [135] to [136], SAT didn't re-appoint two family members as administrators or guardians because of the represented person's unwillingness to co-operate with them.

[342] As contemplated by section 75 of the GA Act, but SAT is "ordinarily loath" to do so (see *LM* [2023] WASAT 15 at paragraph [51]).

[343] This happened, for instance, in:

- *Public Trustee and PJH* [2006] WASAT 81
- *CF* [2009] WASAT 145
- *RJK* [2019] WASAT 109
- *BZ* [2020] WASAT 159.

[344] See section 68(1) of the GA Act. In *AG* [2022] WASAT 4, SAT didn't appoint the represented person's son as administrator, partly because the member didn't believe that the son could act in the best interests of his father (see paragraphs [60] to [79]).

[345] In *PV* [2020] WASAT 40 at paragraph [115], SAT quoted two meanings of "compatible" from the *Macquarie Online Dictionary*.

[346] See section 68(3). For an example, see *FC* [2012] WASAT 61 at paragraphs [37] to [49]. In *AG* [2022] WASAT 4, SAT didn't appoint the represented person's son as administrator. The

In at least some cases, it's better to have just one person or organisation managing (in one form or other) a person's finances.[347]

Sometimes, the same people are appointed as both guardian and administrator.[348]

Conflict of interest

Section 44(1)(b) of the GA Act stops someone being appointed guardian whose interests conflict or may conflict with the interests of the represented person.[349] Being a relative doesn't, by itself, create a conflict.[350]

SAT has described section 44(1)(b) as "broadly stated"[351] and "an onerous provision",[352] but has noted that there isn't a similar provision for administrators.[353]

A conflict of interest therefore doesn't, in itself, render a person or body unsuitable to be an administrator. SAT has said:[354]

> "In the appointment of an administrator, there is a statutory preference in the GA Act for the appointment of a person who is close to the represented person (see, in particular, s 68(3)(a) and s 69(3)(b)), and it is not uncommon for potential financial

represented person's wishes were relevant in two ways. Member Marillier believed that the son would not act in the best interests of his father, due to his disregard for his father's wishes. She also did not accept that the son's appointment would accord with the father's wishes, but found that the appointment of the Public Trustee did accord with them. (See paragraphs [78] to [79].)

[347] See *PMB and LJB* [2015] WASAT 96 at paragraph [47] and *SAL and JGL* [2016] WASAT 63 at paragraph [32].

[348] See sections 44(4) and 68(4) of the GA Act.

[349] See, for instance, *MK* [2013] WASAT 146 at paragraphs [26] to [27] and [30] to [31], *C* [2019] WASAT 98 at paragraphs [44] to [45] and [48], *JW No 2* [2019] WASAT 117 at paragraph [150] and *MH* [2022] WASAT 74 at paragraph [171]. For cases concerning paid carers, see:

- *LA* [2006] WASAT 297 at paragraphs [50] to [58], which was based, in part, on section 119(3)(c) of the GA Act, which no longer exists
- *JW* [2007] WASAT 252 at paragraphs [23] to [35]
- *GB* [2017] WASAT 86 at paragraphs [79] to [82]
- *VD* [2023] WASAT 19 at paragraphs [57] to [59].

[350] See section 44(3).

[351] See *GSW and HSH* [2011] WASAT 40 at paragraph [96].

[352] See *DT and EER* [2013] WASAT 38 at paragraph [54].

[353] See *DT and EER* at paragraph [54] and *JL* [2023] WASAT 20 at paragraph [158].

[354] See *DT and EER* at paragraph [55].

> conflicts of interests to be intrinsic to those relationships. Take, for example, a spouse or child appointed as administrator who is also a beneficiary of the will of a represented person, or where an administrator remains reliant on the income of a represented person or continues to live in a represented person's property. These circumstances do not exclude the person from being appointed as administrator but there is a need to manage any conflict that arises and which may compromise the making of a best interests decision for a represented person."[355]

If the represented person owns assets jointly with, say, a spouse, that might be a reason to appoint the spouse as administrator.[356]

Sometimes, though, the conflict of interest is so great that SAT appoints a different person or body.[357] Split appointments may also be a way of managing this.[358]

Choices of guardian or administrator

The choices of guardian or administrator, in essence, are:

Family and friends

The GA Act was designed, in part, to make it easier for people to look after their loved ones, both as guardians and administrators. With respect to guardians, SAT has said:

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[355] See also *JL* [2023] WASAT 20 at paragraphs [157] to [159]. For an example of SAT managing a conflict of interest, see *GF* [2016] WASAT 134.

[356] In *RK* [2022] WASAT 112, the person the subject of the hearing owned assets jointly with his wife, who was the donee of his enduring power of attorney. SAT said at paragraph [163] that appointing the Public Trustee as administrator in those circumstances "would give rise to real practical difficulties". For this and other reasons, SAT didn't appoint an administrator. Instead, the wife remained as the donee of the enduring power of attorney.

[357] See:

- *KB and EB* [2014] WASAT 47 at paragraph [57]
- *AS* [2018] WASAT 1
- *KK* [2021] WASAT 85 at paragraph [62]
- *VD* [2023] WASAT 19 at paragraphs [100] to [101]
- *NE* [2023] WASAT 30.

[358] See, for instance:

- *Public Trustee and PJH* [2006] WASAT 81
- *CF* [2009] WASAT 145
- *RJK* [2019] WASAT 109
- *BZ* [2020] WASAT 159
- *IC* [2023] WASAT 33 at paragraphs [40] to [46].

Split appointments were also discussed in *NE* [2023] WASAT 30 at paragraphs [138] to [141].

- The GA Act has "an intentional bias towards the appointment [as guardian] of a family member of the person or someone close to the person".[359]

- "It is family members who are expected mainly (but not exclusively) to be appointed guardians in the operation of the GA Act."[360]

- The GA Act "provides for a statutory preference of individuals involved in the life of the represented person to be appointed that person's guardian rather than the guardian of last resort".[361]

- "[F]amilies are generally speaking much better placed than the Public Advocate to make intimate medical decisions for their loved ones. They are most obviously more familiar with the person's medical needs and are more readily available."[362]

In the case of *AG*,[363] SAT said that medical treatment decisions for an 85-year-old person with dementia and living in aged care were likely to involve major decisions regarding end-of-life care and ceilings of care. It considered it important that such decisions be made, where possible, by someone familiar with the person's wishes in that regard.[364]

As explained earlier under "Conflict of interest", when it comes to administrators, there's even more of a preference for SAT to appoint family members or friends.[365]

Sometimes, though, none of them want to take on those roles. If they do want to, depending on the circumstances, they also might not be suitable if, for instance:

- they're fighting with other family members and/or friends;[366]

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[359] See *T* [2020] WASAT 76 at paragraph [75].
[360] See *DMS* [2008] WASAT 14 at paragraph [87], referring to what was said in Parliament about the issue.
[361] See *JW* [2007] WASAT 252 at paragraph [35].
[362] See *WS* [2018] WASAT 86 at paragraph [93].
[363] [2022] WASAT 4 at paragraph [54].
[364] See also *DB* [2007] WASAT 243 at paragraph [38].
[365] See *DT and EER* [2013] WASAT 38 at paragraph [55].
[366] See:
- *RC and LP and AC* [2006] WASAT 370 at paragraphs [82] to [85]
- *EA and KD, TA, LA, BA & VT* [2007] WASAT 3 at paragraphs [69] to [71]
- *AP* [2007] WASAT 230
- *RC [No 2]* [2008] WASAT 180 at paragraphs [64] to [67]
- *JC and BP* [2008] WASAT 184 at paragraphs [60] to [61]
- *RS and JEM* [2009] WASAT 202 at paragraphs [35] and [36]

- they're at odds with the people who provide care and/or treatment to the represented person;[367]
- they don't follow professional advice;[368]
- they aren't frank with SAT;[369]
- the represented person has a paranoid fear of them;[370]
- it isn't what the represented person wanted or would want;[371]

- *GSW and HSH* [2011] WASAT 40
- *PH and NJM* [2011] WASAT 163
- *AS* [2011] WASAT 203 at paragraphs [59] to [63]
- *QMW* [2012] WASAT 163 at paragraph [41]
- *HAH* [2013] WASAT 134 at paragraphs [60] to [65]
- *MK* [2013] WASAT 146 at paragraphs [26] to [30]
- *KB and EB* [2014] WASAT 47 at paragraph [56]
- *EDN* [2016] WASAT 34 at paragraphs [30] to [37]
- *LM* [2023] WASAT 15 at paragraphs [63] to [64].

[367] See:

- *SM and HJM* [2011] WASAT 49 at paragraphs [48] to [58]
- *MW and SRB* [2011] WASAT 101
- *JMM* [2015] WASAT 54 at paragraph [61]
- *SM* [2015] WASAT 132 at paragraphs [67] to [71]
- *TS* [2019] WASAT 56 at paragraphs [37] and [39]
- *MH* [2022] WASAT 74 at paragraphs [178] to [183].

[368] See *RH* [2009] WASAT 159 at paragraph [18] and *SM and HJM* [2011] WASAT 49 at paragraphs [48] to [58]. For a discussion on a guardian considering alternative forms of treatment, see *DD and GV and MV* [2015] WASAT 49 at paragraphs [84] to [97].

[369] See *JB* [2008] WASAT 159 at paragraphs [43] to [44] and *MK* [2013] WASAT 146 at paragraphs [26] to [27].

[370] See *SMYM (also known as SMPM, SMY and MYM)* [2007] WASAT 131 at paragraph [65].

[371] See:

- *RM* [2006] WASAT 46 at paragraph [78]
- *RV and PL* [2006] WASAT 91 at paragraph [63]
- *EA and KD, TA, LA, BA & VT* [2007] WASAT 3 at paragraph [69]
- *TM* [2021] WASAT 92 at paragraphs [135] to [136]
- *AG* [2022] WASAT 4 at paragraphs [78] to [79].

- the represented person doesn't want to have contact with them;[372]
- they've done things that weren't in the represented person's best interests;[373]
- there's a need for a professional with experience and/or expertise;[374]
- SAT doesn't think they'd act in the represented person's best interests;[375]
- they have a "history of imprudent financial management";[376]
- they are, or have been, bankrupt;[377]
- there are serious allegations that they've misused the represented person's assets;[378]
- they lack insight into the represented person's disability and/or needs;[379]

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[372] See *BJT* [2022] WASAT 73 at paragraph [59].
[373] See *QW* [2007] WASAT 23 at paragraph [38].
[374] See:
- *KB* [2013] WASAT 108 at paragraph [55]
- *MW* [2015] WASAT 106 at paragraphs [20] to [25]
- *K* [2023] WASAT 32 at paragraphs [38] and [40]
- *LM* [2023] WASAT 15 at paragraphs [70] to [71].

[375] See:
- *Mr N and Mrs N* [2006] WASAT 267 at paragraph [41]
- *JB* [2008] WASAT 159 at paragraphs [48] to [49]
- *QMW* [2012] WASAT 163 at paragraph [43]
- *WR and HR* [2014] WASAT 107 at paragraph [38]
- *AG* [2022] WASAT 4 at paragraphs [78] to [79]
- *LM* [2023] WASAT 15 at paragraph [61].

[376] See *KF & Anor* [2006] WASAT 47 at paragraph [33].
[377] See *JA* [2018] WASAT 68 at paragraphs [91] to [92].
[378] See *AS* [2011] WASAT 203 at paragraphs [58] and [62] to [69], *KRM* [2017] WASAT 135 at paragraphs [74] to [80] and *GYM* [2017] WASAT 136 at paragraphs [76] to [83].
[379] See:
- *Mr N and Mrs N* [2006] WASAT 267 at paragraph [38]
- *QW* [2007] WASAT 23 at paragraph [37]
- *RP and PC* [2007] WASAT 196 at paragraphs [45] to [48]
- *RH* [2009] WASAT 159 at paragraph [18]
- *AS* [2009] WASAT 183 at paragraphs [51] to [55]
- *QMW* [2012] WASAT 163 at paragraph [43]
- *JA* [2018] WASAT 68 at paragraph [88]

- it could damage their relationship with the represented person;[380]
- they have, or are suspected of having, sexually abused the represented person;[381]
- they themselves may have a mental disability and/or physical or mental health issues;[382]
- they themselves are of advanced age;[383]
- there's a need for someone who can take a wholly objective view of the represented person's best interests;[384]
- they wouldn't be capable of performing the role;[385]
- in the case of an administrator, SAT doesn't think they'd submit accounts with the Public Trustee in a timely fashion;[386]

- *MH* [2022] WASAT 74 at paragraphs [172] to [177]
- *LM* [2023] WASAT 15 at paragraph [62].

[380] See:

- *FBP* [2008] WASAT 21 at paragraphs [48] to [53]
- *Ms G* [2017] WASAT 108 at paragraph [108]
- *AH* [2019] WASAT 2 at paragraph [40]
- *T* [2020] WASAT 46 at paragraph [29]
- *SE* [2020] WASAT 168 at paragraphs [31] to [32]
- *K* [2023] WASAT 32 at paragraphs [38] and [40]
- *LM* [2023] WASAT 15 at paragraph [54]
- *VD* [2023] WASAT 19 at paragraphs [62] to [63].

[381] See *Re VH; ex parte VH* [2012] WASAT 86 at paragraphs [70] and [75] and *AB* [2019] WASAT 126. The Sexual Assault Resource Centre is one of the available services for people who have been sexually assaulted.

[382] See *Re VH; ex parte VH* at paragraph [73] and *MH* [2022] WASAT 74 at paragraphs [184] to [187].

[383] See *KF & Anor* [2006] WASAT 47 at paragraphs [33] and [35].

[384] See *RM* [2010] WASAT 152 at paragraph [65] and *MW* [2015] WASAT 106 at paragraphs [20] to [25].

[385] This could be said of many cases, but see in particular *VD* [2023] WASAT 19 at paragraphs [66] to [69] and [102].

[386] See *VD* [2023] WASAT 19 at paragraph [102]. For more on the obligation to submit such accounts, see **[4.23]**.

- they haven't adequately communicated with family members about decisions in relation to the represented person;[387]
- in the case of an administrator, they're not compatible with the guardian;[388]
- in the case of a guardian, they're not compatible with the administrator.[389]

In some cases, family members or friends might still be appointed, despite one of these things. For instance, in *VS*,[390] SAT appointed a daughter as guardian, despite her fighting with her sister.[391] In *RK*,[392] SAT considered that because of family conflict, the represented person's wife wasn't suitable to make contact decisions, but appointed her as guardian to make treatment, services and accommodation decisions. Again, every case that SAT hears is different. The circumstances of every person who's the subject of a SAT hearing are different.[393]

SAT might appoint a family member or friend as guardian, but not as administrator. It could also be the other way around.[394]

A guardian or administrator doesn't have to live in WA. If they don't, it can affect their suitability. In one matter from 2008, SAT decided that a family member from outside WA wasn't suitable to be guardian.[395] Perhaps the case would have been decided differently in a post-COVID-19 world of Zoom and Microsoft Teams. In another matter from 2011, two siblings from New South Wales were considered suitable.[396] In 2018, SAT found a represented person's brother to be unsuitable as administrator, partly because he was living in Europe at that time.[397] In 2021, SAT didn't appoint a brother as guardian or administrator, partly because he lived in Myanmar, which made "the practicalities of investigating alternative

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[387] See *LM* [2023] WASAT 15 at paragraph [57].
[388] See *TL v Office of the Public Advocate* [2020] WASC 455 at paragraph [44] and *MM* [2016] WASAT 62 at paragraphs [110] to [112].
[389] See *DD and GV and MV* [2015] WASAT 49 at paragraphs [72] to [77].
[390] [2008] WASAT 160.
[391] See also *IT and AT* [2014] WASAT 34 at paragraphs [88] to [90], *JN and TD* [2016] WASAT 9 and *MH* [2022] WASAT 74.
[392] [2022] WASAT 112 at paragraphs [123] to [136].
[393] In *K* [2023] WASAT 32 at paragraphs [37] to [38] and [40], SAT was wary about appointing a friend who the represented person, when alone, did not appear to recall. However, there were other reasons for not appointing the friend.
[394] See *RC [No 2]* [2008] WASAT 180 and *Re: DPM* [2011] WASAT 128.
[395] See *GT and TC* [2008] WASAT 225 at paragraph [35].
[396] See *Re IPK; ex parte DK* [2011] WASAT 211 at paragraphs [76] and [81]. This issue was also raised in *NA* [2022] WASAT 118 at paragraph [38], though that dealt with an enduring power of guardianship. Enduring powers of guardianship are discussed more in Chapter 8.
[397] See *K* [2018] WASAT 96 at paragraphs [27] and [97].

accommodation or service provider options logistically challenging".[398] It might be harder to go after an administrator who misappropriates the represented person's assets if the administrator lives outside WA.[399]

Is it ever a problem having a guardian or administrator who lives in WA, but not near the represented person? WA is, after all, a very large state. If you drive north from Perth for more than 24 hours without stopping, you still won't be close to the Northern Territory border. In *AH*,[400] the represented person lived in Perth; her nephew lived in Bunbury (about two hours away by car). SAT said that it considered her guardian, at that time, needed to be available "regularly, readily and, more importantly, fairly quickly".[401] It didn't consider that living in Bunbury, by itself, made the nephew unsuitable.[402]

The Public Advocate and Public Trustee, who might otherwise be appointed, both operate out of Perth and don't have regional offices,[403] although Public Advocate staff normally try to see their regional clients at least once a year.[404]

Professional people

Some professionals such as accountants,[405] solicitors[406] or financial planners[407] may be appointed as administrators, but in their personal capacities. SAT can't, for instance, appoint "The Managing Partner for the time being of Law Firm X", but it can appoint Jane Smith, who happens to be the Managing Partner of that firm.

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[398] See *IH* [2021] WASAT 23 at paragraphs [38], [44] and [62].
[399] For more on the recovery of a represented person's assets, see Chapter 11.
[400] [2019] WASAT 2.
[401] See paragraph [39].
[402] See paragraph [40]. This issue was also raised in *NA* [2022] WASAT 118 at paragraph [38], though that dealt with an enduring power of guardianship. Enduring powers of guardianship are discussed more in Chapter 8.
[403] See the concerns raised in *LB* [2016] WASAT 126 at paragraph [79].
[404] COVID-19 temporarily suspended that.
[405] See:

- *JW* [2005] WASAT 249
- *LWL* [2008] WASAT 35 at paragraphs [91] to [98] and [136] to [144]
- *KRL* [2010] WASAT 187
- *NL and TKT* [2012] WASAT 121 at paragraphs [91] to [103].

It didn't happen in *JGN and CEN* [2006] WASAT 320.
[406] See *SC and SAS* [2005] WASAT 255.
[407] See *Re JCA; ex parte RD* [2012] WASAT 123.

Community volunteers

They're sometimes appointed as guardians under the Public Advocate's Community Guardianship program. The Office of the Public Advocate's website (www.publicadvocate.wa.gov.au) has more information on this.[408]

Trustee companies under the Trustee Companies Act 1987

They can be appointed as administrators.[409] The GA Act restricts when this can happen.[410]

The Public Advocate

The Public Advocate can only be appointed as guardian when there isn't anyone else willing and suitable to act,[411] or when it's jointly with someone else.[412] Sometimes, the Public Advocate is appointed to perform some functions and someone else is appointed to perform others.[413]

In practice, the Public Advocate is never appointed as administrator jointly with someone else. Otherwise, the Public Advocate can only be appointed as administrator when no other individual or corporate trustee is willing and suitable to act.[414] In practice, except in rare cases, the Public Trustee can and will do the job.[415] Sometimes, if the Public Trustee has a significant conflict of interest, the Public Advocate is appointed to perform some functions and the Public

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[408] For cases that talk about the development of the program, see:
- *Public Advocate and F* [2007] WASAT 183
- *DMS* [2008] WASAT 14
- *PN* [2008] WASAT 32 at paragraphs [11] to [12]
- *JH* [2008] WASAT 119 at paragraphs [9] to [10].

[409] See, for instance, *AG* [2007] WASAT 7, *PMB and LJB* [2015] WASAT 96 at paragraphs [32] to [49] and *VD* [2023] WASAT 19 at paragraph [111].

[410] See section 68(2) of the GA Act and the cases of *PMB and LJB* [2015] WASAT 96 at paragraphs [18] and [46], *RK* [2021] WASAT 13 at paragraphs [95] to [99] and *JH* [2021] WASAT 23 at paragraphs [77] to [99].

[411] See section 44(5) of the GA Act. For an example, see *TL v Office of the Public Advocate* [2020] WASC 455 at paragraph [43]. The Court in that case, at paragraphs [109] to [112] and [117], described some problems with being a guardian of last resort and the skill at which staff at the Office of the Public Advocate go about it.

[412] See section 44(5) of the GA Act. For an example, see *DM* [2012] WASAT 161 at paragraphs [73] to [76].

[413] See *MM* [2015] WASAT 78 at paragraphs [31] to [33] and [40] and *RK* [2022] WASAT 112 at paragraphs [123] to [136].

[414] See section 68(5).

[415] In *DN* [2021] WASAT 43, SAT appointed the Public Trustee as administrator, as there was "no other person suitable or willing to be appointed" (see paragraph [38]).

Trustee is appointed to perform others.[416] In other cases, it might be possible to manage such a conflict differently.[417]

The Public Trustee

We don't have to get into whether the Public Trustee can in theory be appointed guardian, because in practice it never happens.

The GA Act doesn't specifically restrict when the Public Trustee can be appointed as administrator. SAT normally prefers to appoint a family member or friend who is willing and suitable, but there may not be one.[418] The Public Trustee charges fees. This does not, by itself, make the Public Trustee unsuitable,[419] though SAT might take it into account.[420] The Public Trustee never gets appointed as administrator jointly with someone else, but is sometimes appointed to perform some functions, while someone else is appointed to perform others.

SAT has recognised that the appointment of government bodies has its limits. In the case of *AR*,[421] Member Child said:[422]

> "The demands on the Public Advocate and the Public Trustee, where they each act as guardian or administrator of last resort for thousands of represented persons, means that in all likelihood that direct contact with AR would be minimal and certainly much less than the contact he has with the existing guardians (and attorneys). There would be no possibility for example that AR would be taken to

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[416] See, for instance, *CF* [2009] WASAT 145, *RJK* [2019] WASAT 109 and *BZ* [2020] WASAT 159.
[417] See, for instance, *AT* [2007] WASAT 324.
[418] In *DN* [2021] WASAT 43, SAT appointed the Public Trustee as administrator, as there was "no other person suitable or willing to be appointed" (see paragraph [38]). See also *SMPM (also known as SMYM or SMY)* [2004] WAGAB 3 at paragraph [11].
[419] See *AS* [2018] WASAT 1 at paragraph [65]. See also *SMPM (also known as SMYM or SMY)* [2004] WAGAB 3 at paragraph [12], which was a decision of the old Guardianship and Administration Board. In 2008, the way in which the Public Trustee charged its fees changed, but the general principle remains.
[420] See:

- *AM and MM* [2011] WASAT 200 at paragraph [25]
- *MG* [2013] WASAT 48 at paragraphs [40] to [45]
- *ES* [2014] WASAT 91 at paragraph [64]
- *KK* [2021] WASAT 85 at paragraph [65]
- *RK* [2022] WASAT 112 at paragraph [163]
- *IC* [2023] WASAT 33 at paragraphs [6] and [37].

[421] [2021] WASAT 137.
[422] See paragraph [149].

> his bank by the Public Trustee's trust manager or visited weekly much less daily by a delegated guardian of the Public Advocate."

SAT also set out some pros and cons of appointing the Public Trustee, rather than a family member, in the case of *MT*.[423]

Suitability

If SAT says you're unsuitable to be guardian or administrator, is that a reflection on your character or ability? At times it might be, but not always. The circumstances of the situation might work against you.

In the case of *LM and MM*,[424] SAT found that the represented person's daughter couldn't be guardian because the daughter's relationship with her mother's nursing home staff had broken down to the extent that she was banned from visiting. SAT accepted that the represented person's son was "a devoted son and a concerned brother", but also found him unsuitable. Member Child said:[425]

> "The appointment of the son as guardian would inevitably lead to conflict between him and [the daughter] about decisions for the represented person since they do not agree on some issues and [the daughter] has very strong views about her mother's care. This would put him in an untenable position were he to attempt to preserve the relationship he has with his sister. Their relationship has, according to [the daughter], only recently been restored after a period of conflict. The appointment of the Public Advocate as an independent guardian is needed in order to ensure the best interests of the represented person are advanced."

In the case of *TM*,[426] SAT said:[427]

> "… while we have no doubt that as a matter of intellect, energy and commitment, Mr DM and Ms AS are capable of performing the functions of a guardian and administrator, we are concerned that [the represented person's] unwillingness to co-operate with them would hinder their performance of the functions of those roles."

[423] [2018] WASAT 80 at paragraphs [60] to [63].
[424] [2010] WASAT 110 at paragraphs [43] to [46].
[425] See paragraph [46].
[426] [2021] WASAT 92.
[427] See paragraph [135].

If someone applies for guardianship and administration orders for a family member, that in itself can cause damage to family relationships.[428]

[4.17] Must SAT seek to ascertain the wishes of the person who's the subject of the hearing?

Yes, though SAT isn't necessarily bound by them. This is covered at **[7.9]** to **[7.12]**.

[4.18] Must SAT act in the best interests of the person who's the subject of the hearing?

The best interests of the person are SAT's primary concern, but aren't SAT's only concern.[429] Chapter 7 deals with the "best interests" test.

[4.19] If the Public Trustee is appointed as administrator, does the Public Advocate ever get appointed as guardian?

Yes, but not always. There may not be an application for a guardianship order. If there is, SAT may dismiss it, for instance, because there's no identified need and/or the person can make their own lifestyle decisions. And if a guardianship order is made, someone else, such as a family member, may be willing and suitable to act.

[428] See *TM* [2021] WASAT 92 at paragraphs [124] and [133].
[429] See section 4(2) of the GA Act.

[4.20] Can SAT make different orders to what's asked for in the application?

Yes. For instance, if you ask to be appointed limited administrator, SAT could end up appointing the Public Trustee as plenary administrator.

SAT could instead dismiss the application, if it isn't satisfied that a guardianship and/or administration order can or should be made.

Under section 47 of the SAT Act, SAT can also dismiss or strike out a proceeding that it thinks is "frivolous, vexatious,[430] misconceived or lacking in substance",[431] "being used for an improper purpose"[432] or is "otherwise an abuse of process". This section is rarely used when the proceeding is under the GA Act, as SAT has a protective role,[433] but it does happen.[434] Sometimes, SAT may only be able to work out whether applications are an abuse of process "by considering the practical matters raised in support of them".[435]

[4.21] If you make an application, but later want to withdraw it, can you do so?

Only with SAT's permission.[436] In the case of *Mrs AEIBR*,[437] SAT allowed an application for an administration order to be withdrawn after two donees (attorneys) of an enduring power of attorney resolved their differences. In other cases,[438] SAT allowed applications for guardianship orders to be withdrawn after finding that the guardianship needs of the people in question could be met in less formal ways.

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[430] See *MS* [2020] WASAT 66, where the same assertions and allegations had been "raised repeatedly" and "fully ventilated" in previous SAT proceedings. SAT, though, did not use section 47 to dismiss every application made.
[431] See *H* [2016] WASAT 33, which was the latest in multiple, unsuccessful applications for review of the appointment of an administrator (see **[4.25]**), and didn't raise matters that would provide the basis for a review. See also *NA AND JA and WA* [2017] WASAT 151.
[432] See *PT* [2020] WASAT 147, which was an application for the donee of an enduring power of attorney to file records and accounts and have them audited.
[433] See *WD* [2022] WASAT 12 at paragraphs [81] to [83] and *GD* [2022] WASAT 33 at paragraphs [33] to [37].
[434] SAT might also do it if, for instance, someone made a guardianship application for a dead person.
[435] See *RK* [2022] WASAT 112 at paragraph [6].
[436] See section 46(1) of the SAT Act.
[437] [2005] WASAT 17.
[438] See *THB* [2005] WASAT 26 and *G and J* [2006] WASAT 324.

Again, SAT has a protective role to play, so if it thinks the person might require an order, it might keep the proceedings going. Things could get taken out of your hands altogether.

[4.22] What if something needs to be done in a hurry?

SAT normally must give at least 14 days' notice of the hearing to various people,[439] but in exceptional circumstances, up to a point, it can waive or shorten this requirement.[440]

A guardianship application might be heard in a matter of hours, rather than days, if, for instance, a person is alleged to be the victim of a sexual assault, and can't consent to being examined, having samples taken and being screened for sexually transmitted infections. When family and friends haven't had an opportunity to be heard, SAT may limit the scope of the order and set an early date by which the order is to be reviewed.[441]

SAT can also appoint someone (such as the Public Trustee) to exercise powers of an administrator as an emergency measure until it has the chance to decide whether the requirements for an administration order are met.[442]

[4.23] What's the Public Trustee's role when supervising administrators?

Administrators, other than the Public Trustee, are normally required to submit accounts to the Public Trustee's Private Administrators' Support (PAS) team, though the Public Trustee can exempt them.[443] For more on this, see the Private Administrator's Guide published by the Public Trustee and Public Advocate.

The Public Advocate doesn't perform a similar supervisory role for guardians.

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[439] See section 41(1) of the GA Act.
[440] See section 41(3) of the GA Act. For an example, see *GEG* [2022] WASAT 121 at the footnote to paragraph [13].
[441] See *PG* [2014] WASAT 66, in particular paragraphs [1] and [39]. Reviews under Part 7 of the GA Act are covered at **[4.25]**. The Sexual Assault Resource Centre is one of the available services for people who have been sexually assaulted.
[442] See section 65 of the GA Act. For examples, see *MT* [2018] WASAT 80 at paragraph [7] and *SJ* [2021] WASAT 119 at paragraph [34].
[443] See section 80 of the GA Act and the Private Administrator's Guide published by the Public Trustee and Public Advocate.

When the Public Trustee is administrator, it's accountable in many different ways, which are outlined in Chapter 16.

[4.24] How can a SAT decision made under the GA Act be changed?

In one case, when giving its reasons for making an administration order, SAT said:

> "The Tribunal has not found it easy to reach a determination in this matter. It raises some difficult questions about the balance between flexibility and freedom on the one hand, and protection and restriction on the other."[444]

Other people might take a different view of the right balance to strike. Circumstances might change. Maybe an error needs to be corrected. There are several ways that a SAT decision made under the GA Act can be changed.

Section 17A review

Section 17A of the GA Act allows a "determination" of a single member to be reviewed by a "Full Tribunal", meaning three members, including one of the judges, if a party is "aggrieved by the determination".[445] Not every decision that SAT makes classes as a "determination", but decisions to make (or refuse to make) a guardianship or administration order are among them.

It's a merits review.[446] The Full Tribunal doesn't have to find that the single member was wrong at the time of making the original decision. It looks at what was said at the hearing before the

[444] See *PN* [2008] WASAT 309 at paragraph [45].

[445] The meanings of "determination" and "Full Tribunal" are in section 3(1) of the GA Act. For the time limits on applying and when extensions of time can be granted, see section 17A(2) of the GA Act and the cases of:

- *SH and EJH* [2013] WASAT 176 at paragraphs [11] to [14]
- *ED and ID* [2015] WASAT 123 at paragraphs [17] to [19]
- *DN* [2021] WASAT 43 at paragraph [2]
- *The Public Trustee and KD* [2021] WASAT 87 at paragraphs [23] to [35].

[446] See *FY* [2019] WASAT 118 at paragraphs [9] to [10], *ED* [2020] WASAT 34 at paragraphs [8] to [12] and *TL v Office of the Public Advocate* [2020] WASC 455 at paragraphs [29] to [33]. For a contrary view, see *LP* (2020) 99 SR (WA) 123, [2020] WASAT 25 at paragraphs [59] to [83].

single member, the material that the single member had, plus any new material.[447] It needs to consider what's happened since the hearing before the single member.

For instance, in the case of *EBM*,[448] SAT reviewed (among other things) a "determination" to appoint the Public Trustee as plenary administrator. The Full Tribunal said:[449]

> "The appointment of the Public Trustee may well have appeared to be the appropriate outcome at the time of the initial hearing, and a benefit of the appointment of the Public Trustee has been that the estate has now been quantified and a schedule prepared, which no doubt will be of assistance to everyone."

SAT appointed someone else as plenary administrator.

A section 17A review is an important safeguard for someone who's lost the right to make important decisions. Allowances need to be made for that. In *DN*,[450] a represented person who was unhappy with her administration order sent an email to SAT to "request a hearing to revoke the order of public trust management of my pension cheque", stating "enough is enough!". SAT accepted the email as an application for a section 17A review and allowed it to happen, even though it was out of time.[451]

The Full Tribunal doesn't necessarily have to decide whether or not the initial member observed natural justice (or procedural fairness), but can look at that.[452]

Appeal under the GA Act

Section 19 of the GA Act allows the Supreme Court to hear an appeal from a "determination"[453] of three SAT members.[454]

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[447] See *NA* [2022] WASAT 118 at paragraphs [8] to [9] and [23] to [24].
[448] [2012] WASAT 157.
[449] See paragraph [29].
[450] [2021] WASAT 43 at paragraph [1].
[451] See paragraphs [1] and [2] of that decision. In *MK* [2019] WASAT 73 at paragraphs [1] to [2], SAT also treated an email as an application for a section 17A review.
[452] See *FC* [2012] WASAT 61 at paragraphs [50] to [52]. For more on natural justice, see **[5.2]**.
[453] The meaning of "determination" is in section 3(1) of the GA Act. For the time limits on applying, see section 20(4) of the GA Act.
[454] *"M" v Office of the Public Advocate* [1997] Library 970242 and *Martin v Office of the Public Advocate* [1999] Library 990150 were appeal proceedings from decisions of the Guardianship and Administration Board, which existed before SAT. As to why appeals under the GA Act exist, when the SAT Act has its own appeal provisions, see *SG v AG* [2008] WASC 123 at paragraph [38].

In theory, the grounds on which an appeal can be brought are broad. In practice, there would normally need to be an error by SAT (such as a denial of natural justice) for the court to correct. The court needs to grant leave (permission) for the appeal to be brought. Even if SAT may have made an error, that may not be enough for leave to be granted.[455]

Appeal under the SAT Act

Section 105 of the SAT Act also allows appeals to the Supreme Court, although questions have arisen as to when it can be used.[456]

Judicial review

The Supreme Court might be asked to exercise its powers of judicial review.[457] For example, in *HB v His Honour Judge T Sharp*,[458] the Supreme Court was asked to stop one of SAT's Deputy Presidents from hearing a particular application.

The slip rule

Section 83 of the SAT Act can be used to rectify some mistakes, though there are limits on this.[459] It's roughly the equivalent to what's known in courts as the "slip rule". If, for instance, one of

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[455] See *T v State Administrative Tribunal* [2021] WASC 67 at paragraphs [13] to [21]. For more examples of when the court did not grant leave, see *BMD v KWD* [2008] WASC 196 and *TL v Office of the Public Advocate* [2020] WASC 455. For an example of the court granting leave and allowing the appeal, see *'G' v 'K'* [2007] WASC 319. For an example of the court granting leave, but the appeal failing, see *SG v AG* [2008] WASC 123.

[456] See *S v State Administrative Tribunal of Western Australia [No 2]* [2012] WASC 306 and *RM v MF* [2012] WASC 367, in which, with respect, different views are expressed. Whatever the situation, a decision that is not a "determination" *could* be the subject of an appeal under section 105 of the SAT Act. This happened in *GS v MS* [2019] WASC 255. The decision being appealed against was the granting of an adjournment, which SAT had the power to do under from section 32(7)(e) of the SAT Act. The adjournment, though, had been granted on the basis that SAT had the constitutional power to decide an application for guardianship and administration orders (at least up to a point). The Supreme Court was asked to decide whether this power existed. If section 105 does apply, it could be used where there was a denial of natural justice.

[457] See *S v State Administrative Tribunal of Western Australia [No 2]* [2012] WASC 306 at paragraph [113].

[458] [2016] WASC 317.

[459] See *S v State Administrative Tribunal of Western Australia [No 2]* [2012] WASC 306 at paragraphs [107] to [115].

the names on an administration order is misspelt, this can cause problems when dealing with banks. Section 83 can be used to correct the spelling error.[460]

Review under section 84 of the SAT Act

Section 84 of the SAT Act allows SAT to review its decision if a person didn't appear and wasn't represented at a hearing. That may in part involve a denial of natural justice. In at least one matter under the GA Act, SAT has contemplated using this provision.[461]

Denial of natural justice (procedural fairness)

As discussed in **[4.12]**, at least generally speaking, SAT has to observe natural justice. If it doesn't, it has the power to change its decision. This is separate to the powers referred to above.[462]

Nunc pro tunc

This is another Latin phrase. It means "now for then". In limited circumstances, courts can change their orders retrospectively. It isn't clear whether this concept can apply to SAT in proceedings under the GA Act.[463]

Death of the represented person

Although the GA Act doesn't specifically go into it, SAT has said that once a represented person dies, a guardianship order ceases to have any force.[464] With some possible exceptions, the sorts of things that a guardian does can only be done for a living person.

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[460] For another case when the Supreme Court examined section 83, see *SG v AG* [2008] WASC 123 at paragraphs [144] to [158].

[461] There could be a question, at least in some cases, as to whether section 84 of the SAT Act is inconsistent with section 17A of the GA Act. Section 5 of the SAT Act says that if there is any inconsistency between the SAT Act and an enabling Act, the latter prevails. The GA Act is an "enabling Act" because it confers jurisdiction on SAT (see the definition of "enabling Act" in section 3(1) of the SAT Act). SAT didn't refer to this as an option in *NM and SGF* [2014] WASAT 103 at paragraphs [15] to [19] or in *RK* [2022] WASAT 112 at paragraphs [32] to [44].

[462] See *Legal Profession Complaints Committee and Gandini [No 3]* [2013] WASAT 31 at paragraphs [3] to [6] and *NM and SGF* [2014] WASAT 103 at paragraph [17]. SAT didn't refer to this as an option in *RK* [2022] WASAT 112 at paragraphs [32] to [44].

[463] See *CD* [2020] WASAT 41 at paragraphs [170] to [181], which discussed its possible use in proceedings under section 112 of the GA Act.

[464] See *AB and Public Trustee* [2015] WASAT 68 at paragraph [16] and *LFG and Public Trustee* [2015] WASAT 71 at paragraphs [17] and [18].

Section 78(1)(b) of the GA Act says that the death of the represented person ends an administration order.[465]

Death of a guardian

If a guardian dies, the guardianship order must be reviewed,[466] but in the meantime:

- if there was only one guardian, the Public Advocate takes over;[467]
- if there were two joint guardians, and one of them dies, the other guardian carries on alone;[468]
- if there was one guardian, and one alternate guardian, and the former dies, the latter takes over, but must send evidence of the death to the Public Advocate;[469]
- if there were two guardians – a private individual and the Public Advocate – and they were performing different functions (eg one made medical treatment decisions and the other made contact decisions) and the private individual dies, the Public Advocate takes over all the functions.[470]

Death of an administrator

If an administrator dies, the administration order must be reviewed,[471] but in the meantime:

- if there was only one administrator, the Public Advocate takes over;[472]
- if there were two joint administrators, and one of them dies, the other administrator carries on alone;[473]

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[465] Section 78(2) of the GA Act allows the administrator to continue until satisfied that the person has died. Section 29 of the *Public Trustee Act 1941* gives the Public Trustee some ongoing powers if it's been the administrator.
[466] See section 85(1)(a) of the GA Act and **[4.25]**.
[467] See section 99 of the GA Act.
[468] See section 54 of the GA Act.
[469] See section 55 of the GA Act. There's a question as to whether, in this case, the order does need to be reviewed, but appointments of alternate guardians are rare.
[470] Section 99 of the GA Act doesn't quite spell that out, but this is how it's been interpreted.
[471] See section 85(1)(a) of the GA Act and **[4.25]**.
[472] See section 99 of the GA Act.
[473] See section 78(3) of the GA Act.

- if there were two administrators – a private individual and the Public Trustee – and they were performing different functions, and the private individual dies, the Public Advocate takes over all the private individual's functions, but the Public Trustee keeps all its own functions.[474]

Part 7 review

This is discussed below at **[4.25]**.

So there are different ways to change an order. This can contribute, in some instances, to SAT dealing with many applications for the same person over a period of time.[475]

[474] Section 99 of the GA Act doesn't quite spell that out, but this is how it's been interpreted.
[475] For examples, see *JPA and SA* [2012] WASAT 22 at paragraph [20] and *RK* [2022] WASAT 112 at paragraphs [18] and [19].

[4.25] What's a Part 7 review?

Setting a review date

According to Part 7 of the GA Act, when SAT makes a guardianship or administration order, it must set a date by which the order is to be reviewed, no more than five years away, and then review it.[476]

The GA Act doesn't specifically state in what circumstances that date should be earlier than five years, but it may set it earlier if, for instance, there's a prospect of:

- the represented person recovering the capacity to make their own decisions (or at least more of them);[477]

- family members and/or friends resolving at least some of their differences;[478]

[476] See section 84 of the GA Act. An order isn't reviewed if the represented person dies in the meantime.

[477] See:

- *MEH* [2005] WASAT 35 at paragraphs [22] to [23]
- *JT and NB & CS* [2005] WASAT 156 at paragraphs [36] and [38]
- *LJC and IC & RJC* [2006] WASAT 19 at paragraph [51]
- *JH and EP* [2010] WASAT 51 at paragraph [26]
- *LA* [2012] WASAT 6 at paragraph [33]
- *RC* [2014] WASAT 25 at paragraph [80]
- *JC* [2016] WASAT 83 at paragraph [62]
- *BSL* [2021] WASAT 69 at paragraph [19]
- *DC* [2021] WASAT 95 at paragraph [83]
- *GG* [2021] WASAT 133 at paragraphs [103] to [104].

[478] See:

- *MBL* [2005] WASAT 261 at paragraph [55]
- *PH and NJM* [2011] WASAT 163 at paragraph [90]
- *HAH* [2013] WASAT 134 at paragraph [66]
- *MK* [2013] WASAT 146 at paragraph [35]
- *AM* [2015] WASAT 87 at paragraph [198].

- family members and/or friends having (and/or sustaining) a better relationship with the people who provide care and/or treatment to the represented person;[479]
- a guardian making long-term decisions (such as where the represented person should live), which are accepted;[480]
- the order not working;[481]
- legal action being finalised;[482]
- significant financial issues being resolved;[483]

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[479] See:
- *LM and MM* [2008] WASAT 106 at paragraph [42]
- *LM and MM* [2009] WASAT 81 at paragraph [41]
- *LM and MM* [2010] WASAT 110 at paragraph [50]
- *MH and HH* [2013] WASAT 59 at paragraphs [54] to [55]
- *JMM* [2015] WASAT 54 at paragraph [63]
- *SM* [2015] WASAT 132 at paragraph [72].

[480] See:
- *MBL* [2005] WASAT 261 at paragraph [55]
- *EH and CP* [2006] WASAT 1 at paragraphs [53] to [54]
- *GRH* [2006] WASAT 66 at paragraph [53]
- *JW and NBH* [2006] WASAT 88 at paragraph [21]
- *KM and MM* [2006] WASAT 89 at paragraph [58]
- *PK and LM* [2006] WASAT 285 at paragraph [72]
- *TC and Z* [2007] WASAT 36 at paragraph [49]
- *HL and HS* [2012] WASAT 118 at paragraph [65]
- *LB* [2016] WASAT 126 at paragraph [87]
- *WS* [2018] WASAT 86 at paragraph [109]
- *SA* [2020] WASAT 96 at paragraph [34].

[481] See:
- *HL and MI* [2006] WASAT 25 at paragraphs [44] to [45]
- *Re IPK; ex parte DK* [2011] WASAT 211 at paragraph [80]
- *TR and CJ* [2013] WASAT 119 at paragraph [54]
- *NB* [2023] WASAT 88 at paragraph [57].

[482] See:
- *Public Trustee and PJH* [2006] WASAT 81 at paragraph [49]
- *Re AWC, ex parte AWC* [2009] WASAT 216 at paragraph [121]
- *SY and MM* [2013] WASAT 68 at paragraph [36]
- *MW* [2015] WASAT 106 at paragraphs [25] to [26].

[483] See:

- the Public Trustee putting procedures in place to manage the estate;[484]
- an investigation being substantially or fully completed;[485]
- family members and/or friends having a better relationship with the represented person;[486]
- family members and/or friends gaining insight into the represented person's disability and/or needs;[487]
- a change in government policy;[488]
- a major change to the represented person's living arrangements;[489]
- a successful trial that gives the represented person more financial freedom;[490]
- there being a further assessment of capacity;[491]
- the represented person attending a future hearing;[492]

- *PK and LM* [2006] WASAT 285 at paragraph [73]
- *LWL* [2008] WASAT 35 at paragraph [147]
- *LL and PL* [2008] WASAT 85 at paragraphs [31] to [32]
- *G and N* [2009] WASAT 99 at paragraph [85]
- *GSW and HSH* [2011] WASAT 40 at paragraph [102]
- *AM and MM* [2011] WASAT 200 at paragraphs [26] to [28]
- *EBM* [2012] WASAT 157 at paragraph [30]
- *Public Trustee and GB* [2013] WASAT 97 at paragraph [36].

[484] See *PK and LM* [2006] WASAT 285 at paragraph [73].
[485] See *VM and Y* [2006] WASAT 245 at paragraph [45] and *RCP and MCTB* [2011] WASAT 52 at paragraph [53].
[486] See *AM and MM* [2011] WASAT 200 at paragraphs [26] to [28] and *MT* [2017] WASAT 132 at paragraphs [168] to [169].
[487] See *RP and PC* [2007] WASAT 196 at paragraph [48] and *RH* [2009] WASAT 159 at paragraph [19].
[488] See *JD* [2007] WASAT 80 at paragraph [38].
[489] See *TS* [2019] WASAT 56 at paragraphs [40] to [41] and *TM* [2021] WASAT 92 at paragraph [140].
[490] See *AM* [2015] WASAT 24 at paragraphs [123] to [129].
[491] See *E* [2017] WASAT 27 at paragraph [104], *NJH* [2017] WASAT 98 at paragraphs [131] to [132] and *GEG* [2022] WASAT 121 at paragraphs [22] and [30].
[492] See *GEG* [2022] WASAT 121 at paragraph [22].

- the represented person having a more stable life;[493] and/or
- a long review period causing additional distress to the represented person.[494]

A theme running through many of these cases is that it's a big thing to take away a person's rights to make their own decisions, particularly if it isn't what they want, and/or the government is making those decisions instead.[495] If there's some prospect of giving the person more freedom, complying more with their wishes and/or reducing the government involvement in their life, SAT should create the opportunity for that to happen. With respect, SAT may at times err on the side of optimism, but if so, that would be consistent with what the GA Act provides.

In the case of *MF*,[496] SAT set a review date of only one year for guardianship and administration orders. It said that the represented person, who was about to turn 18, was "maturing into adulthood". With "support and his positive attitude", SAT was "hopeful that he will be able to learn from his inevitable mistakes such that orders will become less relevant as time goes by".

There are times, though, when SAT may set an early review date because it has reason to be concerned about the future. For instance, in the case of *CDM*,[497] Member Mansveld said:[498]

> "I make the order for 12 months on the basis that the circumstances of [the represented person] are fluctuating and unpredictable and because the restrictions to his decision-making and actions should be reviewed regularly. It is of course

[493] See *HSB* [2007] WASAT 240 at paragraphs [49] to [58] and *SJ* [2021] WASAT 119 at paragraph [33]. In *BSL* [2021] WASAT 69 at paragraph [19], the represented person was about to be released from prison.
[494] See *EC* [2021] WASAT 74 at paragraph [170].
[495] See also *RK* [2022] WASAT 112 at paragraph [32], in which SAT also said that a guardian and administrator had "serious obligations".
[496] [2016] WASAT 46 at paragraph [64].
[497] [2007] WASAT 282.
[498] See paragraph [65].

> possible that should his situation change for the worse, a more extensive order may then be needed."

If there are both guardianship and administration orders, SAT may want to have them reviewed at the same time.[499]

If an administrator is alleged to have made a mistake, a short review period can give the administrator the opportunity to deal with it and report back to SAT on it.[500]

A plenary guardianship order can be very restrictive and isn't that common. If one is made, SAT may want to review it earlier than in five years, in case a less restrictive alternative can be found.[501]

Several factors might go towards setting an appropriate review date.[502]

There isn't always enough reason to set an early review date.[503] In one matter, SAT expressed the need for "stability and sureness".[504] In another, SAT talked about "stability and

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[499] See:
- *AS and AA* [2007] WASAT 54 at paragraph [83]
- *MH and HH* [2013] WASAT 59 at paragraph [55]
- *KB* [2016] WASAT 100 at paragraph [89]
- *MS* [2020] WASAT 146 at paragraph [133]
- *FE* [2021] WASAT 37 at paragraph [46]
- *JK* [2021] WASAT 139 at paragraph [66].

[500] See *AT* [2007] WASAT 324.

[501] See *AS and AA* [2007] WASAT 54 at paragraph [73].

[502] See:
- *SA* [2010] WASAT 186 at paragraph [56]
- *FY* [2019] WASAT 118 at paragraph [97]
- *JH* [2021] WASAT 23 at paragraph [102]
- *JG* [2021] WASAT 83 at paragraph [68].

[503] See, for instance:
- *EA and KD, TA, LA, BA & VT* [2007] WASAT 3 at paragraph [72]
- *DL* [2007] WASAT 97 at paragraph [49]
- *SMYM (also known as SMPM, SMY and MYM)* [2007] WASAT 131 at paragraph [66]
- *DB & DB* [2007] WASAT 205 at paragraph [35]
- *DB* [2007] WASAT 243 at paragraph [41]
- *AB* [2008] WASAT 25 at paragraph [51]
- *JAB* [2010] WASAT 97 at paragraph [81]
- *KSC* [2012] WASAT 51 at paragraph [26]
- *MW* [2022] WASAT 107 at paragraph [109].

[504] See *AG* [2022] WASAT 4 at paragraph [81].

certainty".[505] In a different matter, SAT didn't think the represented person's circumstances would change in the foreseeable future and it considered it "unnecessary to trouble the parties, including [the represented person], with unnecessary processes".[506]

Early reviews

No matter what date is set, in some circumstances, SAT can, or a times must, review a guardianship or administration order before that date.

Mandatory early review under section 85 of the GA Act

Section 85(1) of the GA Act says that SAT "shall" review a guardianship or administration order if the guardian or administrator:[507]

(a) dies;

(b) wants to give up the role;

(c) "has been guilty of such neglect or misconduct or of such default as, in the opinion of [SAT], renders him unfit to continue as guardian or administrator";[508]

(d) "appears to [SAT] to be incapable by reason of mental or physical incapacity of carrying out his duties";

(e) is "a bankrupt or a person whose affairs are under insolvency laws";[509] or

(f) (in the case of a corporate trustee) "has ceased to carry on business, has begun to be wound up, or is under official management or subject to receivership".

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[505] See *DL* [2023] WASAT 66 at paragraph [32].

[506] See *MK* [2019] WASAT 73 at paragraph [69]. See also, for instance, *RK* [2022] WASAT 112 at paragraph [137]. In *Re IPK; ex parte DK* [2011] WASAT 211 at paragraph [80], SAT made a guardianship order, set an early review date and gave the parties liberty to apply for an earlier review. In *GF* [2016] WASAT 134, SAT directed the administrator to seek a review if some living arrangements changed. In *NE* [2023] WASAT 30 at paragraph [148], SAT contemplated that an early review of an administration order might be appropriate.

[507] For an example of when section 85 was used, see *RJK* [2019] WASAT 109.

[508] This is confined to "cases of such serious neglect, misconduct or default as to render the guardian or administrator unfit to continue". SAT's role here isn't to review every decision that a guardian or administrator makes. See *RK* [2022] WASAT 112 at paragraph [35] and *NE* [2023] WASAT 30 at paragraphs [107] and [124] to [127].

[509] According to the definitions in section 13D of the *Interpretation Act 1984*.

Early review under sections 86(1)(a), (aa) or (b) of the GA Act without leave

The represented person, the Public Advocate, the Public Trustee, a guardian or an administrator can ask SAT for an early review. They don't need SAT's leave (permission) to do so.[510]

Early review by leave under section 87 of the GA Act

Other people or bodies need SAT's leave (permission) to ask for an early review.[511] There must be "a change of circumstances or … any other reason a review should be held". SAT can attach conditions.[512]

Why the need for leave? SAT has said that a review and a change of order are "likely to be a cause of anxiety and disruption in the life of a represented person".[513] Before making the existing order, SAT should have received relevant evidence and information, and would have assessed whether the order should be reviewed before five years.[514]

The person seeking leave needs to state their reasons for doing so.[515] They would be expected to provide evidence or information to SAT. When deciding whether to grant leave, SAT's primary concern is the represented person's best interests.[516] SAT is unlikely to grant leave on the basis of that evidence or information if:

- SAT knew about it when it made the existing order; or

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[510] Section 86(1)(a) applies to the Public Advocate; section 86(1)(aa) applies to the Public Trustee; section 86(1)(b) applies to the represented person, a guardian or an administrator. In *RK* [2022] WASAT 112 at paragraph [36], SAT said that this right of review was "no doubt because of the significance of guardianship or administration orders" and that those with the right were "directly involved in the performance of guardianship or administration orders". Apart from the Public Trustee and Public Advocate, a guardian or administrator can only use section 86(1)(b) to seek a review of the order under which the guardian or administrator acts [see section 86(2)]. For instance, if the represented person's nephew is appointed guardian and the niece is appointed administrator, the nephew could use section 86(1)(b) to seek a review of the guardianship order, but would need to seek another way to change the administration order.

[511] Section 86(1)(c) of the GA Act says that leave under 87 is needed.

[512] See section 87(5)(b) of the GA Act and the case of *CK* [2012] WASAT 189 at paragraphs [20] to [21].

[513] See *RK* [2022] WASAT 112 at paragraph [38].

[514] See *RK* [2022] WASAT 112 at paragraphs [39] to [40].

[515] See section 87(4) of the GA Act.

[516] See section 4(2) of the GA Act and the case of *RK* [2022] WASAT 112 at paragraphs [43] to [44].

- the person seeking leave had the opportunity to give the evidence or information to SAT before it made the existing order.[517]

SAT has to be satisfied that there's a good enough reason for a review. It doesn't have to be a reason given by the person seeking leave. SAT might, when examining the application for leave, identify its own reason why leave should be given.[518][519]

Section 47 of the SAT Act

Under section 47 of the SAT Act, SAT can also dismiss or strike out a proceeding that it thinks is "frivolous, vexatious, misconceived or lacking in substance", "being used for an improper purpose" or is "otherwise an abuse of process". This section has been used to dismiss applications for:

- mandatory early review under section 85 of the GA Act;[520]

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[517] See *RK* [2022] WASAT 112 at paragraphs [41] to [43].

[518] See *RK* [2022] WASAT 112 at paragraphs [105] to [111].

[519] For examples of when leave was granted, see *RV and PL* [2006] WASAT 91 at paragraphs [11] to [13] and *LM and MM* [2009] WASAT 81. For examples of when it was refused and/or the leave application was withdrawn, see:

- *Re JMM; ex parte JMM* [2009] WASAT 95
- *Re: JAB* [2009] WASAT 151
- *VAM* [2010] WASAT 183
- *TGI and HI* [2012] WASAT 92
- *Re: TJC* [2012] WASAT 111
- *RM* [2020] WASAT 4
- *PB* [2021] WASAT 42.

In *VW* [2016] WASAT 119, leave was granted to review the guardianship order, but not the administration order. Leave was granted on a limited basis in *CK* [2012] WASAT 189 at paragraphs [20] to [21] and *HS* [2019] WASAT 94. See also the case of *MS* [2020] WASAT 66 referred to below.

[520] See *MS* [2020] WASAT 66. Apart from some new facts relating to guardianship, SAT said that the assertions and allegations had been "raised repeatedly" and "fully ventilated" in previous SAT proceedings (see paragraphs [43] to [44]). SAT granted leave under section 87 of the GA Act to review the guardianship order, but this was limited to a review of the appointment of the Public Advocate with the functions of determining where and with whom the represented person should live. It used section 47 of the SAT Act to dismiss:

- an application for review of the guardianship and administration orders under section 85 of the GA Act;
- an application for leave to review the administration order under section 87 of the GA Act; and

- early review under sections 86(1)(a), (aa) or (b) of the GA Act without leave;[521] and
- early review by leave under section 87 of the GA Act.[522]

This, however, is rare, as SAT has a protective role.[523] Sometimes, SAT may only be able to work out whether applications are an abuse of process "by considering the practical matters raised in support of them".[524] [525]

Teething problems

It can take a while for guardianship and administration orders to work. In the case of *CK*,[526] SAT said:[527]

> "It is not unusual for there to be what might be described as teething problems in the appointments of guardians (or administrators), with lack of understanding or acceptance of the role by others and/or lack of certainty and apprehension about the assertion of their authority on the part of the appointee. It is certainly not unusual that residential care facilities take some time to recognise the authority of an appointed guardian. This can be the case even when the Public Advocate is the appointed guardian."

If a person has a problem with how such an order is working, there may be ways to resolve it without going back to SAT.[528]

Section 17A or Part 7?

In theory, a section 17A review should happen when a party thinks that the original "determination" of a single member was wrong; a Part 7 review should be used after a change

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- (subject to the limited grant of leave) an application for leave to review the guardianship order under section 87 of the GA Act.

[521] See *H* [2016] WASAT 33, which was the latest in multiple, unsuccessful applications for review of the appointment of an administrator, and didn't raise matters that would provide the basis for a review. See also the case of *MS* [2020] WASAT 66 referred to above.
[522] See the case of *MS* [2020] WASAT 66 referred to above.
[523] See *GD* [2022] WASAT 33 at paragraphs [33] to [37].
[524] See *RK* [2022] WASAT 112 at paragraph [6].
[525] Section 47 of the SAT Act is discussed further at **[4.20]**.
[526] [2012] WASAT 189.
[527] See paragraph [97].
[528] See *RM* [2020] WASAT 4 at paragraphs [49] to [60].

in circumstances and/or a lapse of time.[529] In practice, that distinction can get blurry, particularly because Part 7 reviews are generally simpler. In *JS*,[530] a person applied (through lawyers) under section 17A for a review of her administration order. Given that she was substantially out of time and had said that her circumstances had changed, SAT accepted the application as having been made under Part 7.[531]

In *DN*,[532] a person who was unhappy with her administration order sent an email to SAT about it. SAT accepted the email as an application for a section 17A review, but said that it could have been accepted as a Part 7 review.

To complicate things, if a single member of SAT makes, or refuses to make an order on a Part 7 review, a "Full Tribunal" can review that determination in a section 17A review.[533]

A Part 7 review involves some consideration about how the guardianship and/or administration order has been operating.[534] The Supreme Court has said, though, that SAT's role is neither to review individual decisions made by the guardian or administrator[535] nor to exercise the powers conferred on the guardian or administrator.[536] Chapter 9 explores the extent to which SAT can tell a guardian or administrator what to do.

[529] See *S v State Administrative Tribunal of Western Australia [No 2]* [2012] WASC 306 at paragraphs [160] to [165]. Similarly, an appeal to the Supreme Court under section 19 of the GA Act isn't the normal way to address a change in circumstances. Instead, a Part 7 review should usually be sought. See *T v State Administrative Tribunal* [2021] WASC 67 at paragraph [16]. In *RK* [2022] WASAT 112 at paragraph [43], however, SAT said that leave could be given for a Part 7 review "if an applicant for leave produces evidence, or identifies an issue, which would suggest that the challenged decision was not, or is no longer, in the represented person's best interests".

[530] [2020] WASAT 44 at paragraphs [8] to [9].

[531] For another example, see *VZ and HJM* [2011] WASAT 89 at paragraphs [5] to [9].

[532] [2021] WASAT 43 at paragraphs [1] to [2].

[533] See section 17A of the GA Act and paragraph (d) of the definition of "determination" in section 3(1) of the GA Act. For examples of when that happened, see *DTM and JMM* [2009] WASAT 203 and *PB* [2021] WASAT 42.

[534] See *SM and HJM* [2011] WASAT 49, in which SAT didn't like a lot of what the existing guardian was doing, and replaced him.

[535] See *TL v Office of the Public Advocate* [2020] WASC 455 at paragraphs [4] and [90].

[536] See *TL v Office of the Public Advocate* at paragraph [16].

New or old proceedings?

A Part 7 review is a fresh set of proceedings.[537] SAT must "determine afresh the question of whether a guardianship order can or should be made in the particular circumstances that exist, and on the information available, at the time of the review hearing".[538] SAT needs to go through the same decision-making process that it went through when the orders were originally made. Every time there's such a review, the presumptions of capacity (discussed at **[4.10]** and **[4.11]**) apply.[539]

Generally speaking, an appeal to the Supreme Court against a SAT decision looks "backwards" to identifying an error made by SAT. On the other hand, a Part 7 review looks "forward" into the future and what's in the represented person's best interests.[540] This doesn't stop SAT looking at material from earlier proceedings.[541]

What can happen – renewal of the order

At a Part 7 review, SAT sometimes makes a new order that's substantially the same as before. terms as before.

The case of *AM and MM*[542] was about a woman with a progressive degenerative neurological illness, who had a friend as her plenary administrator, as was her wish. She was due to get a substantial amount of money from a family law property settlement. There was no question of her neurological condition getting better. The main issue at the Part 7 review was whether the current administrator should continue to act or whether the Public Trustee should be appointed. SAT kept on the friend as plenary administrator, but ordered that there be another review in a year.

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[537] See *KWD* [2011] WASAT 4 at paragraphs [63] to [83] and *CD* [2020] WASAT 41 at paragraph [40].

[538] See *GG* [2021] WASAT 133 at paragraph [9].

[539] See *LS* [2019] WASAT 97 at paragraphs [63] to [65]. Different presumptions can apply in other types of proceedings. See *Levi Jake Saunders by his Next Friend Claire Marie Matthews v Turner* [2020] WADC 133 at paragraphs [63] to [65].

[540] See *T v State Administrative Tribunal* [2021] WASC 67 at paragraph [49].

[541] See:

- *Re JMM; ex parte JMM* [2008] WASAT 221 at paragraph [43]
- *EK* [2017] WASAT 22 at paragraphs [16] to [18]
- *RK* [2022] WASAT 112 at paragraphs [25] to [28]
- *GEG* [2022] WASAT 121 at paragraphs [41] to [51]
- *NE* [2023] WASAT 30 at paragraph [28].

[542] See [2011] WASAT 200.

Senior Member Allen said the represented person's:[543]

> "… financial position may soon settle down and her need for an administrator may reduce, although the Tribunal sees no reason to think that there will not be an ongoing need for financial management given the assets that have been mentioned. In addition, if the matrimonial proceedings are finalised, the friction between [the represented person] and her daughters may subside – one hopes that it will – and it may well be that at some time in the future [the represented person] will see her daughters in a different light and be more willing to consider alternatives for her financial management."

What can happen – revocation of the order

An order may be revoked, and no new one made, because the represented person has recovered sufficiently from their impairment. Maybe a guardian had been appointed to decide where the person should live, which now seems to be working out well, and no-one is questioning it. There may no longer be a need for an administrator because a court case has been resolved. A new guardian or administrator could be appointed because a family member, who previously didn't want to do it, is now willing and suitable to take on the role.

Here are some examples.

In the case of *Re JTF; ex parte JTF*,[544] a man with a history of mental illness and substance abuse applied to have his administration order, which appointed the Public Trustee, revoked. The current medical evidence was that his mental illness was stable. He said he could manage his own finances and had family and other supports to help him if necessary. SAT concluded that while he did have a diagnosed mental illness, there wasn't enough to say that by reason of that illness, he couldn't manage his finances. SAT revoked the order.

In *PG*,[545] SAT revoked a guardianship order concerning accommodation and services because the decisions about those issues had been made and implemented. Although the person remained vulnerable and easily influenced, SAT was confident that the person's family and the Disability Services Commission were appropriate safeguards.

The case of *ZJ*[546] concerned a middle-aged man with an intellectual disability. The Public Trustee had been appointed limited administrator, in particular to represent his interests in

[543] See paragraph [27].
[544] [2010] WASAT 14.
[545] [2006] WASAT 256 at paragraph [34].
[546] [2007] WASAT 179.

respect of his father's deceased estate. The father's estate included interest in overseas property. On reviewing the order, SAT said:[547]

> "With the support of [one of his sisters] and her husband, the represented person has been able to manage his day-to-day financial affairs in the period since the order was reviewed in 2001. The continuation of his ability to do this is seen as critical to his health and to his mental state by the clinical psychologist. There is no need for an administration order to manage these aspects of his estate.
>
> Since the legal proceedings for which the Public Trustee was appointed administrator are now complete, the representation of the interests of the represented person in the overseas property and his day-to-day finances are managed less restrictively through the involvement and support of his sister … and her husband, there is no need for the continuation of the appointment of the Public Trustee as administrator. This is consistent with the wishes of the represented person.
>
> Since there is no need for an administrator of the estate of the represented person an order may not be made."

SAT revoked the order.

The case of *ET*[548] concerned an elderly indigenous woman, whose son was her plenary administrator. On reviewing the order, Member Mansveld found that "in a practical sense", her pension was pooled with the income of other family members, which, in the circumstances, he did not find wrong.[549] The member said:[550]

> "The assessment of [a general practitioner], which I accept, is that the represented person is well cared for by [her daughter-in-law] and other family members. It is clear that without the level of care the represented person receives from her family she would have to be placed in a nursing home. I can infer from the doctor's assessment that the represented person's nutritional and medical needs are being met. There is no evidence of neglect or deprivation of the necessities of life.
>
> I am therefore satisfied that the expending of the represented person's pension meets her particular needs and enables her to continue to be cared for at home which is clearly in her best interests.

[547] See paragraphs [42] to [44]. See also paragraph [41].
[548] [2012] WASAT 3.
[549] See paragraph [61].
[550] See paragraphs [62] to [64].

> When I look at all the facts and evidence in this case I am not satisfied that an administration order is currently needed. I should therefore permit the informal financial arrangements to operate. Of course if the particular circumstances of the represented person should change then it might become necessary for an order again to be made for the protection and management of her estate."

Again, SAT revoked the order.

What can happen – replacement order

SAT also has the power to replace one guardianship or administration order with another. It could, for instance, change the order's scope or appoint a different guardian or administrator.[551]

Not living in WA

Section 67(1) of the GA Act says that SAT can make an administration order "in respect of a person who is not resident or domiciled in Western Australia, but any such order is limited to the person's estate within Western Australia".[552] Sometimes, though, if the represented person moves away from WA, there might no longer be a need for an administration order in WA. The order can be revoked in a Part 7 review.[553]

For guardians, there isn't any similar provision to section 67(1). Even so, sometimes, SAT can decide to make or retain a guardianship order for people who don't live in WA or are planning to leave.[554] It may instead decide that such an order shouldn't be made,[555] or should be revoked in a Part 7 review.[556]

There are provisions that allow some places to recognise guardianship or administration orders that were made in WA, or vice versa, but we don't go into them here.

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[551] See *SM* [2016] WASAT 44 at paragraphs [6] to [18] and [71], which goes through a long history of different orders made for a person.

[552] Section 67(1) was discussed in the cases of *NCK* [2004] WAGAB 6 (a decision of the old Guardianship and Administration Board) at paragraphs [45] to [46] and *SG v AG* [2008] WASC 123 at paragraphs [134] to [135]. The meaning of "domicile" for people with decision-making disabilities was discussed in *NCK* [2004] WAGAB 6 at paragraphs [31] to [41]. In *PMB and LJB* [2015] WASAT 96 at paragraphs [15] to [16], an administration order was made for a resident of New South Wales who owned a unit in WA.

[553] See *ZJK* [2005] WASAT 18, *NCK* [2005] WASAT 283 and *The Public Trustee and EP* [2006] WASAT 335.

[554] See *NCK* [2004] WAGAB 6.

[555] See *CS and JS* [2005] WASAT 285 at paragraphs [1] and [14] and *SM* [2010] WASAT 108.

[556] See *NCK* [2005] WASAT 283.

[4.26] How does the procedure for appointing an administrator compare with the old law?

Here, we compare:

- SAT's procedure under the GA Act, with
- the way the Public Trustee, prior to 1992, declared people to be "infirm" under section 35 of the *Public Trustee Act 1941* and manage their estates. We'll call this "the old section 35 procedure".

The old section 35 procedure wasn't the only way in which the estates of others could be managed,[557] but it was a common way. Section 35 has been repealed.

Type of disability

SAT has to be satisfied that the person has a mental disability.[558] Under the old section 35 procedure, a physical disability may have been enough.

Type of evidence

Under the GA Act, there's a presumption that people do have capacity. SAT needs evidence to overcome that. The GA Act doesn't spell out what type of evidence is needed. It doesn't say that it must come from a GP, geriatrician or neurologist. In practically every case, there will be some evidence from a health professional. But SAT can also take into account the evidence of friends and family, and from their own observations of the person who is the subject of the hearing.[559]

Under the old section 35 procedure, the Public Trustee could have someone declared as infirm by getting certificates from two medical practitioners. The Public Trustee could then manage that person's finances. The Public Trustee was allowed to seek further evidence, but didn't have to get it.

Alternatives to an order

Under the GA Act, there must be a need for an administrator. SAT can't make an administration order if there's a less restrictive alternative.[560]

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[557] One of the other ways is discussed at **[6.1]**.
[558] See **[4.10]**.
[559] See **[4.13]**.
[560] See **[4.10]**.

Under the old section 35 procedure, the Public Trustee didn't have to consider whether there was a need or a less restrictive alternative.

Limited or plenary

Under the GA Act, SAT can't make a plenary order if a limited one will do.[561] Under the old section 35 procedure, it was all or nothing.

The wishes of the person

Under the GA Act, SAT has to try to work out the wishes of the person who's the subject of the hearing.[562]

Under the old section 35 procedure, the Public Trustee had no obligation to do that.

The involvement of family

Under the GA Act, SAT is normally obliged to give notice to various people, including the "nearest relative" of the person who is the subject of the hearing.[563]

Under the old section 35 procedure, there was no requirement for the next of kin to be informed of the process, even though they had the right to challenge it.

The involvement of an independent body in making the initial order

Under the GA Act, SAT (or the Supreme Court on appeal) decides whether or not to make an administration order, and holds a public hearing first.

Under the old section 35 procedure, the person or the person's next of kin had the right within three months to go to the Supreme Court and have a judge review the matter. But the onus was on the person or the person's next of kin to do that.

The involvement of the Public Advocate

Under the GA Act, the Public Advocate can and often does investigate and advocate for the person and seek out the person's wishes.[564] That didn't apply under the old section 35 procedure. There was no Public Advocate at the time.

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[561] See **[4.15]**.
[562] See section 4(7) of the GA Act and **[7.9]** to **[7.12]**.
[563] See **[5.2]**.
[564] See **[5.2]**.

The appointment of an alternative to the Public Trustee

Under the GA Act, SAT can, for instance, appoint family or friends as administrators, rather than the Public Trustee.[565] Under the old section 35 procedure, this wasn't possible, although the *Mental Health Act 1962* did allow the Supreme Court to appoint people other than the Public Trustee as managers.

The requirement to give reasons

When making an administration order, SAT is required to give reasons, and if a party asks, those reasons must be in writing.[566]

Under the old section 35 procedure, some information was on the certificates, but there was no requirement to give extensive reasons.

The ability to give directions

Under the GA Act, SAT has some ability to give directions to an administrator.[567] That was not the case under the old section 35 procedure, although the Supreme Court could, if asked.

The requirement for reviews

Under the GA Act, SAT has to set a date by which the order is to be reviewed. It can't be more than five years away.[568] There wasn't a similar requirement under the old section 35 procedure.

The ability to seek an earlier review

Under the GA Act, a person under an administration order can seek an early review of the order in SAT.[569] Under the old section 35 procedure, a doctor could certify that the person had recovered their capacity. The Public Trustee could disagree, in which case, the person or their next of kin had to go to the Supreme Court.

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[565] See **[4.16]**.
[566] See sections 74 to 79 of the SAT Act.
[567] See Chapter 9.
[568] See **[4.25]**.
[569] See **[4.25]**.

Summary

	The old section 35 procedure	**The procedure under the GA Act**
Did/does the person need a mental disability?	No.	Yes.
Could medical certificates be the only type of evidence?	Yes.	Not normally.
Did/does there have to be a need for an appointment?	No.	Yes.
Could an appointment be made, even if there was/is a less restrictive alternative?	Yes.	No.
Could a limited authority be given?	No.	Yes.
Was/is there an obligation to try to work out the person's wishes?	No.	Yes.
Did/do next of kin have to be invited to participate in the process of making an appointment?	No.	Normally yes.
Did/does an independent body make the decision after a hearing?	No.	Yes.
Could the Public Advocate be involved?	No.	Yes.
Could friends or family be appointed?	Not in that way.	Yes.
Was/is there a requirement to give reasons?	Not extensively.	Yes.
Could an independent body direct the Public Trustee?	Yes, if asked.	Yes.
Was/is there a requirement for regular reviews by an independent body?	No.	Yes.
Could the person seek a review by an independent body?	No, or at least not readily.	Yes.

CHAPTER 5 – Representation at guardianship and administration hearings

[5.1] Why have this chapter?

Usually in civil court proceedings, or even in some other areas of the State Administrative Tribunal (SAT), people either instruct lawyers to represent them, or they act for themselves. If they're found not to have the mental capacity to do that, someone may be appointed to give instructions on their behalf.[570] But in SAT proceedings under the GA Act,[571] a person's mental capacity may be the very issue in question. Can that person be represented in the proceedings? If so, how? What about other people? And who pays? This chapter aims to de-murk a murky area.

[5.2] What different types of people advocate for, or represent, a person in SAT in proceedings under the GA Act?

One reason this area is complicated is that there are many different types of people who may advocate for, or represent, a person in these proceedings. That's a good thing, and makes the complications worthwhile. Those people include the following:

A lawyer acting directly for the represented person or proposed represented person[572]

In such a case, the lawyer should take instructions directly from that person, who would be the client. Subject to a lawyer's legal and ethical obligations, the lawyer would have to act on those instructions.[573]

Assume, for instance, the client is Bob and he is the represented person. What if Bob makes it clear that he wants to live with his daughter Jill, and wants the lawyer to argue for anything that would achieve that? The lawyer normally couldn't argue in SAT, "Bob wants to live with his daughter Jill, but I don't think it's a good idea. I think he'd be better off with his son Frank."

See **[5.3]** for whether a lawyer *can* act for someone with capacity issues.

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[570] For how that works in civil proceedings in the Supreme and District Courts, see Chapter 10.

[571] *Guardianship and Administration Act 1990*.

[572] Section 40(1) of the *State Administrative Tribunal Act 2004* (SAT Act) says that if a party is unrepresented, SAT may appoint a person to represent the party, though this would rarely, if ever, happen in matters under the GA Act.

[573] In *GYM* [2017] WASAT 136 at paragraphs [76] to [77], the lawyer submitted something different to what the client said. In the particular circumstances of that case, SAT said it was "grateful" to the lawyer for that. But this may be the exception that proves the rule.

A lawyer acting for another party at a hearing

SAT is usually required to give notice to various people of the hearing, including the "nearest relative" of the proposed represented person.[574]

A lawyer might act for another party at the hearing, such as a son or daughter.

Suppose that:

- Bob is under an administration order.
- He has a son Frank and a daughter Jill.
- Frank is the administrator.
- Jill comes to a lawyer, saying that she's applied to have the administration order reviewed.
- She asks if the lawyer could assist her.
- The lawyer appears at the hearing, on instructions from Jill, and incurs $4,000 in costs.
- The Public Trustee is appointed as Bob's administrator.
- Jill wants the costs to be paid out of Bob's money because the application was made for his benefit.

In the above hearing, the lawyer might be helping Bob, but is actually acting for Jill. She is the client, as she engaged the lawyer and is providing the instructions.

The Public Advocate as investigator advocate

One of the Office of the Public Advocate's functions is to attend SAT hearings to:

- seek to advance the best interests of the represented person or proposed represented person;
- present any relevant information to SAT; and/or

[574] See sections 17B, 41 and 89 of the GA Act.

- report on any matter that SAT asked be investigated.[575]

Sometimes, the Public Advocate is the applicant.

SAT must give the Public Advocate notice of every hearing of an application for a guardianship or administration order.[576] This makes the Public Advocate a party to any such application,[577] but the office doesn't always get involved.

If one of the Public Advocate's officers does prepare a report and attend a hearing, they probably will have tried to work out the wishes of the represented person or proposed represented person. This can be less intimidating for someone than talking at a hearing, although it means that SAT doesn't get the information first-hand.[578] The officer isn't bound by the person's wishes, and could say: "Bob wants to live with his daughter Jill, but I don't think it's a good idea. I think he'd be better off with his son Frank."

SAT often appoints the Public Advocate as guardian of a represented person, and in rare cases as administrator. The officer may argue for or against such appointments, and can't be a total outsider who looks from a distance at all the options, because the Public Advocate can *be* one of the options. This isn't a criticism; it's inherent in the GA Act.

The administrator

Sometimes, SAT has previously made orders appointing an administrator, and is now:

- reviewing that order; or
- hearing an application to appoint a guardian.

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[575] See section 97(1)(b) of the GA Act. For examples, see:
- *VS* [2008] WASAT 160 at paragraphs [26] to [30]
- *ST and EPP* [2011] WASAT 62 at paragraphs [82] to [87]
- *MT* [2017] WASAT 132 at paragraphs [102] to [107]
- *AM* [2020] WASAT 162 at paragraphs [154] to [171]
- *JL* [2023] WASAT 20 at paragraphs [58] to [71].

[576] See section 41 of the GA Act.

[577] See the definition of "party" in section 36 of the SAT Act, when read with the definition of "party" in section 3(1) of the GA Act.

[578] For an example of an interview with a proposed represented person that a Public Advocate officer reported to SAT, see *WS* [2018] WASAT 86 at paragraph [73]. In *NJH* [2017] WASAT 98 at paragraphs [67] to [79], a Public Advocate officer interviewed the represented person and the other main parties. The Supreme Court discussed a Public Advocate report in *TL v Office of the Public Advocate* [2020] WASC 455 at paragraphs [75] to [91].

Section 70(1) of the GA Act says: "An administrator shall act according to his opinion of the best interests of the represented person."

Section 70(2) lists ways in which an administrator does this. They include acting as "an advocate for the represented person"[579] and taking account the person's wishes. They also include matters such as protecting the represented person from abuse, neglect and exploitation.[580]

At SAT hearings, administrators might take into account the wishes of the represented person, but would not take instructions as such. They would be free to argue what they thought was in the person's best interests, even if it wasn't what the person wanted.

What if, for instance, SAT has previously made orders appointing an administrator for Bob, and is now hearing an application to appoint a guardian? At the hearing, the administrator might:

- tell SAT that Bob wants Jill to be his guardian; but
- argue that Jill shouldn't be appointed because she's misappropriated money from Bob in the past; and
- say that her appointment could cause problems for the administrator when managing Bob's finances.

If SAT is reviewing an administration order, it might consider the performance of that administrator, who might have to justify some of the decisions that were made and answer criticisms at the hearing.

The guardian

The considerations that apply to an administrator may apply in a similar way to a guardian, including the Public Advocate.[581]

The donee of an enduring power of attorney or guardianship

What if the person who's the subject of the hearing is the donor of an enduring power of attorney or guardianship?[582] The situation here may not be as clear. The donee might purport

[579] But not contrary to the *Legal Profession Uniform Law (WA)*.
[580] For more on the "best interests" test, see Chapter 7.
[581] For section 70, read section 51, which is very similar. See Chapter 7 for the "best interests" test.
[582] Enduring powers of attorney and guardianship are discussed more in Chapter 8.

to speak for the donor, but what if it's alleged that the donee has done the wrong thing, or the enduring power is invalid? It also isn't clear to what extent the donee would have to follow the wishes of the donee.

In *SG & Anor and GLG*,[583] the person who was the subject of the hearing had her own direct legal representation. One of her sons was donee of an enduring power of attorney, which had only recently been executed. He also had legal representation, which was stated to be in his capacity as attorney (donee). The member described it as an "unusual situation".

In the *Re AM; ex parte AM* costs decision,[584] the donee of an enduring power of attorney had engaged legal representation. Did she do that in her own right, or as donee? SAT found, in the circumstances of that case, it was as donee.

Legal representative appointed by the administrator

This might apply if the represented person already has an administrator and an application is made for a guardian to be appointed. The Supreme Court has suggested that an administrator, at least in some cases, could appoint a legal representative to advocate on behalf of the represented person in the guardianship application.[585] It isn't clear if this has ever happened.

Expert or professional assistance sought by SAT

SAT can appoint a legal practitioner, or any other person with relevant knowledge or experience, to assist it in a proceeding by providing advice or professional services or by giving evidence.[586]

Litigation guardian

Section 40(2) of the SAT Act[587] says:

> "If a person who is not of full legal capacity is a party or potential party to a proceeding or proposed proceeding, the Tribunal may appoint a litigation guardian in accordance with the rules to conduct the proceeding on the person's behalf."[588]

[583] [2011] WASAT 178 at paragraph [41].
[584] [2012] WASAT 137 (S).
[585] See *'G' v 'K'* [2007] WASC 319 at paragraph [78].
[586] See section 64(1) of the SAT Act.
[587] *State Administrative Tribunal Act 2004*.
[588] The relevant rule is rule 39 of the *State Administrative Tribunal Rules 2004*.

In this context, the word "may" normally means that a person doesn't have to do something.[589] It's rare, in applications for a guardian or an administrator, for SAT to appoint a litigation guardian.

In hearings under the GA Act, SAT's primary concern is the best interests of the represented person, or the person in respect of whom the application is made.[590]

If SAT appoints a guardian or administrator, it takes away at least some of the person's rights to make their own decisions. SAT needs to ascertain, as far as possible, the wishes of that person.[591] Generally speaking, it has an obligation to observe natural justice.[592]

If appointed, a litigation guardian decides whether or not to oppose the application. In some cases, that could get in the way of the person's right to be heard.[593]

It might also be hard to find someone willing and suitable, who doesn't have an adverse interest, to be litigation guardian, and to find the money to pay their costs.

It may be that SAT should only appoint a litigation guardian when the other forms of representation and advocacy, as outlined in this chapter, aren't enough to ascertain the wishes of the person and observe natural justice.

For an example of when it happened in a guardianship application, see *TJC*.[594]

The Public Trustee performing its PAS function

The Public Trustee's Private Administrators' Support (PAS) team examines the accounts of most private administrators.[595] At times in that role, the Public Trustee may advocate for the retention or removal of the administrators[596] or assist SAT to deal with an issue that's arisen for a private administrator.[597] The Public Trustee isn't bound by what the represented person says.

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[589] See **[2.3]**.
[590] See section 4(2) of the GA Act and Chapter 7.
[591] See section 4(7) of the GA Act and **[7.9]** to **[7.12]**.
[592] See section 32(1) of the SAT Act and **[5.2]**.
[593] A similar point was made in the case of *S v State Administrative Tribunal of Western Australia [No 2]* [2012] WASC 306 when a person challenged SAT's decisions to appoint a guardian and administrator for her (see **[5.3]**).
[594] [2009] WASAT 130. This was a re-hearing after the Supreme Court in *'G' v 'K'* [2007] WASC 319 allowed an appeal against the original decision.
[595] See section 80 of the GA Act and the Private Administrator's Guide published by the Public Trustee and Public Advocate.
[596] See, for instance, *ET* [2012] WASAT 3 and *FV and Public Trustee* [2016] WASAT 86.
[597] See, for instance, *GF* [2016] WASAT 134.

The Public Trustee when specifically invited to attend an application for an administration order

Although the Public Trustee is a party to virtually all applications for an administration order,[598] it doesn't attend them as a matter of course. Sometimes, SAT asks the Public Trustee to attend the hearing, and possibly make submissions.[599] Again, the Public Trustee isn't bound by what the person who's the subject of the hearing says.

Advocacy organisations

People from advocacy organisations can also appear at SAT hearings.[600]

Health professionals

Health professionals such as doctors, social workers and nursing home staff may, in the course of the proceedings, express their views as to what should happen.

[5.3] Can a lawyer act for a represented person and charge for doing so?

Sometimes SAT:

- has previously made orders appointing a guardian and/or administrator, and is now reviewing that order;
- has previously made orders appointing an administrator, and is now hearing an application to appoint a guardian; or

[598] The definition of "party" in section 36(1) of the SAT Act includes the applicant and a person who is specified by an "enabling Act" to be a party to the proceeding. The GA Act is an "enabling Act" because it confers jurisdiction on SAT (see the definition of "enabling Act" in section 3(1) of the SAT Act). The definition of "party" in section 3(1) of the GA Act includes a person to whom the Act requires notice of an application to be given. Section 41(1)(c)(ii) of the GA Act requires notice to be given to the Public Trustee, though section 41(3)(b) says that in "exceptional circumstances", that can be dispensed with.

[599] See, for instance, *MA and BM* [2010] WASAT 121 at paragraphs [29] to [33].

[600] In *JC* [2016] WASAT 83 and *I* [2018] WASAT 29, the people the subject of the hearings had advocates, though the reasons for decision don't name the organisations involved. See also *DL* [2023] WASAT 66 at paragraphs [1] and [8].

- has previously made orders appointing a guardian, and is now hearing an application to appoint an administrator.

Can a lawyer act for the represented person in SAT and charge for doing so? Let's assume that the person is over 18, as is almost always the case.

Some general principles are:

- People are presumed to be capable of doing various things until the contrary is proved to the satisfaction of SAT.[601]
- If SAT appoints a guardian or administrator, it takes away at least some of the person's rights to make their own decisions.
- SAT needs to ascertain, as far as possible, the wishes of the person who is the subject of the hearing.[602]
- Generally speaking, SAT has an obligation to observe natural justice.[603]
- SAT has to impose the least restrictive alternative.[604]
- A single member of SAT can make the wrong decision. A three-member panel of SAT (including a judge) can correct it on review.[605]
- Circumstances can change. Some people can recover their mental capacity (such as after a stroke). Others might accept the need for their order, but want SAT to change their guardian or administrator. In either case, they can apply to review the order.[606]

Section 39(1) of the SAT Act allows a legal practitioner (with some possible exceptions) to represent a "party" in SAT. The represented person is a "party".[607]

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[601] See section 4(3) of the GA Act.
[602] See section 4(7) of the GA Act and **[7.9]** to **[7.12]**.
[603] See section 32(1) of the SAT Act and **[5.2]**.
[604] See sections 4(4), (5) and (6) of the GA Act and **[4.10]** and **[4.15]**.
[605] See section 17A of the GA Act and **[4.24]**.
[606] See section 86 of the GA Act and **[4.25]**.
[607] See section 36 of the SAT Act, when read with the definition of "party" in section 3(1) of the GA Act.

Section 77(1) of the GA Act restricts when a person under an administration order can appoint an agent or attorney in respect of their estate.[608] Normally, if a client loses capacity, the solicitor no longer has authority to act.[609]

Section 77(3)(a) of the GA Act says that nothing in section 77 affects "any contract for necessaries entered into by a represented person".

Under the general law, the word "necessaries" has a special legal meaning. It can include provision of legal services, and did in the 1908 High Court decision of *McLaughin v Freehill*.[610] In that case, a person had been declared incapable of managing his affairs. The legal work was in an action, which was successful, to have that order set aside. The court held that the costs were "necessaries" and that the solicitor was entitled to recover them from his client.[611]

McLaughin v Freehill doesn't say that "necessaries" means the provision of *any* legal service. We need not get into exactly what it does and doesn't cover. But whatever the case, the law seems to recognise that it can be important to have legal representation when challenging a declaration of incapacity.

In the case of *S v State Administrative Tribunal of Western Australia [No 2]*,[612] SAT appointed an administrator and a guardian for a Ms S. She appealed to the Supreme Court against that decision. She was a "person under disability" within the meaning of the RSC[613] because she had a guardian and an administrator. She normally would have needed a "next friend" to make decisions on her behalf in the appeal. The court found that she didn't need one when appealing against the decision that had made her a "person under disability".[614]

There is a distinction between:[615]

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[608] For a case on section 77 of the GA Act, see *NE* [2023] WASAT 30, although this doesn't go into contracts for necessaries. For the general law position when a person lacks capacity, see the High Court case of *Gibbons v Wright* (1954) 91 CLR 423, [1954] HCA 17.

[609] See *Yonge v Toynbee* [1910] 1 KB 215, cited in the Commentary on Order 70 of the RSC in the looseleaf and online service *Civil Procedure Western Australia*, published by LexisNexis.

[610] (1908) 5 CLR 858, [1908] HCA 15.

[611] For a discussion of the language used in this case which would now be considered offensive, see **[1.7]**.

[612] [2012] WASC 306.

[613] *Rules of the Supreme Court 1971*.

[614] For a further discussion of this and its complications, see **[10.5]**. See also *Daynes v Public Advocate* [2005] VSC 485 at paragraph [37] and *AM* [2017] WASAT 65 at paragraph [111].

[615] See *AM* [2017] WASAT 65, in particular at paragraphs [109] to [111], although in that matter, SAT did not end up deciding whether particular services provided were "necessaries" (see paragraph [124]). In *Re ; ex parte MM* [2011] WASAT 47 at paragraph [33], SAT, with respect,

- acting for a represented person (and charging for doing so) in proceedings concerning whether or not there should be guardianship and/or administration orders, and if so, the terms of such orders; and

- claiming to act for a person under an administration order generally in matters concerning the estate of the represented person (and claiming to charge for doing so).

[5.4] Does a represented person or proposed represented person have the capacity to instruct a lawyer?

This can be tricky, particularly when capacity is the subject of the hearing itself.

People can be capable of doing and understanding some things, but not others. In guardianship and administration hearings, it usually isn't just a case of asking, "Is the person mentally capable?" and getting either "yes" or "no" for an answer. They might be able to manage their pension, but not their savings of $100,000.

Despite what's said about contracts for necessaries, it would seem that a lawyer can only act for a represented person if that person can give relatively coherent instructions. Lawyers are not free agents. Subject to legal and ethical obligations, they must act on instructions. In doing so, they must have instructions in the first place.

Although a lawyer may seek *information* from different people, a lawyer's *instructions* must come from the client, and not anyone else. A lawyer who purports to act for a represented person or proposed represented person needs to be clear it's that person, and not someone else, who's giving those instructions.

Suppose that Bob is the represented person. Jill and Frank are his children. Say Frank and Bob come in together to a lawyer's office, and Frank tells the lawyer, "My father wants you to represent him."

The lawyer should speak to Bob alone, to see what Bob really wants. The lawyer normally should not immediately ask, "Do you want me to be your lawyer at the SAT hearing to review your administration order?" Instead, the lawyer might start with an open question like, "How can I help you?" That said, sometimes a person may be limited in how they can communicate, but not by what they understand. There isn't a one-size-fits-all approach to dealing with this.

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appears not to have considered the possibility of a contract for necessaries when being represented in the Mental Health Review Board.

[5.5] How can costs be recovered?

Cost recovery by a lawyer acting directly for the represented person or proposed represented person

If a lawyer represents the person in respect of whom the application is made, then as long as the person has an administrator, it's up to that administrator to decide whether to pay the lawyer's costs from the represented person's estate.[616]

There are three restrictions on the payment of legal services that are "necessaries". First, the person is only liable to the extent of their own property. Secondly, the services can't be supplied under an obligation (eg they can't be a gift). Thirdly, there is the price.[617]

There is a series of costs determinations relating to appearing in SAT, which set out the rates at which lawyers can charge.[618] These determinations don't always apply if there's a valid costs agreement in place.[619] There are also other protections, designed to stop lawyers overcharging.[620]

Cost recovery from another party

If a lawyer acts for another party, but says, "I'm doing it for the benefit of the represented person or proposed represented person," can the administrator pay the costs of that other party?

Normally, the answer is no, unless SAT orders it. It's not for the administrator to pick winners in litigation. To do so would normally breach section 72(3) of the GA Act.[621]

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[616] See *EA and KD, TA, LA, BA & VT [No 2]* [2007] WASAT 175 at paragraph [18].

[617] For the first two requirements, see *Contract Law in Australia* (3rd ed, 1996) by JW Carter and DJ Harland, published by Butterworths. There might be some question as to whether the general law, as opposed to sale of goods legislation, requires the price to be reasonable, but the lawyers are regulated on what they can charge.

[618] The most recent is the *Legal Profession State Administrative Tribunal Determination 2022*. These costs determinations are available online.

[619] See section 141(2) of the *Legal Profession Uniform Law Application Act 2022* and section 199(2)(a) of the *Legal Profession Uniform Law (WA)*. There's also section 271 of the repealed *Legal Profession Act 2008*. We won't go here into which law applies in which case.

[620] To go through them in detail would considerably expand the length of this book, but see, for instance, Part 4.3 of the *Legal Profession Uniform Law (WA)* and Part 10 of the repealed *Legal Profession Act 2008*. Again, we won't go here into which law applies in which case.

[621] See *Perpetual Trustees WA Limited and The Public Trustee* (2009) 68 SR (WA) 128, [2009] WASAT 253.

Section 87(1) of the SAT Act says that each party normally bears its own costs. This can be contrasted with Supreme Court civil proceedings, where the loser is normally ordered to pay the winner's costs.[622]

At the start of the 2002 Oscars®, Steve Martin said: "Remember, there are no losers here tonight – but we're about to change all that."

In applications for guardianship and administration orders, there are, in a sense, no winners or losers. The Chief Justice of the Supreme Court of WA has said: [623]

> "The Tribunal, in hearing a guardianship order or an administration order, does not decide a dispute between the parties; it applies its statutory obligation …to act in 'the best interests of [the] person in respect of whom an application is made'. Indeed, the expression, 'person in respect of whom an application is made' emphasises that the application is *about* the person rather than *against* the person."

In a SAT review of an administration order, Senior Member Allen said: [624]

> "This decision should not be seen by some of the parties as a win. In coming to my determination, my only focus has been what is in the best interests of JS."

The parties, though, can view things differently. The case of *GSW and HSH*[625] concerned a woman with Alzheimer's disease who moved into a hospital. HSH's husband invited another woman to live with him. HSH's son claimed that the husband and the other woman were having an affair; the husband denied this. The son applied to SAT for guardianship and administration orders to be made for his mother.

SAT said:[626]

> "… the questions about what is best for HSH in her personal and financial life are not ones raised in an environment of agreed circumstances and openness to a settled outcome. As is often the case, these matters take the form of a contest with the opposing parties holding strong and no doubt genuine views that what they propose is in the best interests of the person….

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[622] See Order 66 rule 1(1) of the RSC. There are several "ifs" and "buts" to that. See also *RK* [2020] WASAT 53 (S) at paragraph [22].
[623] See *GS v MS* [2019] WASC 255 at paragraph [84].
[624] See *JS* [2012] WASAT 220 at paragraph [50].
[625] [2011] WASAT 40.
[626] See paragraphs [29] and [63].

> It is always unfortunate when matters come before this Tribunal in circumstances where a family member has become disabled and the family fractures when issues are brought to the surface that might otherwise remain in check.… [W]hat often follows is a contest of sorts between people who claim primacy in the person's life. The person, because of their disability, is not able to impose their will on the situation."

SAT said that by making the applications, the son was "protecting his mother's honour and her financial interests", but that the husband saw the situation "quite differently".[627]

Sometimes in SAT proceedings under the GA Act, parties can "lawyer up" and argue different things. One party may get what they want and another doesn't. Proceedings can be taken for the wrong reasons. Someone might spend their own money to do what they think is right for the person who's the subject of the hearing.

In an application for guardianship or administration orders, it isn't enough to say, "I got appointed, so I'm entitled to my costs."[628] Conversely, if you didn't get appointed, SAT *might* still award you costs, although normally it wouldn't.

Section 87(2) of the SAT Act says that SAT does have the discretion to order that one party pays another party's costs. Generally, a costs order will only be made under that section in proceedings under the GA Act "where a party has acted unreasonably and has, by that party's unreasonable conduct, caused another party to incur costs".[629]

In the case of *GA and EA and GS*,[630] three parties maintained the proceedings, at least after a certain point, substantially for an ulterior motive. They made serious allegations against two other parties that were largely outside the scope of the proceedings. It was reasonable for the two other parties to get legal representation. SAT ordered that the three parties pay certain costs and disbursements of the two other parties.

It may, though, be reasonable to bring and maintain applications for guardianship and administration orders, even if SAT ends up dismissing them.[631]

Section 87(2) can apply if proceedings are withdrawn, but the onus is on the party seeking costs, and the starting presumption is that an order won't be made.[632]

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[627] See paragraphs [70] and [71].
[628] See *Re ; ex parte MM* [2011] WASAT 47 at paragraph [31].
[629] See *GA and EA and GS* [2013] WASAT 175 at paragraph [43].
[630] [2013] WASAT 175 at paragraphs [42] and [43].
[631] See *KZ* [2021] WASAT 24 at paragraph [36].
[632] See *SC* [2018] WASAT 116 at paragraphs [25] and [26].

All other things equal, it may be harder to get a costs order against a party who is "unsophisticated in relation to legal matters" and "by no means familiar with legal processes",[633] but maybe not if SAT goes to "extraordinary lengths" to explain something to the party.[634]

SAT can and does apply section 87(2) differently in proceedings under different Acts, such as in vocational regulation.[635]

Section 16(4) of the GA Act allows one party's costs to come out of the estate of the represented person or proposed represented person.[636] Again, costs orders under this section are the exception, not the norm. Section 16(4) specifically requires SAT to be satisfied that the party "has acted in the best interests" of that person. That "is not a difficult threshold to cross, and something more is required before the Tribunal will exercise its discretion to make an award of costs".[637]

Even if proceedings seem difficult and unusual to you, they may seem less so to a SAT member. When considering a costs application, Member Dean said:

> "I do not accept that the proceedings were 'unique' for the reasons outlined in the application. The Tribunal frequently has before it cases with numerous parties in attendance and a high level of conflict between them."[638]

Section 16(4) says that the costs which may be awarded are "such costs relative to those proceedings as the State Administrative Tribunal thinks fit be paid to that party by, or out of the assets of" the person who's the subject of the hearing.

Some questions to ask are:

- Without legal assistance, would an application have been made to SAT? Did legal assistance result in the person who was the subject of the hearing getting the protection of a guardianship and/or administration order?[639]

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[633] See *SC* at paragraph [27].
[634] See *GA and EA and GS* [2013] WASAT 175 at paragraph [45].
[635] See *Medical Board of Western Australia and Roberman* [2005] WASAT 81 (S) at paragraph [30].
[636] For a history of section 16, see *RK* [2020] WASAT 53 (S) at paragraphs [18] to [22].
[637] See *MB and EM* [2014] WASAT 17 at paragraph [72].
[638] See *TJC [No 2]* [2009] WASAT 232 at paragraph [25].
[639] See *EA and KD, TA, LA, BA & VT [No 2]* [2007] WASAT 175 at paragraph [57] and see *RK* [2020] WASAT 53 (S) at paragraph [24].

- Were there serious allegations that the person who was the subject of the hearing was suffering from abuse? Was legal assistance needed to present a reasoned case to SAT in a timely manner?[640]

- Was there conflict between significant parties (such as the children of the person who was the subject of the hearing)? Was it so bad that legal assistance was needed to present a coherent case to SAT in respect of the history and needs of the person who was the subject of the hearing?[641]

- Was the application so urgent that legal assistance was needed to present a reasoned case to SAT in a timely manner?[642]

- Was the application contentious and unique? Was it about, for instance, whether a person should be sterilised?[643]

- Did the application raise a special point of law?[644]

- Were there other things stopping a party presenting their case to SAT without legal representation?[645]

- What role or contribution did the party seeking costs play in the proceedings?[646]

- What roles did the other parties play in the proceedings?[647]

- How complex were the proceedings?[648]

- What are the best interests of the person who was the subject of the proceedings?[649]

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[640] See *EA and KD, TA, LA, BA & VT [No 2]* at paragraph [57].
[641] See *EA and KD, TA, LA, BA & VT [No 2]* [2007] WASAT 175 at paragraph [57].
[642] See *RK* [2020] WASAT 53 (S) at paragraph [24].
[643] See *EA and KD, TA, LA, BA & VT [No 2]* at paragraph [57].
[644] See *EA and KD, TA, LA, BA & VT [No 2]* at paragraph [57].
[645] See *RK* [2020] WASAT 53 (S) at paragraph [24].
[646] See *RK* [2020] WASAT 53 (S) at paragraph [28].
[647] See *RK* [2020] WASAT 53 (S) at paragraph [28].
[648] See *EA and KD, TA, LA, BA & VT [No 2]* at paragraph [57] and *RK* [2020] WASAT 53 (S) at paragraph [28].
[649] See *RK* [2020] WASAT 53 (S) at paragraph [28].

It isn't relevant how much money the person seeking the costs has.[650] But no matter what the other circumstances, SAT could still refuse to make a costs order if the person who was the subject of the hearing doesn't have much money.[651]

Part of the rationale for restricting costs orders under section 16(4) was that SAT:[652]

> "… aims to make proceedings as accessible as possible to the parties…. Legal representation is not usually required at hearings of the Tribunal in the GA Act jurisdiction because the information necessary to make a determination is generally secured by the application and hearing processes alone. In the GA Act jurisdiction moreover, the Tribunal is able to refer an application to the Public Advocate for independent investigation, report and advocacy in the best interests of the person for whom the application is made (s 97(1)(b))."

Is it reasonable not to have a lawyer at SAT?

On the one hand, generally speaking, there is a public interest in making guardianship and administration applications accessible and cheap. In many cases, they're the only way of protecting vulnerable people with mental disabilities. Someone could easily be deterred from making such applications if a lawyer were needed. Plenty are heard without them.

On the other hand, taking away the rights of a person to make their own decisions is a very serious business with potentially far-reaching consequences, not just for the person, but for others.

There's also the question of familiarity. At a SAT hearing, there will normally be one or three SAT members. There might also be someone from the Office of the Public Advocate and/or the Public Trustee. They may have been to many hearings before, know where to go, and know the jargon.

They're more likely to understand the initials. They may know, for instance, that SAT can direct OPA[653] to investigate the misuse of an EPA[654] executed by someone who had been under the care of what used to be called DCP,[655] who later had DSC[656] assisting them, and recommend

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[650] See *A and ES* [2005] WASAT 279 at paragraph [18], *EA and KD, TA, LA, BA & VT [No 2]* at paragraph [50].
[651] See *RK* [2020] WASAT 53 (S) at paragraph [28].
[652] See *EA and KD, TA, LA, BA & VT [No 2]* at paragraph [43]. Similar comments were made in *RK* [2020] WASAT 53 (S) at paragraph [24].
[653] Office of the Public Advocate.
[654] Enduring Power of Attorney.
[655] Department for Child Protection.
[656] Disability Services Commission.

whether to make someone an RP[657] and appoint the PT,[658] or whether instead, to appoint someone else and have the PTO's PAS team[659] check up on them.

SAT has a statutory obligation, amongst other things, "to take measures that are reasonably practicable ... to explain to the parties, if requested to do so, any aspect of the procedure of the Tribunal, or any decision or ruling made by the Tribunal, that relates to the proceeding".[660]

That said, it takes years of study to get a law degree. There's a limit to what can be explained in a hearing that only lasts an hour. For some people, it's not in their nature to ask.

Generally speaking, competent lawyers can present a case better than a member of the public acting in person.

TJC [661] concerned an application for guardianship. The grandmother of the proposed represented person didn't have a lawyer representing her, although her nephew assisted in the presentation of the case. The grandmother and her nephew asked a series of questions to a psychologist, but eventually SAT cut off their questioning.

On appeal to the Supreme Court, Justice Jenkins made this comment:[662]

> "It is disappointing, that the presiding officer cut the questioning of [the psychologist] short on these issues. I appreciate that it was difficult for the presiding officer to control the proceedings. From examining the transcript of the hearing and from my own experience with [the grandmother] in the course of the hearing of this application, I appreciate that [the grandmother]'s enthusiasm to communicate her points, her nervousness and her lack of legal training can complicate proceedings. Nevertheless, the questions asked of [the psychologist] by [the grandmother]'s nephew appear to me to have raised some relevant issues for the Tribunal's consideration."

Sometimes people don't present well and say irrelevant things, but also make some very good points. There can be a risk that those points are overlooked. The grandmother's appeal succeeded.

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[657] Represented Person.
[658] Public Trustee.
[659] Public Trust Office's Private Administrators' Support team.
[660] See section 32(6)(b) of the SAT Act.
[661] [2007] WASAT 105.
[662] See *'G' v 'K'* [2007] WASC 319 at paragraph [117].

What if a party has already taken the costs from the estate of the person who's the subject of the hearing? SAT can't make an order under section 16(4) of the GA Act to say it was OK for them to do so. Section 16(4) can't work retrospectively.[663]

Section 87(3) of the SAT Act says that SAT's power to order that one party pay another's costs "includes the power to make an order for the payment of an amount to compensate the other party for any expenses, loss, inconvenience, or embarrassment resulting from the proceeding or the matter because of which the proceeding was brought". It isn't meant to be a form of punishment.[664]

In *GA and EA and GS*,[665] part of a claim for costs included $900 for lost wages. SAT found it had the discretion to award that, but declined to do so, saying that such an award would only be "exceptionally done".[666]

In *MD*,[667] SAT didn't make an order against a party under section 87(3) because the party showed a "lack of understanding rather than a calculated or vexatious decision to cause inconvenience and cost to the applicant".[668]

At the end of this part are further examples of applications under section 87(2) of the SAT Act, section 16(4) of the GA Act, or both.

Cost recovery from a party's representative

Section 87(6) of the SAT Act allows this in limited circumstances.[669]

The timing of a costs application to SAT

In *RK*,[670] SAT left open the question of whether a costs application can be made in SAT *after* the proceedings are otherwise over. In *GB*,[671] SAT said there was a 21-day time limit, but that it had the power to dispense with that requirement (and did so in the circumstances).

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[663] See *MB and EM* [2014] WASAT 17 at paragraphs [62] to [68] and [70].
[664] See *MD* [2022] WASAT 45 at paragraph [29] and *CK* [2023] WASAT 84 at paragraphs [20] and [40].
[665] [2013] WASAT 175.
[666] See paragraphs [54] and [55].
[667] [2022] WASAT 45.
[668] See paragraph [35].
[669] See *NMG and MG* [2020] WASAT 19 at paragraphs [15] and [22] to [28].
[670] [2020] WASAT 53 (S) at paragraphs [8] to [11].
[671] [2020] WASAT 61 (S) at paragraphs [34] to [40].

How the amount of costs is worked out

SAT does not have to award whatever costs the party incurred, and can award a lesser amount (though not a greater amount).[672]

The SAT member or panel hearing the matter doesn't have to fix costs,[673] but invariably does so, adopting "a broad and relatively robust fashion".[674] In *GA and EA and GS*, SAT applied the relevant costs determination as a guide.[675]

Personal injuries and criminal injuries compensation matters

Sometimes, as part of conducting litigation in the District Court, it's necessary to seek a guardianship or administration order under the GA Act.[676] If, at the end of the litigation, another party pays all the legal costs of the person who brought that SAT application, all well and good. But this doesn't always happen.

In one matter, the District Court made an award of damages and paid it to the Public Trustee as trustee, to hold on behalf of the plaintiff.[677] The defendant's insurer didn't pay the costs of the SAT application (or at least not all of them). The plaintiff's lawyers sought that the Public Trustee pay them from the award. A District Court official allowed them as part of the costs of the District Court litigation, on the basis that the SAT application was needed.[678]

The same principle could apply in Supreme Court civil litigation and in criminal injuries compensation cases.

Cost recovery by the Public Advocate as investigator advocate

The Public Advocate generally doesn't seek costs at SAT hearings, even when legally represented.

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[672] See *RK* [2020] WASAT 53 (S) at paragraph [11]. This case dealt with an application under section 16(4) of the GA Act, but the same principle would apply to other costs applications.
[673] See section 89 of the SAT Act.
[674] See *JHR* [2017] WASAT 154 at paragraph [75]. See also *PT* [2020] WASAT 147 (S) at paragraphs [26] to [30].
[675] See paragraph [56].
[676] See **[10.3]**.
[677] For more on that type of trust, see Chapter 13.
[678] No written reasons were given (or sought) for that decision. There may have been other decisions on this.

Cost recovery by the administrator

If SAT is reviewing an administration order, it might consider the performance of that administrator, who might have to justify some of the decisions that were made and answer criticisms at the hearing.

In *FV and Public Trustee*,[679] FV's two private administrators had placed a substantial portion of her money into superannuation. At the review hearing, the question arose whether they had the power to do that. SAT agreed with the Public Trustee that they did.

The administrators had also engaged lawyers. The Public Trustee thought that it reasonable for them to do so. The administrators had acted properly. The case raised important questions of law. The Public Trustee submitted that provided the amounts were reasonable, the costs of the administrators should be paid from the represented person's estate without the need for an order.[680] SAT agreed.[681]

Things could have been different if the administrators hadn't acted appropriately or hadn't needed a lawyer.

Cost recovery by the guardian

Similarly, if SAT is reviewing a guardianship order, it might consider the performance of that guardian, who might have to justify some of the decisions that were made and answer criticisms at the hearing.

It seems that if a guardian engaged a lawyer and wants those costs reimbursed, SAT would have to authorise it.[682]

Cost recovery by the donee of an enduring power of attorney or guardianship

There aren't many cases on this, so the situation isn't clear. In *JA*,[683] SAT refused an application for costs by the donee of an enduring power of attorney. In the *Re AM; ex parte AM* costs decision,[684] the donee of an enduring power of attorney had incurred legal costs. Did she do

[679] [2016] WASAT 86.
[680] See paragraph [48].
[681] See paragraph [49]. When the Public Trustee appears in SAT as administrator, the same principles would apply, but its scale of fees govern what costs it can charge.
[682] There could be a question under what provision, but it would be either sections 16(4) or 118(2) of the GA Act, or section 87(2) of the SAT Act.
[683] [2016] WASAT 5.
[684] [2012] WASAT 137 (S).

that in her own right, or as donee? SAT found, in the circumstances of that case, that she incurred them as donee.

Cost recovery by a legal representative appointed by the administrator

If this situation[685] were ever to apply, presumably the administrator would pay out of the represented person's funds.

Cost recovery by a legal practitioner under section 64(1) of the SAT Act

If SAT, under section 64(1) of the SAT Act, appoints a legal practitioner to assist it in a proceeding by providing advice or professional services or by giving evidence, it may order a party to pay or contribute to its costs of obtaining that assistance.[686] Presumably, the government would pay the rest.[687]

Cost recovery by a litigation guardian

When SAT appoints a litigation guardian, it can make orders concerning the costs of that litigation guardian.[688]

Further cases

Here are further examples of applications under 87(2) of the SAT Act:

- *PJC and RJC* [2008] WASAT 224
- *KB and DB and KW* [2008] WASAT 239
- *ILS and SK* [2012] WASAT 203 (S)
- *AS and GS* [2013] WASAT 49
- *AI and GR* [2014] WASAT 150
- *JB and KH* [2014] WASAT 152
- *PHQ and LPQ* [2015] WASAT 5
- *BC and NR* [2016] WASAT 67
- *MB and MM* [2017] WASAT 51
- *JHR* [2017] WASAT 154
- *PT* [2020] WASAT 147 (S)
- *WD* [2022] WASAT 12
- *GD* [2022] WASAT 33

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[685] Discussed at **[5.2]**.

[686] See section 64(2) of the SAT Act.

[687] Section 16(2) of the GA Act may also be relevant here.

[688] We need not get into cost recovery by the Public Trustee performing its PAS function or when it's specifically invited to attend an application for an administration order. We also won't deal with whether advocacy organisations or health professionals can seek costs.

- *GD* [2022] WASAT 33 (S).

Here are further examples of applications under section 16(4) of the GA Act:

- *RC and LP and AC [No 2]* [2007] WASAT 171
- *Re TA; ex parte LA* [2008] WASAT 90
- *KD* [2008] WASAT 109
- *Perpetual Trustees and BW* [2008] WASAT 146
- *MO and JB* [2008] WASAT 228
- *EBF and DMW* [2008] WASAT 236
- *FF and OF* [2008] WASAT 288
- *Re ML; ex parte WW* [2009] WASAT 5
- *Re: GW* [2009] WASAT 126
- *BMD and JDN and KWD* [2009] WASAT 132
- *GB and BM* [2009] WASAT 186
- *BS and KM* [2009] WASAT 198
- *MK and GSK* [2009] WASAT 257
- *Perpetual Trustees WA Limited and NBS* [2010] WASAT 17
- *CH and JC* [2011] WASAT 114
- *Perpetual Trustees (WA) Limited and BW* [2012] WASAT 106
- *LA and JCA* [2012] WASAT 249
- *DB and MJB* [2013] WASAT 73
- *CS and JS* [2014] WASAT 173
- *ER and NR* [2015] WASAT 136
- *PF* [2017] WASAT 69
- *MPM* [2018] WASAT 59
- *Y and CO* [2020] WASAT 166.

Here are further examples of applications under both section 87(2) of the SAT Act and section 16(4) of the GA Act:

- *A and J* [2006] WASAT 287 (S)
- *G and L & Anor* [2007] WASAT 232
- *Re IO; ex parte VK* [2008] WASAT 8
- *MO and JB* [2008] WASAT 228
- *M [No 2]* [2008] WASAT 262 (S)
- *MGT and NED and Anor* [2008] WASAT 280
- *Re WA and IA ex parte AA and JA* [2011] WASAT 33
- *Re GM; ex parte MM* [2011] WASAT 119
- *MHF and TF* [2013] WASAT 210 [also cited as *Re MHF and TF* (2013) 84 SR (WA) 350]
- *BFO & Ors and KPW* [2014] WASAT 68
- *L and V* [2017] WASAT 39
- *SC* [2018] WASAT 116
- *CK* [2023] WASAT 84.\

[5.6] Can SAT apply for Legal Aid?

A little known and little used provision of the GA Act says:[689]

> "Where in any proceedings before the State Administrative Tribunal commenced under this Act a person in respect of whom a guardianship or administration order is in force or a person in respect of whom an application is made is not represented, the Tribunal may direct the executive officer to apply on behalf of the person for legal aid under the *Legal Aid Commission Act 1976*."

This doesn't guarantee that legal aid will be granted. This provision was used in *FC and Public Trustee*,[690] but legal aid was refused.[691]

[689] See clause 13(4) of Schedule 1, which has effect because of section 17.
[690] [2006] WASAT 133.
[691] See paragraph [20].

CHAPTER 6 – Powers of guardians and administrators

[6.1] What's the difference between the powers of a limited and a plenary guardian or administrator?

Guardian

Subject to some limits (see **[6.4]**), section 45(1) of the GA Act[692] says a **plenary guardian** has the same functions "in respect of the person of the represented person" as someone who's been given a parenting order with parental responsibility of a "child lacking in mature understanding".[693] The phrase "in respect of the person of the represented person" is a little confusing, but it means functions concerning the represented person's lifestyle, rather than the person's estate.

The GA Act specifically sets out some of those powers,[694] but they're not the only powers a plenary guardian has. For more on these, see **[4.11]**, in the discussion on the need for a guardian.

A limited guardian has whatever powers the State Administrative Tribunal (SAT) gives them, but they can only be powers that a plenary guardian could have.[695]

Administrator

Before 1992, the Supreme Court could appoint a manager under the *Mental Health Act 1962* for a person who was "incapable, by reason of any mental illness, defect or infirmity … of managing his affairs".[696] Under section 68(1) of that Act, the court had a list of powers. It chose which powers from that list to give to the manager.

Nowadays, if SAT makes an administration order, it can be **limited** or **plenary**.

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[692] *Guardianship and Administration Act 1990*.

[693] See:

- *MS* [2020] WASAT 146 at paragraphs [97] to [105]
- *LGW* [2004] WAGAB 4 at paragraphs [26] to [40]
- *KE and CPJ* [2006] WASAT 45 at paragraphs [66] to [69]
- *AS and AA* [2007] WASAT 54 at paragraphs [53] to [64]
- *LJH* [2007] WASAT 139 at paragraphs [28] to [29].

[694] See section 45(2) of the GA Act.

[695] See section 46 of the GA Act.

[696] See section 64(1), now repealed.

Where an order isn't plenary, SAT "may … authorise the administrator to perform any specified function, including one or more of those set out in Part A of Schedule 2" of the GA Act.[697]

SAT can therefore give, to a **limited administrator**, one or more of the powers set out in the list in Part A of Schedule 2. That list includes:

> "1. To take possession of all or any of the property of the represented person."
>
> "3. To pay any debts of, and settle or compromise, any demand made by, or against, the represented person or against the estate and discharge any encumbrance on the estate."
>
> "18. To sequestrate the estate of the represented person, under the provisions of the bankruptcy laws."[698]

Part A of Schedule 2 of the GA Act is based on the old section 68(1) of the *Mental Health Act 1962*. SAT isn't restricted to the items on that list, and doesn't have to use the same wording. It can give different powers, or differently worded powers, to a limited administrator if it so chooses.[699]

Section 71(2) says that a **plenary administrator**:

> "… may perform, or refrain from performing, in relation to the estate of the represented person, or any part of the estate, any function that the represented person could himself perform, or refrain from performing, if he were of full legal capacity."

Section 71(2) could have said that a plenary administrator can only exercise the powers in Part A of Schedule 2. It doesn't. It seems that it wasn't meant to be as prescriptive as that.

[6.2] What are other powers of administrators?

They include:

- executing all documents and doing all things necessary for the performance of their functions;[700]

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[697] See section 71(3) of the GA Act.

[698] For a case in which an administrator was appointed to do this, see *SAL and JGL* [2016] WASAT 63.

[699] See, for instance, the administration orders made in *RW* [2014] WASAT 120.

[700] See section 69(2) of the GA Act.

- using agents;[701] and
- seeking directions.[702]

At least in some cases, a plenary administrator can place the represented person's assets into superannuation.[703]

[6.3] What's the effect of the decisions of a guardian or administrator?

Assuming that the decisions were validly made, they have effect as though the represented person had made them and was of full legal capacity.[704]

[6.4] What limits are on the powers of a guardian or administrator?

Limits on both guardians and administrators

One obvious limit is if SAT only makes a limited order. There are other limits, which can even apply to plenary orders:

- Any decision has to be one that the represented person could have lawfully made. An administrator can't decide, for instance, to make false statements to the Department of Finance.
- Sometimes, a body has the power to do something to a person, whether or not that person agrees to it, such as send them to prison. A guardian or administrator can't override that.
- A guardian or administrator can be subject to conditions, restrictions and/or directions given by SAT.[705]

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[701] See section 76 of the GA Act. Section 50 of the *Public Trustee Act 1941* is also relevant when the Public Trustee is administrator.
[702] See Chapter 9.
[703] See *FV and Public Trustee* [2016] WASAT 86, in particular at paragraphs [45] to [47]. The question of whether an administrator under the GA Act can make a binding death benefit nomination for superannuation is dealt with in *SM* [2019] WASAT 22.
[704] For guardians, see section 50 of the GA Act; for administrators, see sections 69(3) and 79. We won't go here into what happens if the decisions were not validly made.
[705] See Chapter 9.

- The GA Act requires a guardian and an administrator to act according to their opinion of the best interests of the represented person, though there are, in turn, some limits on that.[706]

- Neither a guardian nor an administrator can make a will on behalf of the represented person.[707] Some represented persons might still have the capacity to make a will themselves. The test for doing so is different from the test for being under a guardianship or administration order. A guardian or administrator isn't required to consent to it.[708] If a plenary guardian or plenary administrator considers that the represented person lacks the capacity to make a will, they can apply to the Supreme Court for what is called a "statutory will".[709]

Conflicts of interest by guardians and administrators

Section 44(1)(b) of the GA Act stops someone being appointed guardian whose interests conflict or may conflict with the interests of the represented person.[710] That provision, together with the "best interests" requirement,[711] suggests that once appointed, guardians must put the interests of the represented person above their own interests.

The situation is not as clear for administrators. They don't have a provision similar to section 44(1)(b). A conflict of interest therefore does not, in itself, render a person or body unsuitable to be an administrator.[712] Even still, at least generally speaking, administrators must put the interests of the represented person above their own interests. They are subject to the "best interests" requirement.[713] In *P*,[714] SAT described the administrator in that case as being "unquestionably in a fiduciary position with respect to the represented person", and that the administrator could not advantage herself at the represented person's expense.

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[706] See Chapter 7.
[707] See sections 45(4) and 71(2a) of the GA Act.
[708] There was a question as to whether section 77 of the GA Act did require an administrator to consent, but ultimately, the answer was no. See *Re Full Board of the Guardianship and Administration Board* (2003) 27 WAR 475, [2003] WASCA 268.
[709] See section 111A of the GA Act. We won't go into whether a limited guardian or administrator can do this. Applications for statutory wills are rare. A plenary administrator made one in *Margaret Joy Langton Britton by next friend The Public Trustee v Britton* [2023] WASC 352. The question of whether an administrator under the GA Act can make a binding death benefit nomination for superannuation is dealt with in *SM* [2019] WASAT 22.
[710] Although sections 44(3) and (4) qualify that.
[711] See Chapter 7.
[712] See **[4.16]** under "Conflict of interest".
[713] See Chapter 7.
[714] [2019] WASAT 38 at paragraph [47]. This case is also called *LR*.

The situation may be more complicated when, for instance, the administrator and represented person are married or in a de facto relationship and have a joint bank account. At least up to a point, it may be reasonable for the administrator to spend some of that money on themselves, even though that means less for the represented person.

That all said, a guardian or administrator can only reasonably be expected to apply so much time and resources to a represented person. They're not expected to devote every waking moment to the task.

Limits on guardians

Guardians don't have the right "to chastise or punish a represented person".[715]

A guardian can't do the following on behalf of the represented person:[716]

- vote in any election;[717]
- consent to various adoptions;
- consent to a particular order under the *Surrogacy Act 2008*; or
- consent to the marriage of a minor, sign a notice of intended marriage or take party in the solemnisation of a marriage.

In *LWL*,[718] SAT considered, but did not finally decide, whether a guardian could initiate divorce proceedings on behalf of a represented person. In *PC*[719], SAT considered, but did not decide, on the extent to which the rights of a guardian could impact on the rights of a spouse.

A guardian can't consent to a sexual relationship on behalf of the represented person,[720] though in one case, SAT authorised a guardian to enquire into the nature, extent and circumstances of any sexual relationship of a represented person with dementia, including the person's capacity to give informed consent for such a relationship, and to provide a report on her findings and

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[715] See section 45(1) of the GA Act.
[716] See section 45(3) of the GA Act.
[717] Under section 111 of the GA Act, in some cases, SAT can declare that a person can't make judgments for the purpose of complying with the provisions of the *Electoral Act 1907* relating to compulsory voting. SAT did this in *GYM* [2017] WASAT 136 at paragraph [86], but not in *KRM* [2017] WASAT 135 at paragraph [83]. SAT also referred to section 111 of the GA Act in *Penn and Teede* [2022] WASAT 31 at paragraph [82].
[718] [2008] WASAT 35.
[719] [2011] WASAT 72 at paragraphs [26] to [28].
[720] See *VM* [2013] WASAT 154 at paragraphs [93] to [97].

conclusions to the other guardian, the children, and the management of the care facility in which the represented person lived.[721]

A guardian can't, on behalf of the represented person, plead guilty or not guilty in criminal proceedings.[722] But a plenary guardian (or a limited guardian with a suitably worded order) could, for instance, make enquiries and advocate with agencies concerning those proceedings.[723]

The limits on a guardian's powers to consent to medical treatment are complicated, but here are some of them:

- If a person is a voluntary patient under the *Mental Health Act 2014* and has the capacity to make a particular treatment decision under that Act, the person normally can consent to or refuse that treatment, even if they have a guardian. There might be, say, eight treatment decisions to make over time. The person might understand some, but not others.[724]

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[721] See *VM* at paragraphs [98] and [103].

[722] The GA Act doesn't specifically stop that, but the *Criminal Law (Mentally Impaired Accused) Act 1996* relates to criminal proceedings involving mentally impaired people who are charged with offences. It doesn't allow guardians to plead guilty or not guilty. Subject to some restrictions, section 45(1) of the GA Act gives a plenary guardian the same powers to make lifestyle decisions as someone who's been given a parenting order with parental responsibility of a "child lacking in mature understanding". Section 29 of *The Criminal Code* restricts when a child under 14 is criminally responsible for an act or omission. Even if a child is criminally responsible, the *Young Offenders Act 1994* doesn't allow a person with parental responsibility to plead guilty or not guilty on behalf of them. SAT considered the issue in *Department of Corrective Services and AP* [2011] WASAT 213 at paragraphs [23] and [34]. Section 45(2) of the GA Act gives a plenary guardian the power to act as "next friend" or "guardian *ad litem*" in some legal proceedings, but those terms, which are discussed in Chapter 10, only apply to civil proceedings. In *Department of Corrective Services and AP*, SAT did give the guardian a role to play in proceedings under *Dangerous Sexual Offenders Act 2006*. That Act no longer exists. The *High Risk Serious Offenders Act 2020* replaced it. In *GEG* [2022] WASAT 121, a person under a guardianship order pleaded guilty to a criminal charge (see the footnote to paragraph [73]).

[723] See *PVS* [2012] WASAT 233. For cases in which a guardian had some functions concerning criminal proceedings, see:

- *CDM* [2007] WASAT 282
- *K* [2018] WASAT 27
- *PR* [2021] WASAT 32
- *GEG* [2022] WASAT 121.

[724] For the relationship between the GA Act, *Mental Health Act 2014* and *Criminal Law (Mentally Impaired Accused) Act 1996*, see *MGP* [2020] WASAT 65 at paragraphs [9] to [22].

- There are specific laws in relation to abortion.[725]
- There are restrictions on a guardian consenting to a sterilisation.[726]
- An advance health directive can override a guardian's powers, though there are "ifs" and "buts" to that.[727]
- A guardian can't consent to voluntary assisted dying.[728]

In 2020, the GA Act was amended to deal with consenting to medical research. We won't go through the limits on a guardian's powers in that area.[729]

A guardian doesn't have the automatic right to enter the premises where the represented person is or might be. The guardian can apply to SAT for a warrant in limited circumstances, and the police (and/or other people) can help if the warrant is granted.[730]

Guardians can't charge fees for acting in the role.[731] The Public Advocate and her staff are public servants and do get paid,[732] but don't charge the represented person.

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[725] As at 1 October 2023, the law allowed an abortion to be performed in a number of circumstances. If "informed consent" was required, only the pregnant woman herself could give it (see *KS and CL* [2015] WASAT 9). The *Abortion Legislation Reform Act 2023* will change the law in this area, but as at 1 October 2023, those changes had not come into effect.

[726] See sections 45(4A) and 56 to 63 of the GA Act and *EW* [2021] WASAT 111 at paragraphs [13] to [22]. For other cases on sterilisation, see *AD* [2007] WASAT 123, *JS and CS* [2009] WASAT 90 and *GEG* [2022] WASAT 121.

[727] See, for instance, section 110ZJ(2) of the GA Act. The Department of Health's website has information on advance health directives. They are discussed in the cases of *AL* [2017] WASAT 91 and *IH* [2022] WASAT 108.

[728] See section 3B of the GA Act.

[729] See in particular Part 9E of the GA Act. The Office of the Public Advocate's website (www.publicadvocate.wa.gov.au) has information on it. See also the report of the WA Legislative Council's Standing Committee on Legislation *Guardianship and Administration Amendment (Medical Research) Bill 2020 and amendments made by the Guardianship and Administration Amendment (Medical Research) Act 2020*, November 2020.

[730] See section 49 of the GA Act and the cases of *CT and ALT* [2014] WASAT 42 and *Public Advocate and TLG-B* [2015] WASAT 108. In *LP* (2020) 99 SR (WA) 123, [2020] WASAT 25 at paragraphs [231] to [233], SAT said that when making a guardianship order, it doesn't have the power to order that keys be provided to the represented person's property, nor say who has access to the represented person.

[731] See section 117(2) of the GA Act.

[732] See sections 91 and 94 of the GA Act.

Limits on administrators – gifts

Section 72(3) of the of the GA Act says that SAT's approval under section 71(5) is needed before an administrator can make:

- "a payment or disposition of a charitable, benevolent or ex gratia nature"; or
- "a payment in respect of a debt or demand that the represented person is not obliged by law to pay".

This is sometimes referred to as "gifting", though it can cover more than what would normally be described as gifts. SAT, with respect, has used different approaches to determine what comes within section 72(3).[733] The answer isn't always obvious.[734] It covers some loans,[735] but not others. Does it include letting someone live rent-free (or at reduced rent) in the represented person's house?[736] Sometimes, SAT gives the authority to an administrator, just in case.[737]

SAT can only authorise a section 72(3) transaction in advance.[738] If an administrator allows it without such approval, the Public Trustee (at least in some circumstances) has the power to relieve the administrator of liability for any loss to the represented person,[739] but in many cases,

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[733] In *FS* [2007] WASAT 202, SAT (including the then-President) appeared to limit the sorts of transactions that fell within section 72(3) and which therefore needed SAT's approval (see paragraphs [135] to [144]). In *Perpetual Trustees WA Limited and The Public Trustee* (2009) 68 SR (WA) 128, [2009] WASAT 253, a differently constituted SAT (including one of the then-Deputy Presidents) appeared to take a different approach (see paragraphs [57] to [86]).

[734] For some cases on what does and doesn't come within section 72(3), see:

- *IL* [2006] WASAT 357 at paragraphs [71] to [73]
- *MD* [2010] WASAT 132 at paragraphs [25] to [62]
- *ET* [2012] WASAT 3 at paragraphs [60] to [61]
- *GC and PC* [2014] WASAT 10
- *FV and Public Trustee* [2016] WASAT 86 at paragraphs [45] to [47].

[735] See *JL* [2015] WASAT 1 and *SMC* [2015] WASAT 41.

[736] See:

- *BME* [2012] WASAT 95 at paragraphs [51] to [54]
- *RC* [2014] WASAT 25 at paragraphs [70] to [77] and [81]
- *KB and EB* [2014] WASAT 47 at paragraphs [52] to [54] and [60]
- *AS* [2018] WASAT 1 at paragraph [66].

[737] See, for instance, *NL and TKT* [2012] WASAT 121 at paragraph [105] and *BME* [2012] WASAT 95 at paragraphs [49] to [54].

[738] See *Perpetual Trustees WA Limited and The Public Trustee* (2009) 68 SR (WA) 128, [2009] WASAT 253 at paragraphs [63] to [86], following *EH* [2008] WASAT 222 at paragraphs [22] to [38].

[739] See section 80(4) of the GA Act.

it wouldn't be appropriate to do so. In *SMC*,[740] SAT approved an interest-free loan becoming an ex gratia payment.

When exercising its powers concerning administrators,[741] SAT "may take a liberal view of the best interests of the represented person".[742] The case of *DW and JM*[743] sets out things that it may take into account when deciding whether or not to authorise a section 72(3) transaction. They include the following:[744]

1. The relationship between the represented person and the beneficiary of the gift.
2. The extent of the estate of the represented person.
3. The income and expenditure of the estate.
4. The age and needs of the represented person.
5. The purpose of the gift.
6. The likelihood of the represented person acceding to the request if they had capacity.
7. The alternatives open to the recipient.
8. The attitude of those who are likely to benefit from the estate of the represented person on the person's death.
9. The needs of any other person dependent upon the represented person.

Although the represented person's will may be relevant, a will only takes effect on death, if then. SAT has said that the GA Act wasn't intended to be a way to allow the represented person's estate to be distributed before then.[745]

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[740] [2015] WASAT 41.
[741] Under Part 6 of the GA Act.
[742] See section 71(5) of the GA Act.
[743] [2006] WASAT 366 at paragraphs [31] to [36]. See also *M* [2007] WASAT 201 at paragraphs [37] to [40] and *JB and CL* [2008] WASAT 105 at paragraphs [9] to [12].
[744] This list has been changed to make it gender neutral.
[745] See *LMM* [2005] WASAT 232 at paragraph [29] and *LAM* [2007] WASAT 195 at paragraph [43]. For more on the significance of the represented person's will, see **[7.11]**.

When making an administration order, it's common for SAT to authorise the administrator to make gifts up to a certain dollar amount per annum.[746]

In the case of *FF and OF*,[747] SAT directed the administrator to pay $1,000 to the represented person's grandson as a gift in recognition of his marriage, and authorised the administrator to make charitable payments of up to $500 per annum, so that the represented person could make a weekly donation at church.

Sometimes, SAT specifically authorises an administrator to use the represented person's assets to support financially other people.[748] It isn't always necessary, as the represented person might already have a legal obligation to do so.

Limits on administrators – day-to-day transactions

It would normally be an unwarranted intrusion into the life of a represented person, and may not be feasible, particularly for professional organisations such as the Public Trustee, for administrators – even plenary– to conduct every single financial transaction on behalf of the represented person, down to buying an ice cream or paying for a ride on the local bus. The Public Trustee may hold on to the bulk of the person's money, but pay regular amounts into a bank account that the person can access, or perhaps to a trust account at the facility where they live.[749]

Limits on administrators – when the represented person is a trustee

What if the represented person is a trustee? Property that the represented person holds on trust doesn't form part of their estate. An administration order – even plenary– isn't enough, by itself, to allow an administrator to exercise the powers of a trustee in place of the represented person. Something more is needed. SAT can make a special order.[750]

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[746] See, for instance, *NCP and HJP* [2005] WASAT 177 at paragraphs [29] and [31], *P* [2017] WASAT 54 at paragraph [59] and *K* [2023] WASAT 32 at paragraphs [30] and [43]. For more complex orders, see *CMA and CRA* [2011] WASAT 204 at paragraphs [23] to [29] and *AF* [2021] WASAT 58 at paragraph [46].

[747] [2008] WASAT 288 at paragraphs [29] to [50].

[748] See *FC* [2012] WASAT 61, *RR* [2015] WASAT 142 and *JS* [2018] WASAT 120. This can be based on the wording of item 21 of Part A of Schedule 2 of the GA Act.

[749] See *CC* [2005] WASAT 291 at paragraph [62].

[750] See section 72(1) and paragraph (h) of Part B of Schedule 2 of the GA Act and the case of *Public Trustee of Western Australia and VV* [2012] WASAT 170. There may be other ways around the issue. For instance, if there's a trust deed, it might say what happens if a trustee is mentally incapable of continuing as trustee. It might give someone the power to remove and appoint trustees. Section 7 of the *Trustees Act 1962* might allow various people to appoint a new trustee or trustees. The Supreme Court has the power to remove trustees and appoint replacements,

Limits on administrators – charging fees

The Public Trustee can and does charge fees to the represented person for acting as administrator. If other administrators want to charge fees to the represented person for acting, they generally need SAT's authority.[751] SAT has authorised remuneration to a trustee company under the *Trustee Companies Act 1987*,[752] solicitor,[753] accountant,[754] financial planner[755] and (rarely) laypeople.[756]

Again, the Public Advocate and her staff are public servants and do get paid,[757] but don't charge the represented person.

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as explained in *Angelina Vagliviello (by her next friend The Public Trustee in and for the State of Western Australia) v Vagliviello & anor* [2003] WASC 61 at paragraphs [3] to [13]. For a restrictive view of the use of paragraph (h), and a history of cases involving its use, see *SQ and IQ* [2012] WASAT 165. See also *MS and YS* [2008] WASAT 72.

[751] See section 117 of the GA Act and the case of *KRL* [2010] WASAT 187 at paragraphs [62] to [97]. In *Re KRL* [2011] WASAT 172, SAT declined to use this section to pay for caring services.

[752] See:

- *IL* [2006] WASAT 357
- *TC* [2006] WASAT 369
- *CD* [2006] WASAT 372
- *AG* [2007] WASAT 7
- *SMC* [2015] WASAT 41
- *PMB and LJB* [2015] WASAT 96
- *VD* [2023] WASAT 19.

[753] See *SC and SAS* [2005] WASAT 255.

[754] See:

- *JW* [2005] WASAT 249
- *LWL* [2008] WASAT 35
- *KRL* [2010] WASAT 187
- *NL and TKT* [2012] WASAT 121 (though in that case, it wasn't expressed in terms of remuneration).

SAT didn't authorise it in *JGN and CEN* [2006] WASAT 320.

[755] See *Re JCA; ex parte RD* [2012] WASAT 123.

[756] See *FG and WHR* [2009] WASAT 102.

[757] See sections 91 and 94 of the GA Act.

[6.5] Where is there more information on the powers of administrators and guardians?

The Public Trustee and Public Advocate have published the Private Administrator's Guide. The Public Advocate has published the Private Guardian's Guide.

CHAPTER 7 – The "best interests" test for guardians and administrators

[7.1] What's the purpose of the GA Act?[758]

The GA Act attempts to balance the right of adults to make their own decisions with the need to protect some adults with impairments from being abused and exploited.[759] This isn't always easy. The Full Court of the Supreme Court grappled with it when deciding whether or not a represented person needed approval from third parties to make a will.

The majority found that the GA Act:[760]

> "… is designed for the protection of adult persons whose faculties may be impaired, for any reason, and who are therefore in need of protection and assistance so as to ensure that their financial affairs and other welfare is not jeopardised by improvident, or ill-considered personal decisions or action, or by unscrupulous or ill-advised influence of relatives, friends and others who may deliberately or inadvertently exploit the vulnerability of the person in need of assistance and protection.
>
> These ends can be achieved, when it comes to dealings with the property and financial affairs of the person in need of assistance, by ensuring that any financial, property or commercial transactions which would, or might, jeopardise the financial security or interests of the disabled person, are only effective when performed by a properly appointed administrator and with the Board's consent.[761] The emphasis is on conserving the property and financial resources of the disabled person to ensure that they are available for his or her own needs, welfare and enjoyment and are not dissipated. These seem to be the primary objectives of the legislation and all the provisions of the Act can be seen to have meaning and effect as leading towards the achievement of those purposes. In the main, these will be accomplished by conserving the resources and property of the person under administration for use to his or her own advantage or, in cases where expenditure or imminent disposition of property are

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[758] *Guardianship and Administration Act 1990*.

[759] As explained at **[4.10]** and **[4.11]**, a mental disability is a specific requirement for an administration order. It isn't for a guardianship order, although someone under such an order would usually have such an impairment.

[760] See the judgment of Justice EM Heenan, with whom Justices Anderson and Miller agreed, in *Re Full Board of the Guardianship and Administration Board* (2003) 27 WAR 475, [2003] WASCA 268 at paragraphs [43] and [44].

[761] The Guardianship and Administration Board has since been abolished. The State Administrative Tribunal (SAT) has taken over most of its functions.

> necessary or advantageous, by scrutinising the transaction to see that it is justifiable or provident having regard to all the circumstances, bearing always in mind the continuing and future needs of the person whose estate is under administration."

These comments tilt the balance between freedom and protection in favour of the latter. But the court didn't ignore freedom. It found that to make a will, a represented person didn't need approval from third parties.[762]

[7.2] To whom does the "best interests" test apply in the GA Act?

The State Administrative Tribunal (SAT)

This chapter doesn't focus on the role of SAT, but some of the decisions on "best interests" deal with what SAT should do. They're relevant to how a guardian or administrator should act in the "best interests" of a represented person.

Section 4 of the GA Act lists principles that SAT must observe in dealing with proceedings commenced under that Act.

One of them is set out in section 4(2), which says:

> "The primary concern of the State Administrative Tribunal shall be the best interests of any represented person, or of a person in respect of whom an application is made."

This could have said that SAT shall act in the "best interests" of any represented person (or a person in respect of whom an application is made). It doesn't. Rather, the "best interests" of such a person is the "primary concern" of SAT. It isn't SAT's only concern.

For instance, section 32(1) of the SAT Act[763] requires SAT to observe natural justice. This is not expressed in absolute terms. If there is an inconsistency between the SAT Act and the GA Act, the latter prevails.[764] The "best interests" of the person might at times override or reduce the need to observe natural justice, or maybe affect what constitutes natural justice in the circumstances of the case.[765]

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[762] That said, many (possibly most) people under administration orders don't have the required capacity to make a valid will. But a significant number do, and shouldn't need permission from SAT or an administrator.

[763] *State Administrative Tribunal Act 2004*.

[764] See section 5 of the SAT Act, which says that if there is any inconsistency between the SAT Act and an enabling Act, the latter prevails. The GA Act is an "enabling Act" because it confers jurisdiction on SAT (see the definition of "enabling Act" in section 3(1) of the SAT Act).

[765] For more on natural justice, see **[5.2]**.

The GA Act also contains specific provisions that override SAT acting in the best interests of the person. For instance, it can't:

- appoint the Public Advocate as a person's sole guardian if someone else is willing and suitable to act,[766]
- appoint an administrator if the person doesn't have a "mental disability";[767]
- appoint the Public Advocate as a person's sole administrator if another individual or corporate trustee is willing and suitable to act.[768]

In the GA Act, the "best interests" of the represented person (or the person in respect of whom an application is made) are specifically mentioned when SAT decides:

- whether or not to make a costs order out of the person's assets;[769]
- whether to close a hearing to the public;[770]
- who to appoint as guardian;[771]
- whether to consent to a sterilisation;[772]
- who to appoint as administrator;[773]
- how to exercise its jurisdiction under Part 6, which deals with Estate Administration;[774] and
- what orders to make when reviewing, under Part 7, a guardianship or administration order.[775]

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[766] See section 44(5).
[767] See section 64(1)(a) and *Public Trustee and KMH* [2008] WASAT 171.
[768] See section 68(5) and *SMPM (also known as SMYM or SMY)* [2004] WAGAB 3 at paragraph [11].
[769] See section 16(4) and **[5.5]**.
[770] See section 17, and clause 11(2) of Schedule 1.
[771] See section 44(1)(a).
[772] See section 63(1) and *EW* [2021] WASAT 111 at paragraphs [22] to [27].
[773] See section 68(1)(c).
[774] See section 71(5), which says, amongst other things, that SAT may take a liberal view of the best interests of the represented person.
[775] See section 90(1). For more on Part 7 reviews, see **[4.25]**.

Guardians

Section 51 of the GA Act says:

> **"Guardian to act in best interests of represented person**
>
> (1) Subject to any direction of the State Administrative Tribunal, a guardian must act according to the guardian's opinion of the best interests of the represented person.
>
> (2) Without limiting the generality of subsection (1), a guardian acts in the best interests of a represented person if the guardian acts as far as possible —
>
> (a) as an advocate for the represented person;
>
> (b) in such a way as to encourage the represented person to live in the general community and participate as much as possible in the life of the community;
>
> (c) in such a way as to encourage and assist the represented person to become capable of caring for themself and of making reasonable judgments in respect of matters relating to their person;
>
> (d) in such a way as to protect the represented person from neglect, abuse or exploitation;
>
> (e) in consultation with the represented person, taking into account, as far as possible, the wishes of that person as expressed, in whatever manner, or as gathered from the person's previous actions;
>
> (f) in the manner that is least restrictive of the rights, while consistent with the proper protection, of the represented person;
>
> (g) in such a way as to maintain any supportive relationships the represented person has; and
>
> (h) in such a way as to maintain the represented person's familiar cultural, linguistic and religious environment.
>
> (2A) Without limiting the generality of subsection (1), a guardian acts in the best interests of a represented person in making a research decision in relation to the represented person if the guardian acts in accordance with sections 110ZR and 110ZT.
>
> (3) Nothing in subsection (2)(a) is to be read as authorising a guardian to act contrary to the *Legal Profession Uniform Law (WA)*."

For a guardian, the best interests of the represented person are more than just a primary concern. With some exceptions, guardians are required to act according to their opinion of those best interests.

The cases dealing with guardianship can be relevant when determining the duty of an administrator, and vice versa.

Administrators

The "best interests" test for administrators is similar to the one for guardians.[776] Section 70 of the GA Act says:

> **"Administrator to act in best interests of represented person**
>
> (1) An administrator shall act according to his opinion of the best interests of the represented person.
>
> (2) Without limiting the generality of subsection (1), an administrator acts in the best interests of a represented person if he acts as far as possible —
>
> (a) as an advocate for the represented person in relation to the estate;
>
> (b) in such a way as to encourage the represented person to live in the general community and participate as much as possible in the life of the community;
>
> (c) in such a way as to encourage and assist the represented person to become capable of caring for himself and of making reasonable judgments in respect of matters relating to his person;
>
> (d) in such a way as to protect the represented person from financial neglect, abuse or exploitation;
>
> (e) in consultation with the represented person, taking into account, as far as possible, the wishes of that person as expressed, in whatever manner, or as gathered from the person's previous actions;
>
> (f) in the manner that is least restrictive of the rights, while consistent with the proper protection, of the represented person;

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[776] This was not always so. When the GA Act was originally passed, there were only five factors in section 51(2) and only two in section 70(2). Sections 51 and 70 have been amended over time. One purpose of the *Guardianship and Administration Amendment Act 2000* was to amend section 70. The Explanatory Notes to the relevant Bill (the *Guardianship and Administration Amendment Bill 1999*) said:

> "The responsibilities of an Administrator are currently not fully prescribed and require articulation. This change will ensure that the responsibilities of an Administrator mirror those of a Guardian, creating consistency and facilitating a clear understanding of the need to include best interests when making a decision on behalf of a represented person."

(g) in such a way as to maintain any supportive relationships the represented person has; and

(h) in such a way as to maintain the represented person's familiar cultural, linguistic and religious environment.

(3) Nothing in subsection (2)(a) shall be read as authorising an administrator to act contrary to the *Legal Profession Uniform Law (WA)*.

(4) Nothing in subsection (2) shall be read as restricting the functions of an administrator at common law or under any written law."

Others

The phrase "best interests" is also mentioned in other places in the GA Act.[777]

[7.3] What are the differences between section 51 of the GA Act (the "best interests" test for guardians) and section 70 (the "best interests" test for administrators)?

Section 51 is said to be "[s]ubject to any direction of the State Administrative Tribunal". Section 70 doesn't say this, but an administrator's duties would also have to be subject to any such direction.[778]

Section 70(4) says: "Nothing in subsection (2) shall be read as restricting the functions of an administrator at common law or under any written law." There isn't a similar section 51(4).[779]

In 2020, as part of the *Guardianship and Administration Amendment (Medical Research) Act 2020*, section 51 of the GA Act was amended, but section 70 was not. As a result:

- Section 51 now includes a reference to research decisions. That doesn't apply to administrators.

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[777] Section 97(1)(b)(i) says that one of the Public Advocate's functions is at SAT hearings (or in some Supreme Court appeals) "to seek to advance the best interests of the represented person or person to whom the proceedings relate" (see **[5.2]**). Section 110ZD allows someone else to make some decisions on behalf a patient who cannot make reasonable judgments in respect of proposed treatment. Section 110ZD(8) provides that the substitute decision-maker must act according to their opinion of the "best interests of the patient". Sections 110ZR, 110ZS and 110ZU mention it when talking about medical research decisions.

[778] For more on directions to guardians and administrators, see Chapter 9.

[779] It isn't clear why not. The Parliamentary Debates to the *Guardianship and Administration Amendment Bill 1999* don't assist.

- Section 51's language is now gender-neutral. Section 70 still refers to "he", "his" and "himself". However, section 10(a) of the *Interpretation Act 1984* says that words such as "he" include any individual, regardless of gender or sex, and any person that is not an individual.[780]

- The word "shall" is replaced with "must" in section 51(1) and "is to" in section 51(3). The Explanatory Memoranda to the relevant Bill (the *Guardianship and Administration Amendment (Medical Research) Bill 2020*) said:

> "'Must' replaces 'shall' in order to strengthen the obligation of the guardian to act in the best interests of the represented person, subject to any direction of the State Administrative Tribunal."

In practice, the legal effects of sections 51 and 70 are still very similar.

[7.4] Are guardians and administrators substitute decision-makers?

Yes. Their role is not to support the represented person to make a decision. Rather, their role is to make the decision.

[7.5] How much leeway is a guardian or administrator given when deciding what are the best interests of the represented person?

SAT has said:[781]

> "There is always scope for different views about what is in a person's best interests. Best interests can be a very elastic concept and variable from one set of circumstances to another. Difference does not necessarily make one of the views wrong; it just makes it a different view."

The Court of Appeal has stressed that section 70 requires an administrator to "act *according to his opinion* of the best interests of the represented person".[782] The same would apply to section

[780] The wording of section 10(a) was different in 2020, but it did not limit administrators to males.

[781] See *RLB and PMB* [2015] WASAT 64 at paragraph [40].

[782] See *The Public Trustee v Baker* [2014] WASCA 23 at paragraph [28]. The court added the emphasis, and seemed to suggest that the administrator had made a reasonable decision, so didn't need to consider how much leeway an administrator should have. The cases of *DON*

51 and guardians, although the wording of that section is different.[783] If someone else might have made a different decision, that doesn't necessarily mean that the guardian or administrator is wrong.

It would seem that the decision must have at least some element of reason.

In the case of *BMD v KWD*,[784] the Public Trustee, as administrator, decided not to take some legal proceedings. When reviewing the administration order, SAT considered the Public Trustee's decision and went through the list in section 70(2) of the GA Act.

One of the parties took the matter to the Supreme Court,[785] which considered section 70 and indicated that a heavy onus rests on a person seeking review of a trustee's decision.[786] The Public Trustee was an administrator, rather than a trustee, but the court appears to have relied on some trustee principles when considering the duties of an administrator.[787]

The court analysed the Public Trustee's decision and found that the party challenging it had failed to establish that it was wrong.[788] Implicit in the court's reasoning is that if an administrator's decision is manifestly unreasonable, it can't be defended simply by saying, "That's my opinion." Rather, it *is* possible to find that an administrator made the wrong decision. It's just difficult to do so.

SAT has said that the "powers given to administrators … are broad and allow for a large amount of latitude for a plenary administrator to act, as long as it is in the best interests of the represented person".[789] It added that the GA Act "allows a large amount of latitude to both the

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[2005] WASAT 193 at paragraph [38], *QW* [2007] WASAT 23 at paragraph [31] and *FS* [2007] WASAT 202 at paragraph [138] may suggest a more objective approach. In *RK* [2022] WASAT 112 at paragraph [35], SAT considered section 85(1)(c) of the GA Act, which says that SAT "shall" review a guardianship or administration order if the guardian or administrator "has been guilty of such neglect or misconduct or of such default as, in the opinion of [SAT], renders him unfit to continue to act as guardian or administrator". SAT confined this to "cases of such serious neglect, misconduct or default as to render the guardian or administrator unfit to continue". It said: "… reasonable minds may differ about the merits of individual decisions. The obligation on the guardian or administrator is to act in what they consider to be best interests of the represented person." See also *NE* [2023] WASAT 30 at paragraphs [121] to [126].

[783] For a discussion of the differences, see **[7.3]**.

[784] [2008] WASAT 127.

[785] See *BMD v KWD* [2008] WASC 196.

[786] See paragraph [17] of the decision. For what is a trust, see Chapter 12.

[787] See also paragraphs [12] to [14].

[788] See paragraph [40].

[789] See *Perpetual Trustees WA Limited and The Public Trustee* (2009) 68 SR (WA) 128, [2009] WASAT 253 at paragraph [54].

administrator and the Tribunal in dealing with what they may see as the best interests of the represented person".[790]

Similar considerations would apply for guardians.

In *ED*,[791] SAT said that "the obligation on a guardian is to act according to their opinion of the best interests of the represented person, but that that opinion is not to be informed solely by regard to their own subjective views".

In *TR and CJ*,[792] CJ's parents were her guardians. SAT found that they:[793]

- had always wanted to do the best thing for CJ; and
- thought they were doing just that; but
- were not actually serving her best interests.

Part of Senior Member Allen's reasoning was as follows:

> "… it seems to me that the parents may have allowed their religious views to cloud and colour their assessment. In one sense there is nothing wrong with that. Treatment and other lifestyle decisions will often reflect values that the decision-maker holds dear, whether they come from religious points of view or other perspectives, but the obligation on a guardian is to make decisions in the best interests of the person concerned.
>
> Section 51 of the GA Act provides guidance as to how that can be assessed. That section expressly refers to consulting the represented person, maintaining supportive relationships that the person has, and maintaining the person's familiar cultural, linguistic and religious environment.
>
> However, in my view, none of that can justify a guardian rejecting treatment options or declining to make a treatment decision for a represented person for reasons that depend too heavily on religious views that exclude appropriate and modern modes of treatment – without giving those treatment options an objective and considered assessment, to see if they may, notwithstanding religious beliefs to the contrary, bring some benefit to the represented person."[794]

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[790] See paragraph [57]. SAT said that section 72(3) was a specific qualification on that.
[791] [2020] WASAT 34 at paragraph [69].
[792] [2013] WASAT 119.
[793] See paragraph [47].
[794] See paragraph [46]. Some lettering has been omitted.

SAT has described the issue in section 51 of the GA Act as "subjective … it is the guardian's opinion as to what would be in the represented person's best interests".[795] But it added that section 51 "provides guidance as to what is involved in the concept of acting in a person's best interests".[796]

In *HS*,[797] SAT said:[798]

> "It is true that s 51 of the GA Act is subjective, in the sense that it requires a guardian to act 'according to his [or her] opinion of the best interests of the represented person'. This does not, however, authorise a guardian to act to facilitate substandard attention in a critical care situation."

Cultural and family obligations can be highly relevant.[799]

Working out what's in a person's best interests may need input from other people, such as the represented person and family members.[800] It isn't just about what the guardian or administrator thinks.

In *EP and AM*,[801] SAT summed it up as follows:[802]

> 'Decisions made by guardians and administrators should be in the person's "best interests" and while some guidance is given in the legislation it is fundamentally a process of judgment and discretion.'

If a guardian or administrator asks SAT for directions, SAT is neither required, nor generally expected, to give them.[803] This places more responsibility on guardians or administrators, which in turn reinforces that they have a fair amount of leeway in the decisions they make.

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[795] See *VM* [2013] WASAT 154 at paragraph [62].
[796] See paragraph [63].
[797] [2019] WASAT 94.
[798] See paragraph [54]. The wording of section 51 has since changed, but the principle remains the same.
[799] See *FS* [2007] WASAT 202 at paragraphs [130] to [142]. See also *JL* [2023] WASAT 20 at paragraph [147], though in that case, a guardian was not appointed.
[800] See *RM* [2020] WASAT 4 at paragraph [55] and *ED* [2020] WASAT 34 at paragraph [71].
[801] (2006) 41 SR (WA) 176, [2006] WASAT 11.
[802] See paragraph [117].
[803] See Chapter 9.

[7.6] Why should guardians and administrators be cautious when applying the lists in sections 51(2) and 70(2)?

A guardian or administrator shouldn't make a decision, then see if any of the eight factors listed in sections 51(2) or 70(2) justifies it. Those factors are so varied that it may not be too difficult to find at least one.

It isn't always possible to satisfy every factor in the lists. The problem was demonstrated in *Re: HK*,[804] when SAT said:[805]

> "The guardian is faced with the difficult task of balancing the perhaps competing obligations set out in [section] 51 in the performance of her functions in the best interests of HK. While HK may express a wish to live in the general community and to maintain her relationship with her partner without restriction, because of her incapacities the guardian is obliged to act in a manner to protect her from neglect, abuse or exploitation. The guardian is required to act in a way which is least restrictive of her rights but consistent with her proper protection."

Other factors may be relevant, including the represented person's physical health and safety, and emotional and psychological health and wellbeing.[806] It may be necessary to ask other people, such as family members.[807] They may not all agree. The Supreme Court has noted that when the Public Advocate is guardian:[808]

> "Very often, the differing factions within a family are beyond the point of listening rationally to the views of the other faction, or factions…. In many cases, the interests of differing factions will simply be irreconcilable."

It may be helpful to look at sections 51 and 70 in a broader sense. SAT has said that section 70 "expresses the need for an administrator to strike a balance between the person's right to function autonomously in the community and the proper protection of the person's estate".[809] In other words, it's freedom vs protection. A guardian also has to strike a balance.

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[804] [2005] WASAT 142.
[805] See paragraph [57].
[806] See *ED* [2020] WASAT 34 at paragraph [70]. SAT was talking about guardians, but the same would apply to administrators.
[807] See *ED* [2020] WASAT 34 at paragraph [71]. Again, the same would apply to administrators.
[808] See *TL v Office of the Public Advocate* [2020] WASC 455 at paragraphs [110] and [112].
[809] See *BJS* [2009] WASAT 246 at paragraph [53]. See also *JH and EP* [2010] WASAT 51 at paragraph [25].

[7.7] Is it worthwhile having lists at all?

Yes, because it encourages a holistic approach.

Section 70(2) correctly assumes that money doesn't necessarily make you happy and well. Administration orders aren't always about getting as much money as possible for the represented person. The consequences need to be examined. As the Supreme Court said:[810]

> "Decisions made by the Public Trustee under the *Guardianship and Administration Act* for the benefit of the represented person are wider than a spare examination of the financial affairs."

The same would apply to other administrators under the GA Act.

SAT has described it as follows: [811]

> "Fundamentally, the expression 'best interests' in the context of a protective jurisdiction, reinforces the idea that the paramount concern is the **overall** interest of the person to whom the protection is directed…. Put another way, the expression is concerned with the person's 'separate and independent welfare'…."

The case of *JL*[812] was (among other things) an application for a guardianship order. As in other cases, SAT's primary concern under section 4 of the GA Act was the best interests of the proposed represented person. It used the list in section 51(2) as guidance when determining that.[813]

[7.8] Does a guardian or administrator have to apply the lists before making *every single* decision?

It would appear not. Sections 51(2) and 70(2) both use the words "as far as possible".

The GA Act was designed, in part, to allow laypeople to manage the affairs of their loved ones. Many decisions of an administrator are routine and mundane, though important nonetheless. Not many people would want to perform the job if they had to consider a long list of factors every time they got a regular power bill. It also wouldn't be practical for a professional

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[810] See *BMD v KWD* [2008] WASC 196 at paragraph [15].
[811] See *ST and EPP* [2011] WASAT 62 at paragraph [90]. Emphasis added.
[812] [2023] WASAT 20.
[813] See paragraphs [143] to [153].

administrator to spend hours agonising over one. Some guardianship decisions can also be fairly routine.

SAT can give some leeway to guardians or administrators if overall, they're doing a good job. The case of *Office of the Public Advocate and GC*[814] was the review of an administration order. The administrator was a retired accountant and old family friend and didn't charge for his services.[815] He didn't appear to have considered section 70(2),[816] but SAT still reappointed him, noting:[817]

> "The administrator has respected the wishes of the represented person by retaining the two family assets, that is, the farm and the house in Perth. He uses a tender process to derive the best income from the farm property and reinvests that income into repairs and improvements. Some of that income is also used to maintain the house in Perth and to provide GC with some extra items that he believes would benefit her. He has not been found to mismanage the estate despite occasional mistakes when bills have not been paid or unofficial bookkeeping has been used to assist GC when she required some extra funds. To date, the Public Trustee has passed all the accounts whose examination is complete. On balance, the Tribunal finds that GH is a fit and proper person to manage the estate and that he has GC's best interests at heart."

[7.9] To what extent are the wishes of the represented person relevant?

One of the eight ways to act "as far as possible" in section 70(2) is "in consultation with the represented person, taking into account, as far as possible, the wishes of that person as expressed, in whatever manner, or as gathered from the person's previous actions".[818]

The Court of Appeal said has that "whether it is appropriate to consult the represented person, and the extent to which any wishes the person may have manifested can be taken into account, will depend upon the particular circumstances".[819]

These included the capacity of the represented person to participate in any consultation. The court noted that there "will inevitably be many cases where the mental capacity of the represented person is such that consultation would be impossible".[820]

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[814] [2009] WASAT 250.
[815] See paragraph [18].
[816] See paragraph [23].
[817] See paragraph [31].
[818] See section 70(2)(e).
[819] See *The Public Trustee v Baker* [2014] WASCA 23 at paragraph [30].
[820] See *The Public Trustee v Baker* at paragraph [30].

The court also said that there "will also inevitably be cases where the circumstances are such that the wishes of the represented person cannot be acted upon".[821]

The same comments would apply to guardians.[822]

The following is respectfully worth adding:

- An administration order is made after a person has been found, because of a mental disability, to be unable to make reasonable judgments with respect to all or part of their estate. There must also be a need for an order. Guardianship orders are also a last resort. There would be little point in going to the trouble of making these orders if the administrator or guardian ends up, without any further thought, doing exactly what the person says they want.

- A person might be under orders, but still well and truly capable of expressing their wishes, and of becoming upset if, for instance, the administrator takes legal proceedings, or even contemplates doing so. Their impairment may be mild. They might have a fluctuating condition. It may not be worth putting them through misery to get something, such as money, that they neither want nor need.

- The expressed wishes of a person may change,[823] and may depend on who they're with at the time.[824] They may really be someone else's wishes.[825]

- The person may not want to criticise someone close to them, such as one of their children.[826]

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[821] See *The Public Trustee v Baker* at paragraph [30].
[822] The SAT decision of *ED* [2020] WASAT 34 at paragraphs [69] to [71] does not specifically refer to *The Public Trustee v Baker*, but says how the wishes of a person under a guardianship order are not binding.
[823] See, for instance, *BB and LG* [2008] WASAT 234 at paragraphs [23] and [51] and *K* [2018] WASAT 96 at paragraphs [70] to [73].
[824] See *PH and NJM* [2011] WASAT 163 at paragraphs [76] and [77] and *K* [2018] WASAT 96 at paragraphs [73] to [75].
[825] In *KRL* [2010] WASAT 187 at paragraph [30], it was suggested that the represented person had been "coached" for a hearing. In *TL* [2011] WASAT 42 at paragraph [46], SAT said that "a … written submission was received from the spouse and the represented person, but probably written by their daughter". In *K* [2018] WASAT 96 at paragraphs [74] to [75], SAT found that the represented person loved her father, wished to please him and to be seen to do as he wanted. SAT said that she was "highly susceptible to his influence". See also *BJT* [2022] WASAT 73 at paragraphs [49] to [54].
[826] See *MH* [2022] WASAT 74 at paragraph [31].

- People don't always mean what they say. Or sing. In a 10cc song, the lead vocalist sings the line "I'm not in love" seven times, but with every chant it becomes increasingly obvious that he's very much in love.[827] In *The Sound of Music*, Maria sings the words "I have confidence" eleven times, but she's clearly nervous about becoming a governess. Mary Poppins tells the children to "stay awake" when she's trying to get them to sleep.

- Section 70(2) contemplates a guardian or administrator, at times, considering the person's previous actions as a way of determining what the person would have wanted now.

- Evidence of the represented person's past wishes may be self-serving statements by someone who doesn't like what the guardian or administrator is planning.

- There can be conflicting evidence about the represented person would have wanted, which can arise when people are fighting.[828]

- People sometimes say what they'd do in a hypothetical situation, but when it actually arises, they might act differently. See, for instance, the case *SAB and NRDC*.[829] NRDC often expressed a desire not to end his days bedridden in a nursing home. He then suffered a severe stroke. SAT said "how people approach a decision about how they might die when the decision actually has to be made, may involve questions of fear or other considerations" which "may affect the decision that the person makes so that it differs from what they may have thought they would do when they were not confronted with the immediate consequences of the decision". The immediate consequence of NRDC not living out his life in a nursing home was "effectively starving himself to death".[830] There was some indication, from things that he said and did after his stroke, that he didn't want to die. For instance, he took fluids that had been offered to him.

- In theory, generally speaking, decisions by guardians or administrators have the same effect as if the represented persons themselves had made them, had they been of full legal capacity.[831] In practice, some decisions need the co-operation of the represented person. A plenary guardian could consent to a person having physiotherapy

[827] For those who've never heard of it, the song is also called "I'm Not in Love".
[828] See *GSW and HSH* [2011] WASAT 40 at paragraph [82] and *PH and NJM* [2011] WASAT 163 at paragraphs [75] to [77].
[829] [2010] WASAT 130.
[830] See paragraph [29].
[831] See sections 50 and 79 of the GA Act.

treatment, but it may be futile if the person refuses to do the recommended exercises. A guardian's powers don't extend to levitation.

Examples of SAT determining a person's wishes from the person's previous actions

- In *HL and MI*,[832] SAT found that "given the long and apparently loving marriage of [the proposed represented person] and his wife, [the proposed represented person] would have wished that his wife continue to be involved in managing his finances and would also wish for her to be financially provided for".[833]

- In *FBP*,[834] SAT found that the proposed represented person nominated both his partner and father as beneficiaries of his life insurance policy, was in a long-term relationship with his partner, with whom he jointly owned property and had a joint bank account and mortgage. SAT said it appeared from this that he had a strong, committed relationship with both his partner and family of origin, and that if he could have expressed a view, he would have likely indicated that he wanted that to continue.[835]

- In *Re JMM; ex parte JMM*,[836] SAT looked at material that it had from earlier proceedings, when at times, various family members helped the represented person and her late husband with both personal and financial matters. It found that if she could have expressed her wishes, she would have wanted family members to make personal and financial decisions for her.[837]

- In *ST and EPP*,[838] SAT found that an enduring power of attorney that a person had made, over ten years earlier, was the "only clear expression" of her intent as to whom should manage her estate in the event of her incapacity.[839]

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[832] [2006] WASAT 25.
[833] See paragraph [41].
[834] [2008] WASAT 21.
[835] See paragraphs [50] to [51].
[836] [2008] WASAT 221.
[837] See paragraph [43].
[838] [2011] WASAT 62.
[839] See paragraph [88]. See also *CJS* [2016] WASAT 42 at paragraphs [61] to [62] and *RK* [2022] WASAT 112 at paragraphs [143] to [144]. An enduring power of attorney can only be a clear expression of the person's wishes if the person had the capacity to make it and was not coerced. In *RK* [2022] WASAT 112 at paragraphs [145] to [148], SAT said that it didn't have the power to make a declaration as to the validity of an enduring power of attorney, but rejected the suggestions that the donor lacked capacity and was coerced. For more on capacity and coercion with respect to an enduring power of attorney, see **[8.2]**.

- In *FC*,[840] SAT found that a document didn't meet the formal requirements of an enduring power of attorney, but was an expression of the person's wishes.

- In *AG*,[841] SAT conducted a review of existing guardianship and administration orders and held a series of hearings in 2021. The represented person couldn't attend.[842] The medical evidence made it clear that he lacked the capacity to appreciate various important matters.[843] SAT considered the represented person's wishes that he'd expressed to the Office of the Public Advocate in 2019, and what was said at a hearing that year when he had been present. It also looked back at some of his actions over his life.[844] The reasons for its decision included a detailed chronology.[845]

[7.10] What's the difference between determining wishes and placing weight on them?

Sections 44(2)(c) and 68(3)(b) of the GA Act explicitly require SAT to take into account, as far as possible, the represented person's wishes when deciding who should be guardian or administrator.

Section 4(7) says:

> "In considering any matter relating to a represented person or a person in respect of whom an application is made the State Administrative Tribunal shall, as far as possible, seek to ascertain the views and wishes of the person concerned as expressed, in whatever manner, at the time, or as gathered from the person's previous actions."

In the case of *GS*,[846] Member Eddy said that although section 4 of the GA Act doesn't expressly say so, "it is implicit that, if the Tribunal is able to obtain the views and wishes of the person concerned, then those views and wishes are relevant matters to be taken into account in reaching a determination".

In *'G' v 'K'*,[847] the Supreme Court said, with respect to a guardianship hearing:

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[840] [2016] WASAT 2 at paragraph [35].
[841] [2022] WASAT 4.
[842] See paragraph [27].
[843] See paragraph [28].
[844] See paragraphs [30] to [31].
[845] See paragraphs [31] to [37].
[846] [2018] WASAT 72 at paragraph [40].
[847] [2007] WASC 319. Section 4 of the GA Act was numbered differently at the time.

- The first obligation of SAT is to ascertain the views and wishes of the person concerned if it's possible to do so.[848] If they can be ascertained, a separate issue arises as to how much weight should be put on them.[849]

- It isn't enough to say that just because the person concerned may not be capable of intellectual reasoning, that reasonable steps should not be taken to ascertain their views and wishes. Where a person functions on an emotional level, it's relevant for SAT to take into account, if possible, their emotional response to the relevant issues.[850]

The same would apply in administration hearings.

We get back to something that was said at **[1.5]**. Some people with dementia want their children to help them, but the same children have misused their assets, leaving them highly vulnerable. This isn't a hypothetical academic proposition. It happens.[851] SAT doesn't have to follow the wishes of such a person.[852]

Sometimes, a person says that they don't want to be under guardianship and/or administration orders at all, but SAT makes such orders anyway.[853]

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[848] In one case, for instance, SAT had a number of people express a view as to where the represented person might have wanted to live, but SAT was not persuaded that it actually knew what she liked or wanted in the circumstances. See *TL v Office of the Public Advocate* [2020] WASC 455 at paragraph [65].

[849] See paragraphs [84] and [155]. See also *TL v Office of the Public Advocate* [2020] WASC 455. In that case, the represented person expressed a view as to whom should make decisions on her part. The Supreme Court noted, however, that "that view was expressed when she already had cognitive decline related to her Alzheimer's disease" (see paragraph [61]).

[850] See paragraph [85].

[851] See *GYM* [2017] WASAT 136 at paragraphs [76] to [83] and *KRM* [2017] WASAT 135 at paragraphs [74] to [80].

[852] For other examples where SAT chose a different guardian and/or administrator to whom the represented person said that they wanted (or who SAT thought they may or would have wanted), see:

- *Re JMM; ex parte JMM* [2008] WASAT 221 at paragraph [43]
- *ST and EPP* [2011] WASAT 62 at paragraphs [89] to [113]
- *PH and NJM* [2011] WASAT 163 at paragraphs [58] to [61], [75] to [76] and [82] to [86]
- *PV* [2020] WASAT 40 at paragraphs [117] to [120]
- *MH* [2022] WASAT 74 at paragraphs [188] to [189]
- *LM* [2023] WASAT 15 at paragraphs [24], [49] and [76]
- *NE* [2023] WASAT 30 at paragraph [144].

[853] See, for instance:

- *SMYM (also known as SMPM, SMY and MYM)* [2007] WASAT 131 at paragraph [67]
- *Re: SD* [2007] WASAT 229 at paragraphs [33] to [34]

It can be a matter of balancing rights with responsibilities. In *WP*,[854] the represented person owed a lot of money to place where he'd lived. SAT found that without an administrator, he couldn't have met his "lawful obligation" to pay that debt.[855]

SAT concluded:[856]

> "The Tribunal is satisfied that were WP able to decide the matter, he would not wish for an administrator to be appointed to control and manage his pension income. On balance, however, the Tribunal finds that to ensure the pension is used to meet WP's needs and obligations, the administration order should continue."

The same issues apply when guardians and administrators are considering the wishes of a represented person.

[7.11] What's the significance of the represented person's will (if any) and potential heirs?

SAT has said that:

- *AB* [2008] WASAT 25 at paragraphs [46] to [49]
- *AS* [2009] WASAT 183 at paragraphs [47] to [48]
- *BJS* [2009] WASAT 246 at paragraphs [51] to [52]
- *SG* [2011] WASAT 81 at paragraphs [8] to [19]
- *PV* [2020] WASAT 40 at paragraphs [117] to [120]
- *GG* [2020] WASAT 54 at paragraph [117]
- *MW* [2022] WASAT 107 at paragraph [108]
- *K* [2023] WASAT 32 at paragraphs [27] to [29]
- *DL* [2023] WASAT 66 at paragraphs [33] to [34].

For examples of when SAT followed the wishes of the person who was the subject of the hearing, see:

- *RV and PL* [2006] WASAT 91 at paragraphs [62] to [63]
- *AS* [2009] WASAT 183 at paragraphs [49]
- *CGH and NVF* [2010] WASAT 76 at paragraph [38]
- *KD* [2020] WASAT 23 at paragraphs [53] to [59]
- *DJJ* [2023] WASAT 17 at paragraph [48]
- *JL* [2023] WASAT 20 at paragraphs [147] and [153].

[854] [2008] WASAT 170.

[855] See paragraphs [98] to [100].

[856] See paragraph [101].

> "An administrator is to step into the shoes of the represented person and to deal with their estate for the purpose of meeting the represented person's needs in their lifetime. What happens to the estate after the represented person dies is a matter for an executor, and if there is a conflict about the deceased estate, eventually the Supreme Court. The purpose of an administration order is to focus on the needs of the person and to address those needs in his lifetime."[857]

Sections 51(1) and 70(1) refer to the best interests of the represented person, not the represented person's potential heirs. In some cases, those interests may closely align; in others they clearly don't.

For the following reasons, though, a will could also be useful to SAT or an administrator during the person's life:

1. It *might* show how special, important or trusted someone is to the represented person.[858] That said, love and affection can't be measured by a mathematical formula. Sometimes people are beneficiaries to avoid a potential claim under the *Family Provision Act 1972* or because their financial needs are greater. A person might name both their children as executors to treat them equally and avoid fights. It might not be a sign that the person trusts both of them to the same degree.

2. In some cases, the person's likely heir may misuse an asset. It's no defence to say: "That house is mine. It's been left to me in the will. That's why I'm entitled to it now." An obvious retort can be: "But he's not dead and he needs it now."[859] But sometimes, the represented person may be dying and have no need for the asset in question. Bringing recovery proceedings may not serve any practical purpose.

3. If a represented person makes specific gifts of assets in the will, the sale of those assets by an administrator could affect those gifts in ways that the represented person never intended. The administrator still might consider that it's in the best interests of the person to sell them, but it's something to take into account. This is a difficult issue, because the law on how such a sale can affect a will has been subject to uncertainty.[860]

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[857] See *MGH* [2013] WASAT 142 at paragraph [16]. See also *CW* [2020] WASAT 132 at paragraph [46].

[858] See *KK* [2021] WASAT 85 at paragraphs [60] to [63]. This could also be of use to a guardian.

[859] In *The Public Trustee v Baker* [2014] WASCA 23, the Public Trustee, on behalf of a represented person, sued a woman who ended up inheriting his estate. The Court of Appeal didn't criticise the Public Trustee for suing her in his lifetime.

[860] This involves a doctrine called "ademption". For discussions, see *JEB* [2016] WASAT 65 at paragraphs [32] to [53] and *Gangemi v Sparta* [2021] WASC 441 at paragraphs [20] to [29]. See also *Public Trustee and BG* [2010] WASAT 195 at paragraphs [14] to [17]. An administrator can apply to SAT under section 72(1) and paragraph (e) of Part B of Schedule 2 of the GA Act.

4. Sometimes, an administrator has a choice of assets to sell, and may first sell those that are not specifically left in the will, before selling those that are.[861]

5. When people move into nursing homes, they can only take some of their personal possessions with them. Decisions have to be taken about what to do with the rest. If a will mentions personal items, it might assist in those decisions.

6. A new administrator doesn't always know what the represented person's assets are. If the will mentions shares in a certain company, or an account with a particular bank, this might give the administrator some idea as to what the represented person might now own.

7. It's possible to pay for a funeral, or at least part of it, before a person's death. If there are enough funds available, it may be reasonable for an administrator to do this, or at least consider it. There could be a problem if the pre-paid funeral is at odds with the wishes in the represented person's will.[862]

8. It might be a factor for SAT to take into account when deciding whether to authorise an administrator to make gifts.[863]

That all said:

1. A will only takes effect on death, if then. SAT has said that the GA Act wasn't intended to be a way to allow the represented person's estate to be distributed before death.[864]

2. A will may not be valid, particularly if it was executed at a time when the represented person was mentally impaired.

Pursuant to paragraph (f), when deciding whether to make such orders, SAT has the power to see the will.

[861] See *JEB* [2016] WASAT 65 at paragraphs [91] to [92].

[862] In *KYL* [2021] WASAT 51 at paragraph [42], SAT said that "the responsibilities of those appointed under the GA Act only relate to decisions for the represented person while they are living". With respect, though, some people want their funeral arrangements sorted before they die. An administrator has the power to pay for a funeral before the represented person's death, just as the represented person could have done if they'd been of full legal capacity.

[863] See *DW and JM* [2006] WASAT 366 at paragraphs [31] to [36]. For more on "gifting", see **[6.4]** under "Limits on administrators – gifts".

[864] See *LMM* [2005] WASAT 232 at paragraph [29] and *LAM* [2007] WASAT 195 at paragraph [43].

3. The execution of a will – or at least a purported will – may be part of a larger scheme to misappropriate a person's assets. If, for instance, a person purports to make a large "gift" to take effect immediately, and at around the same time also purports to make a will, the circumstances of the two events may be closely tied together.

4. It may not be the most recent will.

5. It may later be revoked, such as by marriage or divorce, or even by the Supreme Court making a new will.[865] The represented person may have, or regain, the capacity to make a new will.

6. A will says what happens to the person's assets after death, not before. Subject to paying debts and expenses, a person's assets are given away after death; they don't have to be given away before. In other words: "You can't take it with you."[866] If a will forgives a debt upon the testator's death, that could suggest that the debt was valid and recoverable before then.[867] If an asset is mentioned in a will, that could be a sign that the testator wanted to keep it until death.

7. The distribution under a will can be challenged under the *Family Provision Act 1972*.

8. A person who could benefit under the will may die before the represented person.

In the case of *LR*,[868] SAT didn't authorise gifts of $230,000 to the represented person's daughter, even though that daughter appeared to be the only beneficiary of the person's will.

The extent to which a guardian or administrator under the GA Act is entitled to see the represented person's will, or a copy of it, is not as clear as it could be, and is not discussed here.[869]

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[865] See sections 14 and 14A and Part XI of the *Wills Act 1970*.
[866] The distinction between a disposition in a person's lifetime and a disposition after death is discussed in *Re Full Board of the Guardianship and Administration Board* (2003) 27 WAR 475, [2003] WASCA 268.
[867] See *AP* [2020] WASAT 120 at paragraph [65].
[868] [2019] WASAT 38.
[869] In *MT* [2018] WASAT 80 at paragraphs [65] to [66], SAT ordered that subject to one matter, the administrator be given a copy.

[7.12] What are some questions that might be worth asking when deciding whether and how much to consult a represented person?

- How important is the decision? A guardian or administrator shouldn't have to consult on every single detail of every single matter.
- Does the represented person have a fluctuating illness, and if so, are they in a lucid state at the moment?
- What is the extent of the represented person's impairment?
- How distressing could consultation be to the person?
- If the person were to be against what the guardian or administrator intends to do, could it change the decision?
- Can anything be reliably worked out from the represented person's previous actions?
- Does the person need to be involved in carrying out the decision (such as by doing physiotherapy exercises)?

For some questions the Public Trustee may ask before taking legal proceedings to recover assets on behalf of a represented person, see **[11.8]**.

[7.13] Are there limits on the "best interests" test?

Yes, including at least the following:

- A guardian or administrator can only reasonably be expected to apply so much time and resources to one person.[870]
- If something is unlawful, a guardian or administrator can't consent to it, even if the guardian or administrator considers it to be in the best interests of the represented person.
- The represented person's financial means limit what decisions can be made. It might be in the person's best interests to buy and live in a riverside mansion, but few can afford that.

[870] See, for instance, *TR and CJ* [2013] WASAT 119 at paragraph [34].

- Sometimes, a body has the power to do something to a person, whether or not that person agrees to it. For example, a court can sentence a person to imprisonment. The person has to go to jail, whether or not they want to. If the person has a plenary guardian, that guardian can't say, "I forbid it because it's not in the person's best interests."

- The represented person may not want to co-operate. It is one thing to say that it's in their best interests to stop smoking. It's quite another to try to enforce that.[871]

- In at least some cases, there may be an overriding duty to protect the public. The Hon Peter Blaxell said in a Special Inquiry:[872]

  > "In my view, any public official who exercises statutory responsibilities is under an obligation to fulfil those responsibilities in a way which avoids unnecessary harm to members of the public generally."

  Although no case law is cited, it is difficult, with respect, to disagree with that, particularly when the welfare of vulnerable people, such as those under 18, is involved. Awareness of both child and elder abuse has increased in recent years.

[7.14] What's the future of the "best interests" test?

At **[1.5]**, we discussed the possibility of a move to *formalised* supported decision-making. Yet for adults in WA, there's already a substantial amount of *informal* supported decision-making.

In 2018, more than 30,000 people in WA had dementia,[873] about 52,000 experienced recurring mental illness which significantly affected their quality of life,[874] and about 59,000 had acquired brain injuries.[875] Yet only about 7,000 people in total were under administration orders.

No matter how these statistics are viewed, most adults with mental disabilities are *not* under administration orders.

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[871] SAT acknowledged this in *P* [2016] WASAT 144 at paragraphs [95] to [96].

[872] See page 260 of the 2012 report called *St Andrew's Hostel Katanning: How the System and Society Failed Our Children* by the Hon Peter Blaxell, who was a retired Supreme Court justice and a former District Court judge. He had conducted *A Special Inquiry into the response of government agencies and officials to allegations of sexual abuse*.

[873] Source: Dementia Australia WA.

[874] It was around 2% of the population. Source: Mental Health Commission.

[875] It was around 2.3% of the population. Source: Headwest.

Suppose that SAT gets evidence that a woman, because of a mental disability, can't manage $100,000. Does that mean that SAT will appoint an administrator, to make all her decisions, without any reference to her?[876]

No.

- SAT has to look at the person's actual circumstances. If she actually only has $5,000 and a pension, can manage them well enough, and is unlikely to get many more assets in the near future, SAT may not be able to make an administration order. The person may be able to make reasonable judgments with respect to her estate, but even if she can't, there may not be a need for an order.[877]

- If she does have $5,000 and a pension, and has difficulty managing them, but can do so with the help of supportive friends or family, SAT may not be able to make an administration order because there may be a less restrictive alternative.[878]

- If she has $100,000 and a pension, SAT may appoint an administrator, but limit the order to dealing with the $100,000, and let her still manage her own pension, because that's less restrictive than a plenary order.[879]

- If SAT makes a plenary order, it may direct the administrator to have a trial where the represented person is given money to pay some bills herself.[880]

- Even if SAT doesn't make such a direction, the administrator often will give the represented person a regular sum of money to pay for some day-to-day needs. Over time, an administrator might let her become more responsible for her own money, although the Public Trustee's experience at this happening has been mixed.

- SAT has to try to work out the person's wishes, and that may affect who is appointed as administrator.[881]

- Administrators are required, at times, to try to work out the wishes of the represented person, although they're not bound by those wishes.[882]

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[876] It's assumed that there's no other need for an order, such as a possible claim for damages.
[877] See **[4.10]**.
[878] See **[4.10]**
[879] See **[4.15]**.
[880] See **[9.5]**.
[881] See sections 4(7) and 68(3)(b) of the GA Act and **[7.9]** to **[7.12]**.
[882] See section 70(2)(e) of the GA Act and **[7.9]** to **[7.12]**.

In *LS*,[883] SAT revoked an administration order for a person who'd made a remarkable recovery from an acquired brain injury. SAT noted that the person "intends to take professional financial advice and is open to the support of his family".[884]

In *N*,[885] SAT considered the case of a man with schizoaffective disorder and significant anxiety. There was some question as to the extent that this impaired him cognitively.[886] SAT found that regardless of that, he could "make his own decisions with the assistance and support that is available to him".[887] It revoked the guardianship and administration orders that had previously been made.

There are other concepts, such as enduring powers of attorney,[888] which have some aspects of both substituted and supported-decision making. There are different types of trusts,[889] which may not cover everything a person owns, but do involve substituted decision-making. Even taking them into account, for WA adults, there's probably more supported than substituted decision-making at present.

This takes us back to the start of this chapter and the start of the book. There is always going to be a tension between the right of adults to make their own decisions and the need to protect adults with mental impairments from being abused and exploited. But there has to be a safety valve in place where someone can say: "I know what you're telling me, but for your own protection, it can't happen." There can be arguments about where to draw the line, but it needs to be drawn somewhere.

Support can also only go so far. Even with significant input and information from family, friends, health professionals and other experts, some people don't have enough capacity to make their own decisions about some matters.[890] There can be a fine line between supporting a person to make a decision, and, in reality, making the decision on behalf of the person.

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[883] [2019] WASAT 97.
[884] See paragraph [77].
[885] [2019] WASAT 134.
[886] See paragraphs [36] to [43].
[887] See paragraph [47].
[888] Covered briefly in Chapter 8.
[889] See, for instance, Chapter 13 and Chapter 14.
[890] See *DL* [2023] WASAT 66, particularly at paragraph [17].

CHAPTER 8 – Enduring powers of attorney and guardianship

[8.1] What's this chapter about?

This book focusses more on financial administration than on guardianship matters. The Office of the Public Advocate's website (www.publicadvocate.wa.gov.au) has detailed publications about enduring powers of attorney and guardianship. For these reasons, this chapter doesn't go fully into enduring powers of attorney, and talks even less about enduring powers of guardianship. It's intended to provide an overview, a comparison with administration orders and a place to find cases on the subject.

Guardianship and administration orders are covered in Chapter 4, Chapter 6 and Chapter 7.

[8.2] What are enduring powers of attorney and guardianship?

A power of attorney is a written document in which one person or organisation (called the **donor**) gives authority to another person or organisation (called the **donee** or attorney) to make financial decisions on the donor's behalf.

Under the general law, a power of attorney is revoked when the donor becomes legally incapable.

Enduring powers of attorney were introduced in WA in 1992 with Part 9 of the GA Act.[891] They cover financial matters.

Enduring powers of guardianship were introduced in WA in 2010 with Part 9A of the GA Act. They cover lifestyle matters. An enduring guardian can be given limited or plenary functions. If they're given the latter, they basically have the same functions as a plenary guardian.[892]

Capacity

To be valid, an enduring power of attorney (EPA) or enduring power of guardianship (EPG) must be made when the donor is an adult with "full legal capacity".[893] The GA Act doesn't say exactly what that means, but there are cases on it.[894]

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[891] *Guardianship and Administration Act 1990*.

[892] See section 110G of the GA Act. For what functions a plenary guardian has, see **[4.11]**.

[893] See sections 104(1a) and 110B of the GA Act.

[894] For cases on what is meant by "full legal capacity" (even though they don't all specifically refer to that phrase) when making an EPA or EPG, see:

In the case of an EPA, it may mean that you can understand:

- the nature and extent of what you own;
- that the attorney will in general be able to do anything with your property which you yourself could do;
- that while you are mentally capable, you may direct the attorney to act in a particular way and may revoke the EPA;
- that if you become mentally incapable, the EPA will continue and can only be revoked in limited circumstances; and
- that the attorney won't be monitored or audited as a matter of course, so you are placing a very high level of trust in that person or organisation.

- *RS and Anor and DV* [2011] WASAT 144 at paragraphs [15] to [23] and [50]
- *Re: C* [2012] WASAT 50 at paragraphs [20] to [22]
- *HL and HS* [2012] WASAT 118 at paragraph [57]
- *Re JCA; ex parte RD* [2012] WASAT 123 at paragraphs [57] to [58]
- *LK and EB* [2013] WASAT 70 at paragraphs [54] to [56]
- *MB and EM* [2013] WASAT 106 at paragraph [33]
- *MB and EM* [2014] WASAT 17 at paragraph [9]
- *Legal Profession Complaints Committee and Wells* [2014] WASAT 112 at paragraphs [18] to [19]
- *CS and JS* [2014] WASAT 173 at paragraphs [40] to [41]
- *FC* [2016] WASAT 2 at paragraphs [51] to [56]
- *WD* [2022] WASAT 12 at paragraphs [60] to [61]
- *RK* [2022] WASAT 112 at paragraphs [145] to [147].

For some cases in which SAT found that a person didn't have the required capacity to make an EPA or EPG, see *JS* [2018] WASAT 120 at paragraphs [137] to [141] and [229], *JCM* [2018] WASAT 126 at paragraphs [68] to [69] and *NA* [2022] WASAT 118 at paragraphs [35] to [37], [53] to [55] and [58].

See also the New South Wales cases of *Szozda v Szozda* [2010] NSWSC 804, *Scott v Scott* [2012] NSWSC 1541 and *HLT* [2014] NSWCATGD at paragraphs [88] to [97]. The cases of *RS and Anor and DV* and *Legal Profession Complaints Committee and Wells* went on appeal, but the Court of Appeal does not seem to have overturned what SAT in the paragraphs referred to above.

There's a presumption of capacity,[895] which can be hard to overcome if a doctor witnesses the document.[896]

Coercion

An EPA or EPG isn't valid if the donor was forced into making it.[897]

Correct form, witnessing and acceptance

An EPA or EPG must be in the form, or substantially in the form, set out in legislation.[898] SAT has made decisions on whether particular documents have met that requirement.[899]

They need to be correctly witnessed, according to the law that existed at the time that the document is executed.[900] The requirements for witnessing have changed over the years.

The donee must also accept the appointment. The forms contain places for them to do that.[901][902]

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[895] See *KB and EB* [2014] WASAT 47 at paragraph [27].
[896] See *EB* [2016] WASAT 103 at paragraph [134], but see also *LS* [2016] WASAT 89 at paragraph [72].
[897] In *RK* [2022] WASAT 112 at paragraphs [145] and [148], SAT considered whether an EPA was obtained by coercion.
[898] For an EPA, see section 104(1)(a) of the GA Act. For an EPG, see section 110E(1)(a) of the GA Act and regulation 6 and Schedule 1 of the *Guardianship and Administration Regulations 2005*.
[899] See:

- *Re: C* [2012] WASAT 50 at paragraphs [30] to [56]
- *HL and HS* [2012] WASAT 118 at paragraphs [52] to [53] and [56] to [57]
- *EBM* [2012] WASAT 157 at paragraphs [17] to [19]
- *LK and EB* [2013] WASAT 70 at paragraphs [57] to [74]
- *MB and EM* [2013] WASAT 106 at paragraphs [32] and [33]
- *MB and EM* [2014] WASAT 17 at paragraph [9]
- *DWB* [2015] WASAT 3 at paragraph [38]
- *PJJ* [2015] WASAT 109 at paragraph [23]
- *FC* [2016] WASAT 2 at paragraphs [22] to [32]
- *W* [2018] WASAT 61 at paragraphs [57] to [82]
- *CK* [2023] WASAT 84 at paragraph [6].

[900] The current requirements for witnessing an EPA are set out in section 104 of the GA Act; for an EPG, they're in section 110E.
[901] The case of *BJT* [2022] WASAT 73 at paragraphs [27] to [37] dealt with whether an EPG is valid if the substitute donee had not signed it and how long a donee has to accept an appointment.
[902] We won't go into what happens if there's a suggestion that a donee didn't have the capacity to accept an EPA or EPG, or was coerced into acting.

When they take effect

Usually, an EPA takes effect immediately, and endures, even if the donor becomes legally incapable. This is an "immediate EPA". Some enduring powers of attorney only operate when the State Administrative Tribunal (SAT) declares that the donor is legally incapable. This is a "dormant EPA".[903]

An EPG can only take effect when the donor lacks the capacity to make their own lifestyle decisions.[904]

Number and type of donees of an EPA

The donor of an EPA can appoint:[905]

- a sole donee (or attorney): a single person or organisation;
- two joint donees, who must act together and agree on all decisions that are made; or
- two joint and several donees, who can make decisions together and/or independently.

There can be substitute donees, which are not discussed here.[906]

It's also possible to have two (or more) EPAs at the same time.[907]

The number and type of donees of an EPG are not discussed here.

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[903] See sections 104 to 106 of the GA Act.
[904] See section 110F of the GA Act.
[905] See the definition of "donee" in section 102 of the GA Act, plus Form 1 of Schedule 3 of that Act and the case of *IRC* [2017] WASAT 83 at paragraph [19].
[906] See section 104B of the GA Act.
[907] See, for instance, see *NL and TKT* [2012] WASAT 121 at paragraph [10] and *Re AM; ex parte IS* [2012] WASAT 137at paragraphs [25] to [32].

Gifts

The donee of an EPA usually can't make gifts to themselves,[908] but might be able to make gifts to other people.[909]

Recognition of powers of attorney from elsewhere

Section 104A of the GA Act allows SAT to recognise a power of attorney created outside WA as an EPA in WA. It isn't automatic. SAT must be satisfied that it's appropriate to do so, and that the power of attorney "corresponds sufficiently, in form and effect, to a power of attorney created under section 104". You need to be careful about relying on old SAT decisions on this, because laws on powers of attorney can and do change.[910]

Revocation by the donor

The donor of an EPA or EPG can revoke it if they have enough capacity to do so.[911]

Intervention by SAT[912]

A person who, in SAT's opinion, has a "proper interest" in the matter can apply to SAT under section 109(1) of the GA Act for orders:

(a) requiring the donee of an EPA to file and serve "a copy of all records and accounts kept by the donee of dealings and transactions made by him in connection with the power";

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[908] See:

- *KS [No 2]* [2008] WASAT 29 at paragraphs [50] to [57]
- *M* [2008] WASAT 262 at paragraph [92]
- *AP* [2020] WASAT 120 at paragraphs [27] to [30].

[909] See *DW and JM* [2006] WASAT 366. See also *DD* [2007] WASAT 192. However, with respect, in *RK* [2022] WASAT 112 at paragraph [158], SAT said that the donee of the EPA in that case had no authority to make gifts.

[910] See:

- *IMP* [2006] WASAT 57
- *Re CY; ex parte PY* [2011] WASAT 156
- *Re JCN; ex parte JGN* [2011] WASAT 189
- *IRC* [2017] WASAT 83.

[911] For a case on the level of capacity needed for a donor to revoke their EPA, see *KRL* [2010] WASAT 187 at paragraphs [40] to [44].

[912] The powers of the Supreme Court with respect to EPAs is not discussed here, but one case on it is *Christopher David Hall as beneficiary of the estate of Alwyn Hall v Michael Andrew Hall as Executor of the Estate of Alwyn Hall* [2023] WASC 342.

(b) requiring the accounts to be audited and for a copy of the auditor's report to be provided; and/or

(c) revoking or varying the terms of the EPA, appointing a substitute donee or confirming that a substitute donee has become the donee.

The words "proper interest" limit who can apply.[913]

Even if a person has such an interest, it doesn't automatically follow that SAT should make orders. Donees are supposed to keep records and accounts,[914] so in theory, it shouldn't be that difficult to hand them over. In practice, the ink on some of those accounts might be fresh. Although SAT has some powers of supervision, an EPA is basically a private agreement between the donor and donee. It was designed as a way of keeping the government out of your life. SAT needs a reason to scrutinise the transactions that take place under that agreement. When deciding whether there should be an audit, SAT needs to consider what it might achieve, whether any records exist and who's going to pay for it.[915]

In the case of *EW*,[916] SAT considered what "dealings and transactions … in connection with the power" meant. A woman gave her granddaughter a bank authority in 1999 to operate her bank account, which she never revoked. On 22 July 2004, she gave the granddaughter an EPA. SAT found that the withdrawals that the granddaughter made from 22 July 2004 were "in connection with" the EPA, even though she never lodged that document with the bank.[917]

SAT can make orders, even when the donor has still capacity.[918] It didn't in the case of *NA and JA and WA*,[919] where the donor was aware of the allegations about the donee and actively

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[913] See:
- *EW* (2010) 72 SR (WA) 49, [2010] WASAT 91 at paragraphs [20] to [28]
- *BFO & Ors and KPW* [2014] WASAT 68 at paragraphs [19] to [30]
- *ED and ID* [2015] WASAT 123 at paragraph [20]
- *CW* [2022] WASAT 11 at paragraphs [118] to [124]
- *RK* [2022] WASAT 112 at paragraphs [165] to [168].

[914] See section 107(1)(b) of the GA Act.

[915] See *EW* (2010) 72 SR (WA) 49, [2010] WASAT 91 at paragraphs [94] to [116] on whether SAT should exercise the powers under section 109(1)(b). See also *GA and EA and GS* [2013] WASAT 175 at paragraphs [24] to [26] and *ED and ID* [2015] WASAT 123 at paragraphs [27] to [31]. In *RK* [2022] WASAT 112 at paragraphs [167] to [169], SAT didn't think there was enough substance to the applicant's allegations. For more considerations, see *BFO & Ors and KPW* [2014] WASAT 68 at paragraph [31].

[916] (2010) 72 SR (WA) 49, [2010] WASAT 91 at paragraphs [67] to [93].

[917] See also *JW No 2* [2019] WASAT 117 at paragraph [91].

[918] See *KS [No 2]* [2008] WASAT 29 at paragraphs [38] to [59].

[919] [2017] WASAT 151.

opposed the application for SAT to intervene. It did, though, in *HM*,[920] where the donor herself was the applicant.

If the donor is dead, SAT can make orders in (a) and (b) above, but not in (c), as death revokes an EPA.[921]

In the case of *NM and SGF*,[922] SAT considered whether orders made under section 109(1) could or should be subject to a confidentiality agreement.

If SAT finds that the donee has misused the EPA, it doesn't have the power under section 109(1) to order that they compensate the donor.[923] There also appear to be limits on SAT declaring whether a particular transaction was a loan, gift or some other arrangement.[924] If the donor lacks capacity, and an application is made, SAT might appoint an administrator. Chapter 4 discusses the process for doing that. Chapter 11 discusses how such assets may be recovered if an administration order is made.

There is a question as to whether SAT has the constitutional power to hear cases under section 109(1) when a party lives interstate. That's too complicated to go into here.[925]

[920] [2016] WASAT 121.

[921] See *KS [No 2]* at paragraphs [20] to [37]. In *Christopher David Hall as beneficiary of the estate of Alwyn Hall v Michael Andrew Hall as Executor of the Estate of Alwyn Hall* [2023] WASC 342, the Supreme Court of WA considered that, in the circumstances of the case, a beneficiary of the estate of a dead donor was able to make an application under section 109(1) of the GA Act. The beneficiary was not seeking a revocation of the EPA (see paragraphs [26] to [26], [30], [38] and [62] to [63]).

[922] [2014] WASAT 103 at paragraphs [22] to [33].

[923] See *KS [No 2]* at paragraphs [34] to [35].

[924] See *HM [No 2]* [2017] WASAT 92.

[925] See *GS* [2018] WASAT 72, but see also *GS v MS* [2019] WASC 255.

If SAT makes an administration order, it can also revoke an EPA, and in some circumstances must do so.[926] If it doesn't, the administrator can do so.[927] In the case of *Y*,[928] SAT directed the donees of an EPA not to exercise their powers during the period of an administration order.

The ways in which SAT can intervene in an EPG are not fully discussed here, but it can, for instance, revoke one.[929] It can also declare whether an EPG is valid or invalid.[930] It can't do the same for an EPA, though it can revoke an EPA.[931]

SAT can grant an interim injunction to stop the use of an EPA or EPG.[932] In other cases, SAT has fully or partially suspended the operation of an EPG.[933]

Further cases on section 109(1)

There are two broad types of work that lawyers can do: happy law, in which people strive together to achieve a positive outcome, and unhappy law, in which people get embroiled in nasty disputes. If you read some of the cases on section 109(1), it won't take long to work out

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[926] See sections 108(1) and (1a) of the GA Act. It happened, for instance, in:

- *ST and EPP* [2011] WASAT 62
- *PH and NJM* [2011] WASAT 163
- *SG & Anor and GLG* [2011] WASAT 178
- *KB* [2013] WASAT 108
- *IS* [2018] WASAT 120
- *AF* [2021] WASAT 58
- *IG* [2021] WASAT 83
- *BJT* [2022] WASAT 73.

The circumstances in which SAT revoked an EPA in *NA* [2022] WASAT 118 are more involved, and not discussed here.

[927] See section 110K of the GA Act.

[928] [2007] WASAT 106.

[929] See section 110N(1)(a) of the GA Act. SAT revoked an EPG, for instance, in *IS* [2018] WASAT 120, *AF* [2021] WASAT 58 and *IG* [2021] WASAT 83. It didn't revoke one in *MRH* [2015] WASAT 17. In *MH* [2022] WASAT 74 at paragraph [138], SAT made an order to recognise formally that an application for the appointment of a guardian was also taken to be an application under section 110N to revoke the EPG, and ordered that the EPG be revoked. The circumstances in which SAT revoked an EPG in *NA* [2022] WASAT 118 are more involved, and not discussed here.

[930] See section 110K of the GA Act.

[931] See *CW* [2022] WASAT 11 at paragraph [51]. See also *RK* [2022] WASAT 112 at paragraph [146].

[932] See section 90 of the SAT Act. For an example, see *G and N* [2009] WASAT 99 at paragraph [23].

[933] See *JED* [2013] WASAT 193 at paragraph [48] and *JW* [2019] WASAT 115 at paragraph [68].

which type of law we're talking about here. Apart from those cases already referred to, there are at least the following:

- *TT and NT* [2006] WASAT 273
- *KS (2) [No 4]* [2008] WASAT 167
- *Re SS; ex parte RA* [2008] WASAT 218
- *BJB and GB* [2008] WASAT 307
- *G and N* [2009] WASAT 99
- *PH and IW* [2009] WASAT 141
- *RCP and MCTB* [2011] WASAT 52
- *MRH* [2015] WASAT 17
- *VT* [2015] WASAT 147
- *HD* [2016] WASAT 37
- *SE and ME* [2017] WASAT 38
- *IT and DN and MN* [2018] WASAT 117
- *JS* [2018] WASAT 120
- *JCM* [2018] WASAT 126
- *SMM* [2020] WASAT 85
- *AP* [2020] WASAT 120
- *PT* [2020] WASAT 147
- *R* [2021] WASAT 4
- *ET* [2021] WASAT 36
- *GD* [2022] WASAT 33.

[8.3] What are some of the differences between an immediate EPA and an administration order under the GA Act?

	Immediate EPA	**Administration order**
Is an application to SAT needed?	No.	Yes.
Will your close family members know about it?	Not necessarily.	Generally yes.
Can the power be limited only to parts of your estate?	May be a problem.	Yes.
How long does it take to get the authority to use it?	As long as it takes to prepare the document and have it executed.	An application needs to be made and heard. This normally takes a few months, but the time can vary substantially.
Who will act as attorney or administrator?	The person or organisation you choose who agrees to do it.	The person or organisation appointed by SAT, which may take your wishes into account, but isn't bound by them.
Is education for the attorney or administrator compulsory?	No.	No.
Can the validity of the appointment be questioned or challenged?	Yes.	SAT decisions can be the subject of review or appeal, but the appointment is still valid until an order is made to the contrary.

	Immediate EPA	**Administration order**
Is there a register of appointments?	No compulsory universal central register, but EPAs can be lodged at Landgate.	SAT and the Public Trustee keep records, but there are limits on what can be revealed publicly. The administration order may come up on some Landgate documents.
Are the responsibilities of the attorney or administrator set out in legislation?	Some are, but not all.	Some are, but not all.
Can the attorney or administrator validly make gifts?	Yes, in limited circumstances.	Yes, but only with the permission of SAT.
Can the attorney or administrator apply to SAT for directions?	Yes, though SAT doesn't have to give them and generally won't.	Yes, though SAT doesn't have to give them and generally won't.
Can you still deal with your estate?	Yes, if you have capacity.	Generally not.
Is the attorney or administrator supervised as a matter of course?	Generally not.	Administrators (other than the Public Trustee) usually have to submit accounts to the Public Trustee, though can be exempted.
Does SAT conduct reviews?	Only if it's brought to SAT's attention.	Yes, at least every five years.

CHAPTER 9 – Directions to guardians, administrators and attorneys

[9.1] What's this chapter about?

When you ask someone to do something, do you let them get on with it, or tell them how to do it? If they ask you for guidance, do you give it, or tell them to work it out for themselves?

The State Administrative Tribunal (SAT) has some powers to tell a guardian or administrator what to do, but there are limits, which this chapter explores. The Supreme Court can also have a role to play.

[9.2] What provisions of the GA Act[934] are relevant?[935]

Section 74(1) of the GA Act says:

> "Any administrator may apply to the State Administrative Tribunal for directions concerning any property forming part of the estate of the represented person, or the management or administration of such property, or the performance of any function, and the Tribunal may on any such application give to the administrator any direction not inconsistent with this Act."

Section 75(b) says that where there are joint administrators, and they're not unanimous as to the performance of a function, any administrator may apply to SAT for directions under section 74.

Section 47(1) allows a guardian to apply to SAT "for directions concerning the performance of any function vested in him". **Section 53(b)** says that where there are joint guardians, and they're not unanimous as to the performance of a function, any guardian may apply to SAT for directions under section 47.

At the time of making or reviewing an administration order, SAT can make directions under **section 71(4)**, which says:

> "The State Administrative Tribunal may require a function to be performed by an administrator and may give directions as to the time, manner or circumstances of the performance."

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[934] *Guardianship and Administration Act 1990*.

[935] See also the discussion on sections 51 and 70 of the GA Act at **[7.3]**.

Section 72(1) says:

> "The State Administrative Tribunal may give any direction, make any order or do any other thing provided for in Part B of Schedule 2."

Part B of Schedule 2 says, for instance, that SAT "may … direct that any fine, premium or other payment made on the renewal of a lease be paid out of the estate or be charged with interest on the leasehold property".[936]

Section 72(2) says:

> "Without limiting this section or section 71, the State Administrative Tribunal may make any other order (whether or not of the same nature as those so provided for) that it thinks necessary or expedient for the proper administration of the estate of the represented person."

There are no provisions in the GA Act for guardians that correspond to sections 71(4), 72(1) or 72(2).

Section 64(3)(a) says that administration orders "may" be made subject to conditions or restrictions.[937] **Section 43(3)** says the same for guardianship orders.

In *AM*,[938] SAT appointed the Public Advocate as AM's limited guardian with some functions, and AM's mother as limited guardian with different functions. The mother's appointment was conditional upon her emailing AM's father and the Public Advocate about AM's medical appointments and his treatment.[939]

In *TR and CJ*,[940] SAT had concerns about the way in which the parents of a represented person were acting as guardians. Rather than remove them, SAT imposed conditions.[941]

Section 109(2)(b) of the GA Act allows the donee of an enduring power of attorney to apply for directions as to matters connected with the exercise of the power or the construction of its

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[936] See paragraph (b).
[937] See, for instance, *MB and EM* [2014] WASAT 17 at paragraph [77].
[938] [2015] WASAT 87.
[939] See paragraphs [196] and [200].
[940] [2013] WASAT 119, discussed at **[7.5]**.
[941] For other cases in which SAT imposed conditions on guardians, see *AM* [2015] WASAT 87 at paragraphs [196] and [200], *EB* [2016] WASAT 103 and *SM* [2016] WASAT 109. For a case in which SAT gave directions to two guardians in different ways, see *VM* [2013] WASAT 154.

terms.[942] Section 110M allows SAT to give the same sorts of directions with respect to an enduring power of guardianship.

Section 43 of the GA Act allows SAT to make limited guardianship orders; sections 69, 71(1) and 71(3) allow limited administration orders. These orders at times may have a similar effect to directions.[943]

[9.3] Are any provisions of the SAT Act relevant?

Section 73(1) of the SAT Act[944] also gives some powers to SAT to impose conditions and give directions, though there may be questions as to whether and the extent to which the more specific provisions of the GA Act override that.[945]

[9.4] Does SAT have to give directions?

No.

Note the use of the word "may" in the provisions of the GA Act referred to above. The word "may" normally means that the person has a choice about whether or not to exercise the power, though sometimes it means that the person must do it.[946] Here, it seems clear that SAT doesn't have to give directions, even when asked.

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[942] SAT gave directions in *VM* [2013] WASAT 154, but not in *DW and JM* [2006] WASAT 366, *DD* [2007] WASAT 192 or *DH* [2020] WASAT 100.

[943] See, for instance, the limited administration order made in *LS* [2016] WASAT 89.

[944] *State Administrative Tribunal Act 2004*.

[945] Section 5 of the SAT Act says that if there is any inconsistency between the SAT Act and an enabling Act, the latter prevails. The GA Act is an "enabling Act" because it confers jurisdiction on SAT (see the definition of "enabling Act" in section 3(1) of the SAT Act). In some cases, SAT has given directions to guardians without specifically using the words "conditions" or "restrictions". See, for instance:

- *MD* [2006] WASAT 186
- *JB* [2008] WASAT 159 at paragraph [50]
- *G and N* [2009] WASAT 99 at paragraph [104]
- *Re IPK; ex parte DK* [2011] WASAT 211 at paragraph [81]
- *HL and HS* [2012] WASAT 118 at paragraphs [63] to [64] and [66]
- *RC* [2014] WASAT 25 at paragraphs [55] and [81].

[946] See **[2.3]**.

In *Perpetual Trustees WA Limited and The Public Trustee*,[947] an administrator had paid the legal fees of the represented person's mother, wanted SAT to authorise those payments retrospectively, and (among other things) sought a direction under section 74 of the GA Act. SAT said:[948]

> "Although [section] 74 of the GA Act gives the Tribunal a broad power to give directions to an administrator, on the application of the administrator, to assist the administrator to exercise its functions, the Tribunal exercises this power sparingly. The Tribunal has consistently taken the view, particularly with respect to applications under [section] 74 by plenary administrators, that it should only rarely and with good reason, make directions that relate to the actual management or administration of a represented person's estate, because the GA Act vests all the powers and functions of the represented person in the administrator. The role of the Tribunal is to appoint the administrator where appropriate and to specify if that appointment is plenary or limited in some way. The Public Trustee oversees the conduct of the administrator through the filing of annual accounts and other mechanisms set out in the GA Act. The Tribunal oversees the Public Trustee through provisions such as [section] 80(6a) of the GA Act. The scheme of the GA Act is to enable administrators to conduct the financial affairs of the represented person with the flexibility and autonomy of a natural person but subject to fiduciary obligations, accountability requirements and various necessary statutory restrictions. The Tribunal should not involve itself in the day-to-day administration of a represented person's estate. If any interference of that nature is required, then it falls on the Public Trustee to oversee it. Although [section] 74 enables an administrator to seek directions from the Tribunal, we would generally not give a direction related to the day-to-day management and administration of a represented person's estate. It would be somewhat inconsistent with the scheme and statutory objectives of the GA Act which, although it is protective legislation, must operate within the realities of the needs and abilities of inexperienced private administrators, as well as large professional administrators such as Perpetual Trustees.
>
> The Tribunal does not perceive its role under [section] 74 as effectively usurping the decision-making of an administrator with respect to a difficult or contentious payment. An administrator such as Perpetual Trustees, is well equipped to make appropriate decisions on all matters relating to the administration of a represented person's estate. It cannot come to the Tribunal under [section] 74 to obtain an advisory legal opinion as to its functions or to shift responsibility for the making of an important decision or to absolve it from an unauthorised act with respect to an estate."

The Public Trustee's supervisory role is explained in the Private Administrator's Guide published by the Public Trustee and Public Advocate.

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[947] (2009) 68 SR (WA) 128, [2009] WASAT 253.

[948] See paragraphs [109] and [110].

In *FC and Public Trustee*,[949] the Public Trustee applied for directions about spending a represented person's money. SAT said:[950]

> "As indicated at the hearing, the Tribunal is of the view that such a direction is inappropriate in all the circumstances, and that these are matters for the Administrator to determine as part of the statutory obligations and discretions imposed under the order. Suffice to say that the Tribunal has reviewed the comprehensive information regarding those matters provided by the administrator and has accepted that the administrator has in the past, and will in the future, act in FC's best interests."

Although the application for directions was dismissed, the above passage was an indication from SAT that the Public Trustee was spending the money in an appropriate manner.

As we've seen at **[4.25]**, the Supreme Court has said that SAT's role is neither to review individual decisions made by the guardian or administrator[951] nor to exercise the powers conferred on the guardian or administrator.[952]

SAT sometimes does give directions to an administrator under section 74(1),[953] or specifically leaves open the possibility of the administrator applying for them.[954]

[9.5] What are the restrictions on SAT giving directions?

As already seen, according to *Perpetual Trustees WA Limited and The Public Trustee*, the scheme of the GA Act limits when SAT should give directions.

Section 74(1) of the GA Act also contains a specific restriction. SAT can only give directions that are "not inconsistent with this Act". In *Perpetual Trustees WA Limited and The Public Trustee*, SAT said:[955]

> "We have found that the payment of the legal fees had to be authorised by the Tribunal prior to payment. A direction under [section] 74 could not cure that defect and any

[949] [2006] WASAT 133.
[950] See paragraph [81].
[951] See *TL v Office of the Public Advocate* [2020] WASC 455 at paragraphs [4] and [90].
[952] See *TL v Office of the Public Advocate* [2020] WASC 455 at paragraph [16].
[953] It happened in *Re PD* [2008] WASAT 13, but not in *CW* [2020] WASAT 132.
[954] See *FS* [2007] WASAT 202 at paragraph [143], *FE* [2013] WASAT 26 and *AM* [2020] WASAT 162 at paragraph [204].
[955] See paragraph [111].

> attempt to do so is specifically barred by [section] 74 where it provides that a direction must not be inconsistent with the GA Act."

Section 47(1) contains the same restriction with respect to directing guardians.

The Supreme Court of Tasmania case of *Public Guardian v Guardianship and Administration Board*[956] is also relevant here, even though the legislation isn't exactly the same.

At the time, section 31(4) of Tasmania's Guardianship and Administration Act 1995 said: "The Board of its own motion may direct, or offer advice to, a guardian in respect of any matter."

The Supreme Court said that this power was subject to "unstated limitations". For instance, it could only be invoked where a doubt or difficulty had arisen, and could not cover administrative matters, such as the Public Guardian's record-keeping and internal reviews. It had to be consistent with the scheme of the Act.[957]

Although this case isn't binding in WA, it shows that statutory provisions shouldn't always be read literally, nor in isolation. Even when a power is seemingly expressed widely, there can be limits on how that power is exercised.

In *AM*,[958] the Public Trustee was the administrator of AM, and applied for a review of its administration order. It refused to pay some of a law firm's costs. The law firm asked SAT to make a direction over the disputed costs.

Amongst other things, SAT said that the law firm could sue for recovery of the alleged debt,[959] and that SAT "should be cautious in directing an administrator in the ordinary conduct of the management of a represented person's estate".[960]

SAT said it was relevant that it wasn't the administrator seeking directions, but rather, a body which simply purported to be a creditor of the represented person's estate. Even if it had the power to consider making such directions under sections 71(4) and 72(2), it wasn't appropriate to do so.[961]

SAT also said:[962]

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[956] [2011] TASSC 31.
[957] See paragraph [44].
[958] [2017] WASAT 65.
[959] See paragraph [112].
[960] See paragraph [116]. SAT quoted from *Public Guardian v Guardianship and Administration Board* [2011] TASSC 31.
[961] See paragraphs [117] to [120].
[962] See paragraph [121].

> "The Tribunal should proceed with caution before interfering in the day-to-day management of a represented person's estate by an administrator, but is more likely to consider a direction when sought by the administrator which even then may or may not be given (s 74 of the GA Act)."

In *EBM*,[963], SAT said:[964]

> "The Tribunal, when appointing an administrator, does not usually make orders directing the administrator to act in any particular way. The Tribunal, by making an administration order, recognises that a person will act in the best interest of the represented person and it is generally not desirable to seek to limit the administrator in any way."

It's reasonably common for SAT to give directions to the Public Trustee as administrator, at the time of making or reviewing the administration order, even if the Public Trustee doesn't seek them. This can bring an issue to the attention of management, and may help the Public Trustee explain to third parties why it's doing something. Those directions normally give the Public Trustee a fair amount of leeway. For instance, SAT might direct it to investigate an alleged misappropriation of assets, but not compel it to sue someone.[965]

In the case of *NJH*,[966] SAT requested, rather than directed, that the Public Trustee (as administrator) "give the represented person, if appropriate, an increasing responsibility to manage his income during the term of this order".[967]

In *BS*,[968] SAT directed the Public Trustee to pay $395 per week into the represented person's bank account, saying that the represented person was responsible for the payment of his living expenses, and that the Public Trustee was responsible for payment of the represented person's outgoings on rent and water. However, SAT added: "If at any time the Public Trustee forms the view that the above arrangement is not working in the represented person's best interests the arrangement may be suspended pending the next review."[969]

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[963] [2012] WASAT 157.
[964] See paragraph [25].
[965] In *DC* [2021] WASAT 95 at paragraphs [84] and [85], SAT directed the Public Trustee "to consider" whether to make a particular application to set aside financial transactions.
[966] [2018] WASAT 62.
[967] See paragraph [125].
[968] [2020] WASAT 140.
[969] See paragraph [33]. See also the orders made in *H* [2020] WASAT 75 and *ES* [2020] WASAT 98.

In *PN*,[970] SAT re-appointed the Public Trustee, but kept in directions for a third party to collect the represented person's pension and to hold some of the represented person's money in a bank account. In *AM*,[971] SAT, among other things, directed that the administrator pay an annual lump sum to the represented person for him to manage.

In *PL and SL*,[972] SAT appointed the Public Trustee as limited administrator to deal with $185,000 in a bank account, but also said that the Public Trustee was to lodge a caveat on the represented person's property.

Directions may be a way of managing an administrator's conflict of interest.[973]

Here are further examples of cases in which SAT gave directions to an administrator when making or renewing an administration order:

- *CRA* [2005] WASAT 336
- *VM and Y* [2006] WASAT 245
- *RC [No 2]* [2008] WASAT 180
- *PN* [2008] WASAT 309
- *JAB* [2010] WASAT 97
- *GSW and HSH* [2011] WASAT 40
- *JPA and SA* [2012] WASAT 22
- *RWC* [2012] WASAT 71
- *ML* [2012] WASAT 184
- *MC and KN* [2013] WASAT 8
- *Public Trustee and GB* [2013] WASAT 97
- *RC* [2014] WASAT 25
- *MM* [2015] WASAT 78
- *P* [2017] WASAT 54
- *MT* [2017] WASAT 132
- *KRM* [2017] WASAT 135
- *GYM* [2017] WASAT 136
- *JS* [2018] WASAT 120
- *GG* [2019] WASAT 4
- *JW No 2* [2019] WASAT 117
- *JA* [2020] WASAT 73
- *DN* [2021] WASAT 43
- *JF* [2021] WASAT 59
- *JG* [2021] WASAT 83.

[970] [2008] WASAT 309.
[971] [2015] WASAT 24 at paragraphs [123] to [129].
[972] [2012] WASAT 167.
[973] See *GF* [2016] WASAT 134.

[9.6] Can an administrator seek directions from the Supreme Court?

Section 58 of the *Public Trustee Act 1941* allows the Public Trustee to seek an opinion or direction from the Supreme Court. If the Public Trustee, as administrator, is ever unclear about whether or not to take legal proceedings on behalf of a represented person, it's more likely to use this provision than anything in the GA Act.

For instance, in *Re Estate of Vitalina Ferrari; ex parte The Public Trustee as Plenary Administrator of the Estate of Vitalina Ferrari*,[974] the Public Trustee sought the opinion and direction of the Supreme Court about whether it should bring proceedings to set aside a deed of gift.

In a different case, the Public Trustee used section 58 to ask the Supreme Court whether it was justified in selling a house property that had been declared unfit for human habitation.[975]

Guardians and other administrators might, in theory at least, be able to ask the Supreme Court for directions under its *parens patriae* jurisdiction.[976] The extent to which the court would be prepared to give such directions is unclear.

In an appeal under the GA Act, the Supreme Court directed the Public Trustee – which was the administrator for a represented person – to report a tax minimisation scheme to the Commissioner of Taxation. The Public Trustee had not sought this direction.[977]

[974] [1999] WASC 50.
[975] SAT referred to the Supreme Court case in *PB* [2021] WASAT 42 at paragraphs [11] and [25].
[976] The *parens patriae* jurisdiction is explained at **[1.1]**.
[977] See *SG v AG* [2008] WASC 123 at paragraphs [237] to [238].

PART C- CIVIL LITIGATION

CHAPTER 10 – When parties in civil cases in the Supreme or District Courts of WA have mental impairments or are under 18

This chapter only deals with civil proceedings[978] in the Supreme and District Courts of WA.[979]

[10.1] How does the *parens patriae* jurisdiction work here?

Normally, the role of civil courts is to resolve disputes. But at times, they do more than that. We started this book with a discussion of the *parens patriae* jurisdiction,[980] which had an awful past, but has come to be a way of protecting people. The Supreme Court might exercise that jurisdiction when a party before it in civil litigation is mentally impaired or under 18.

Order 70 of the *Rules of the Supreme Court 1971* (RSC) also covers this area.[981] The *parens patriae* jurisdiction is broad and flexible; Order 70 is prescriptive. It hasn't always been clear how the two relate, although practically speaking, it normally hasn't mattered. It may be that Order 70 doesn't limit the court's broad powers, but is more of a framework for exercising them.[982]

The District Court deals with most personal injuries cases in WA, such as when someone is injured in a car accident and another person or body (usually a driver) may be wholly or partly to blame. What happens when a party to civil litigation in that court is mentally impaired or under 18? It appears that the District Court also has *parens patriae* jurisdiction to deal with

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[978] It isn't always clear whether proceedings are civil or criminal. See *MCL v Chief Executive Officer for the Department of Child Protection* [2015] WASC 39 at paragraphs [43] to [45].

[979] Although it contains some references to the Court of Appeal, this chapter doesn't specifically cover civil proceedings in which the *Supreme Court (Court of Appeal) Rules 2005* apply. Some cases are mentioned. The relevant principles and laws are similar, but not exactly the same, as those in other Supreme Court civil proceedings.

[980] See **[1.1]**.

[981] Order 70 and much of the subject matter of this chapter are also covered in the Commentary on Order 70 of the RSC in the looseleaf and online service *Civil Procedure Western Australia*, published by LexisNexis.

[982] See *Wood v Public Trustee* (1995) 16 WAR 58, [1995] Library 950567 and *Cadwallender v Public Trustee* [2003] WASC 72 at paragraph [31]. According to *S v State Administrative Tribunal of Western Australia [No 2]* [2012] WASC 306 at paragraph [45], quoting from *Fletcher (as trustee of the Brian Fletcher Family Trust) v St George Bank Ltd* [2010] WASC 75 at paragraph [21], court rules cannot modify substantive law. But with respect, see also the Supreme Court of WA case of *Taylor v Walawski* [1991] Library 8992.

this.[983] And again, the RSC apply, with some variations, to civil proceedings in the District Court.[984]

For people under 18, there's also the *Legal Representation of Infants Act 1977*, though it may not often be invoked, and we won't cover it here.

We also won't talk here about proceedings under the *Civil Procedure (Representative Proceedings) Act 2022*.

[10.2] Who is a "person under disability"?

A "person under disability" is:[985]

- under 18 years of age;
- a "represented person"; and/or
- declared by the court to be incapable of managing their affairs with respect to the proceedings, "by reason of mental illness, defect or infirmity".[986]

[983] See sections 52, 53 and 57 of the *District Court of Western Australia Act 1969*; *Morris v Zanki* (1997) 18 WAR 260 at page 285, [1997] Library 970374 at page 40; *Jones v Moylan* (1997) 18 WAR 492, [1997] Library 970626; *Cadwallender v Public Trustee* [2003] WASC 72 and *Perpetual Trustee Company Ltd v Cheyne* (2011) 42 WAR 209, [2011] WASC 225 at paragraph [31]. With respect, more limited views of the District Court's powers were expressed in *Jones v Moylan [No 2]* (2000) 23 WAR 65, [2000] WASCA 361. In Annexure A to the case of *Ryan v Kivits* [2022] WADC 67 at paragraph [1], the District Court relied on section 50(2) of the *District Court of Western Australia Act 1969* when it came to personal injuries claims.

[984] See rule 6 of the *District Court Rules 2005*.

[985] See Order 70 rule 1 of the RSC. This definition can be contrasted with the comments in the District Court case of *Max Elio Naso by his next friend Sabatino Naso & Anor v Cottrell [No 2]* [2001] WADC 7, that the *parens patriae* jurisdiction "is a jurisdiction which exists for the purpose of looking after those who cannot look after themselves". With respect, this may be an instance where Order 70 is prescriptive, but the *parens patriae* jurisdiction is broad and flexible.

[986] For an example of where the Supreme Court made such a declaration, see *Donaldson v Nolan [No 5]* [2017] WASC 44 at paragraph [8]. For an example where the Supreme Court ended up not making such a declaration, see *SA v Manonai* [2008] WASCA 168 and *SA v Mannonai [No 2]* [2008] WASCA 170.

The definition of "represented person" in Order 70 has changed. It used to mean anyone who was subject to a guardianship and/or administration order under the GA Act.[987] Since December 2020, the guardianship and/or administration order has to be broad enough to bring or defend legal proceedings.[988]

There could be some question as to what guardianship or administration orders the definition covers. Whatever the answer, it's clear that not every person who is subject to a guardianship or administration order is automatically a "person under disability".[989]

[10.3] Suppose a party (or planned party) is over 18 and is not a "represented person". If there's a question about that person's mental capacity, should it be dealt with before proceedings are commenced or continued?

Yes. There is a presumption that adult parties have the capacity to conduct litigation, but if the court gets evidence that a person may not have the capacity to do this, the court has to decide whether the person does have capacity. If this doesn't happen, the proceedings could be set aside as being irregular.[990] Normally, if a client loses capacity, the solicitor no longer has authority to act.[991]

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[987] *Guardianship and Administration Act 1990*.

[988] The full definition of "represented person" in Order 70 rule 1 is:

> "a person in respect of whom a guardian or administrator has been appointed under the [GA Act] with authority to do either or both of the following —
>
> (a) as the next friend of the represented person, to commence, conduct or settle on behalf of the represented person specified proceedings, some proceedings or all proceedings;
>
> (b) as the guardian *ad litem* of the represented person, to defend or settle specified proceedings, some proceedings, or all proceedings, that are taken against the represented person."

The terms "next friend" and "guardian *ad litem*" are discussed at **[10.4]**.

[989] This is discussed more at **[10.5]**.

[990] See *Farrell v Allregal Enterprises Pty Ltd [No 2]* [2009] WASC 65 at paragraphs [37] to [38]. *Allregal Enterprises Pty Ltd v Carpaolo Nominees Pty Ltd* [2009] WASCA 33 at paragraph [8].

[991] See *Yonge v Toynbee* [1910] 1 KB 215, cited in the Commentary on Order 70 of the RSC in *Civil Procedure Western Australia*.

The District Court has a practice direction that normally requires an application to be made to the State Administrative Tribunal (SAT) for a guardianship or administration order.[992] The Supreme Court doesn't have anything similar.

If proceedings are on foot, that court could adjourn them, to allow an application to be made to SAT for an administration order. Alternatively, it could consider whether or not to make a declaration of incapacity under Order 70 rule 1.[993] Either way, the court could ask the Public Advocate to investigate capacity.[994]

This can, at least up to a point, involve pre-judging what the court later has to decide in the case. In a claim under the *Family Provision Act 1972*, the daughter of a deceased person may seek more from her father's estate because she has a severe mental illness and can't work. If she has such an illness, it may be enough for her to be a "person under disability". But what if the other parties say that she's faking it or exaggerating her symptoms, so she can get more money? If the court or SAT agree, her claim may fall apart.

[10.4] Who conducts the proceedings for a "person under disability"?

With some exceptions, a "person under disability" needs:[995]

- a next friend – if the person is a plaintiff; or
- a guardian *ad litem* – if the person is a defendant.

A next friend or guardian *ad litem* "must act by a solicitor".[996]

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[992] See paragraph 11.2.2 of the *District Court Practice Directions – Civil*. For an example of SAT making and reviewing an administration order that covered taking District Court proceedings, see *Re AWC, ex parte AWC* [2009] WASAT 216. For an example of when SAT dismissed an application for such an order, see *CM and TM* [2015] WASAT 48.

[993] Even if capacity doesn't seem to be contentious, the court would usually require a medical opinion before making such a declaration. See *Litopoulos v Indiana Holdings Pty Ltd* [2021] WASCA 88 at paragraph [47].

[994] See section 97(1)(c) of the GA Act. This happened in *SA v Manonai* [2008] WASCA 168.

[995] See Order 70 rule 2 of the RSC. One exception is that a judge can allow a minor not to have one (see rule 2(4)).

[996] See Order 70 rule 2(3).

[10.5] If a party is under a guardianship or administration order – even a limited one that doesn't cover the proceedings – do they need a next friend or guardian *ad litem*?

What if, for instance, a person isn't under an administration order, but is under a guardianship order that's limited to making treatment decisions? Such an order wouldn't cover civil proceedings in the District Court to recover a debt.[997]

However, the fact that the person is under a limited guardianship and/or administration order would bring into question whether that person could conduct civil litigation. Maybe SAT didn't make broader orders because, at the time, there was no litigation on the horizon. Depending on the circumstances, it might be necessary to:

- look at why SAT limited the orders in the way that it did;
- seek medical evidence;
- ask the Public Advocate to investigate capacity; [998]
- apply to SAT for guardianship and/or administration orders;[999]
- ask SAT to review existing guardianship and/or administration orders;[1000] and/or
- ask the court to make a declaration of incapacity under Order 70 rule 1.

There are also times when even if a guardianship or administration order covers civil litigation, the court may say that the represented person doesn't need a next friend or guardian *ad litem*.

In the case of *S v State Administrative Tribunal of Western Australia [No 2]*,[1001] SAT appointed an administrator and a guardian for a Ms S. She appealed to the Supreme Court against that decision. Because she had a guardian and an administrator, she was a "person under

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[997] In *Allregal Enterprises Pty Ltd v Carpaolo Nominees Pty Ltd [No 2]* [2009] WASCA 55, Justice Pullin said that being under a limited guardianship order was enough to become a "person under disability" and in need of a next friend. At the time this case was decided, the definition of "represented person" in Order 70 was much broader than it is now, and covered any person under a guardianship and/or administration order, no matter what the terms.

[998] See section 97(1)(c) of the GA Act.

[999] For how SAT appoints guardians and administrators, see Chapter 4 and Chapter 5.

[1000] See **[4.25]**.

[1001] [2012] WASC 306.

disability".[1002] Justice EM Heenan applied Order 1 rule 3A of the RSC, which says that the inherent power of the court to control the conduct of a proceeding is not affected by those rules, and found that she didn't need a next friend when appealing against the decision that had made her a "person under disability".[1003]

His Honour also said that rules of court cannot amend or modify the operation of laws enacted by Parliament.[1004] Ms S strenuously maintained that she was wrongly found to be a person in need of orders. Forcing her to have a next friend would have substantially diminished or encroached upon her statutory rights of appeal.[1005][1006]

[10.6] Who acts as the next friend or guardian *ad litem*?

That depends. It might, for instance, be the guardian or administrator under the GA Act, the parent or guardian if the "person under disability" is a minor, or the Public Trustee.[1007]

[10.7] When the Public Trustee is administrator under the GA Act, must it be the person's next friend or guardian *ad litem*?

Generally speaking, yes.[1008]

[1002] As discussed at **[10.2]**, the definition of "person under disability" in order 70 rule 1 of the RSC has changed since then.

[1003] See paragraphs [36] to [46]. His Honour specifically agreed with the approach taken by Justice Pullin in *Allregal Enterprises Pty Ltd v Carpaolo Nominees Pty Ltd [No 2]* [2009] WASCA 55, but said that it seemed Justice Pullin was not referred to Order 1 rule 3A.

[1004] See paragraph [45], quoting from Chief Justice Martin in *Fletcher (as trustee of the Brian Fletcher Family Trust) v St George Bank Ltd* [2010] WASC 75 at paragraph [21].

[1005] See paragraph [46].

[1006] In *MCL v Chief Executive Officer for the Department of Child Protection* [2015] WASC 39, the question arose whether the proceedings, which were brought under the *Children and Community Services Act 2004*, were civil and whether Order 70 of the RSC applied. Justice EM Heenan did not decide the issue. The children were represented by a legal practitioner who was appointed under section 148 of the Act. His Honour was satisfied that the interests of the three children were fully protected by the role and responsibility of that practitioner. His Honour therefore did not appoint a guardian *ad litem* for the children. See paragraphs [43] to [45].

[1007] See Order 70 rules 3 and 4 of the RSC. In *Farrell v Allregal Enterprises Pty Ltd [No 2]* [2009] WASC 65, the Supreme Court compelled the Public Trustee to act as next friend.

[1008] See Order 70 rule 3(3) of the RSC. We won't cover probate actions here.

There are exceptions. For instance, it didn't happen in the case of *S v State Administrative Tribunal of Western Australia [No 2]*, when the represented person was challenging the guardianship and administration orders.[1009] It also shouldn't happen when the Public Trustee is appointed as limited administrator with some functions, and someone else (such as the Public Advocate) is appointed as limited administrator with the function of conducting litigation. The purpose of such split appointments is to manage a conflict of interest.[1010] The court can also choose to appoint someone else.[1011]

If proceedings are already on foot when the Public Trustee is appointed administrator, the court needs to make an order appointing the Public Trustee as next friend or guardian *ad litem*.[1012]

[10.8] Can the Public Trustee agree to be next friend of a person under 18, before proceedings are instituted?

This has happened. The Public Trustee has been named on the court papers as next friend without any order being made.

[10.9] Can the court remove a next friend or guardian *ad litem*?

Yes. Order 70 rule 7 of the RSC specifically allows for this.

At least one reason why this may happen to a next friend (or presumably a guardian *ad litem*) is if they aren't properly conducting the litigation.[1013]

If the person is under an administration order under the GA Act, an application could be made to SAT review the order.[1014] If SAT changed the administrator, that wouldn't automatically change the next friend or guardian *ad litem*.[1015] If the order were revoked entirely, the person may no longer be "under disability", so the next friend or guardian *ad litem* might be removed

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[1009] See **[10.5]**.
[1010] See **[4.15]** and **[4.16]**.
[1011] See Order 70 rule 3(4) of the RSC.
[1012] See Order 70 rule 3(6) of the RSC.
[1013] See *Allregal Enterprises Pty Ltd v Carpaolo Nominees Pty Ltd [No 3]* [2009] WASCA 118 at paragraph [4].
[1014] See **[4.24]** to **[4.25]**. For an example of such a review, see *JS* [2020] WASAT 44. An appeal to the Supreme Court against the administration order might also be possible.
[1015] See Order 70 rules 3(3) to (5) of the RSC and the case of *DT and EER* [2013] WASAT 38 at paragraph [60].

that way. The court, though, would have the power to make its own declaration of incapacity and still have a next friend or guardian *ad litem* in the proceedings.

[10.10] Who can make the application for removal?

The "person under disability" can, at least in some cases.[1016]

At times, what might appear to be an application by the "person under disability" for the removal of a next friend or guardian *ad litem* might, in substance, be an application by someone else, such as a relative who is also an opposing party.

An opposing party can apply to remove a next friend or guardian *ad litem*, though whether the application succeeds is another matter.[1017] At least in some circumstances, the guardian of the "person under disability" can do it.[1018]

If the person was under an administration order, the "person under disability" could application to SAT to review that order.[1019] Other people can also apply, though they may need to get SAT's leave.[1020]

[10.11] When proceedings are on foot, must the court approve a compromise involving a "person under disability"?

Yes, according to Order 70 rule 10 of the RSC.[1021] This includes an acceptance of an offer to consent to judgment. One reason for this is "to ensure that the settlement is fair and reasonable".[1022] Sometimes, all the terms of the compromise are included in the court's orders.

[1016] In *Donaldson v Nolan [No 5]* [2017] WASC 44, the court treated Mr Donaldson's actions as an application for an order to remove the next friend. It appeared to accept that it had the power to make such an order, but found in the circumstances that the next friend should remain.

[1017] See *Williams v Schwarzback* [2015] WASC 296 at paragraphs [23] to [27]. Whether, and in what circumstances, a non-party can apply is not covered in this book.

[1018] See *Allregal Enterprises Pty Ltd v Carpaolo Nominees Pty Ltd [No 3]* [2009] WASCA 118 at paragraph [1].

[1019] See **[4.24]** to **[4.25]**. That's what happened in *JS* [2020] WASAT 44. The represented person applied through lawyers.

[1020] See **[4.24]** to **[4.25]**.

[1021] Annexure A to the case of *Ryan v Kivits* [2022] WADC 67 contains a summary of the law with respect to settlements under Order 70 rule 10.

[1022] See *Scaffidi v Perpetual Trustees Victoria Ltd* (2011) 42 WAR 59, [2011] WASCA 159 at paragraph [51]. For further reasons, see the same paragraph of that case, plus *Dion Giuseppi*

In other cases, the terms (or at least the bulk of them) are put in a settlement deed, and the court (if appropriate) makes orders approving the deed.[1023]

[10.12] If the "person under disability" is the plaintiff, and the next friend discontinues the proceedings against the defendant, is that a compromise?

Having considered two cases,[1024] it seems that the answer could depend on whether the defendant has a right to seek costs. That in turn could depend on matters such as whether the defendant knows about the proceedings, has participated in them and has engaged lawyers. Things could get more complicated when there are more than two parties.

[10.13] When no proceedings are on foot, must the court approve a compromise involving a "person under disability"?

No. Order 70 rule 11 of the RSC says that when court proceedings have not been commenced, an originating summons "may" be issued, seeking orders for approval of the compromise and related matters. The words "may"[1025] and "it is desired to obtain the Court's approval" show that this is optional.

[10.14] If proceedings have not been commenced, should a court nonetheless be asked to approve the compromise?

There are a number of questions to ask.

Sergi By Next Friend Aileen Solowiej v Sergi [2012] WASC 18 at paragraph [39]. *Scaffidi v Perpetual Trustees Victoria Ltd* (2011) 42 WAR 59, [2011] WASCA 159 at paragraph [52] raises what might happen if an agreement is reached directly with a "person under disability".

[1023] For a case on issues with settlement deeds that the court approves, see *Scaffidi v Perpetual Trustees Victoria Ltd* (2011) 42 WAR 59, [2011] WASCA 159.

[1024] *Holland by his next friend Roberta Ashworth Holland v The Metropolitan Health Services Board* [2001] WASCA 155 and the District Court of WA case of *Jarvinen v Minister for Health (WA)* (1998) 19 SR (WA) 338, [1998] Library 980223. The former case is cited in the Commentary on Order 70 of the RSC in *Civil Procedure Western Australia*.

[1025] See **[2.3]**.

Does the person giving instructions have the authority to compromise on behalf of the "person under disability"?

An administrator appointed under the GA Act may have this authority, but this would depend on the scope of the administration order and the subject matter of the compromise.

Within the legal profession, there appear to be differing views as to whether a parent's authority is enough to sign a deed on behalf of a person who is under 18.

If no-one has the authority, one way to get it is to commence substantive proceedings, or proceedings under Order 70 rule 11, and have someone act as next friend in those proceedings.

What's the attitude of the other side?

The other side may make it a condition of the compromise that court approval is obtained.

What if the person giving instructions has the authority to compromise and the other side doesn't require court approval?

Suppose Gwen, an elderly lady with early dementia, purports to give away $900,000 to John, who is one of her adult relatives. A concerned person applies to SAT, which appoints a plenary administrator for Gwen under the GA Act.[1026]

The administrator's lawyers write a letter of demand, seeking the entire $900,000 from John, plus interest and costs, on the basis that Gwen didn't have the capacity to make the gift, and there was undue influence and unconscionable dealing. No proceedings are actually brought.

John offers to pay back $895,000 plus interest and costs, in full and final settlement of the claim against him.

A plenary administrator has the power to agree to such a compromise, without getting court approval. But should it be sought in any event? The following factors are worth considering:

- How much is the person giving up? In the example above, Gwen may be giving up less than 1% of the value of her claim. In those circumstances, it may not be worth seeking court approval. What if, on the other hand, Gwen's claim is weak, John offers her $20,000 to go away, in full and final settlement of her claim, and the administrator thinks it's worth taking? It may be worth obtaining the protection of the court to settle for such a low sum.

- What would be the extra cost of seeking the court's approval?

[1026] For how SAT appoints administrators, see Chapter 4 and Chapter 5.

- How long would it take to seek it?
- Is the court likely to give approval?
- Would the other side withdraw the offer if it meant having to go to court? Some people don't like the idea of being involved in any court proceedings, even if it's just to get a compromise approved.

Could SAT be asked to give directions?

Section 74(1) of the GA Act allows an administrator to seek the directions of SAT. At first glance, this might seem an alternative to going to court if there is an administrator and court approval isn't needed. But SAT isn't obliged to give directions and exercises this power sparingly. Good reasons would have to be given for going this way.[1027]

[10.15] When should counsel's opinion be obtained?

This depends on the circumstances.

What if the proceedings are to be compromised under Order 70 rule 10 of the RSC?

The "opinion of an independent counsel" is needed unless the court dispenses with it.[1028] Factors to take into account when deciding whether to seek such an opinion may be:

- How much is the person giving up?
- What would be the extra cost?
- How long would it take to obtain?
- Is counsel likely to agree with the compromise?

In some cases, the court *might* be prepared to accept an opinion from the solicitor handling the matter if, for instance, the solicitor is experienced and the subject matter is highly specialised.

[1027] See Chapter 9.

[1028] For an example of when the Supreme Court waived the need for counsel's opinion, see *Cugley v Tara Renee Macpherson by her Guardian ad litem Debra Ann MacPherson* [2015] WASC 156 at paragraphs [13] and [14].

In *Layne Carmel Dixon by her next friend Andrew Nigel Dixon v Clarke*,[1029] the court raised whether the barrister giving the opinion was "independent counsel". He clearly was "counsel", but was he "independent", given his prior involvement in the case? In the end, the court didn't need to decide the point, as it was prepared to dispense with the opinion if need be.

The position is slightly different in the Court of Appeal. Before a single judge can approve a "settlement or compromise", the application must be filed with an opinion by an "independent legal practitioner", unless the single judge orders otherwise.[1030]

In *Farrell v Allregal Enterprises Pty Ltd [No 3]*,[1031] the court said what was meant by an "independent lawyer",[1032] and held that the barrister giving the opinion in that case met the definition. The court added that even if he wasn't independent, it would not have required something more from an "independent lawyer" because the opinion was correct.[1033] Although the rule isn't exactly the same, this case is clearly relevant to Order 70 rule 10 (and rule 11) of the RSC and was cited in *Layne Carmel Dixon by her next friend Andrew Nigel Dixon v Clarke*.[1034]

What if an application is made under Order 70 rule 11 of the RSC?

This rule doesn't specify that counsel's opinion is needed. Nonetheless, the court may require it before approving the compromise. The same factors as above may apply.

What if no application to the court is being made?

Again, the same factors may apply. There may be more reason to obtain counsel's opinion, as a substitute for seeking the protection of the court.

[10.16] Do the other parties get to see counsel's opinion?

No, if the normal procedure is followed. Counsel's opinion should be annexed to an affidavit that's filed in court. The other parties should get a copy of the affidavit, but not that annexure. Why? The court might refuse to approve the compromise. If the other parties see counsel's opinion, they might find out weaknesses in the case of the "person under disability".

[1029] [2017] WASC 310 at paragraphs [11] to [16].
[1030] See rule 60(4) of the *Supreme Court (Court of Appeal) Rules 2005*.
[1031] [2011] WASCA 247.
[1032] At the time, rule 60(4) used the phrase "independent lawyer". It now says "independent legal practitioner".
[1033] See paragraphs [17] to [19].
[1034] [2017] WASC 310 at paragraph [15].

[10.17] What should the court consider when deciding whether or not to approve a compromise?

The general principles are:[1035]

- The compromise needs to be "for the benefit of" the person under disability.
- The court has to satisfy itself that the person's legal advisers have brought together and considered all the facts relevant to that person's case.
- Unless it has waived the need for counsel's opinion, the court needs to consider the opinion and the reasons for it.
- If it appears that counsel has properly considered all aspects of the case, the court should be slow to disagree with the opinion, particularly in a matter such as assessment of damages for personal injuries.
- The court should be aware of the risk of litigation where reasonable people can reasonably reach different conclusions.
- The court should be slow to force a person under disability to take a risk which it can't underwrite.
- The court needs to be satisfied that the next friend or guardian *ad litem* has considered and understood counsel's opinion, and give proper weight to the fact that this person wishes to accept the settlement.

The court's role "is not to hear the application as if it were the substantive hearing and then to give or withhold its approval by comparing the offer with the judgment which it would have given".[1036] The relevant question is "whether the prospect of getting a greater sum by rejecting the present offer is good enough to outweigh, significantly, the risk of not getting any more".[1037]

[1035] See *Sosa v Carter* [1978] WAR 123, cited in the Commentary on Order 70 of the RSC in *Civil Procedure Western Australia*. It dealt with a plaintiff who was under 18, but the same general principles would apply to any "person under disability". See also *Trout v Minister for Health* [2012] WADC 172 at paragraphs [10] and [11]. Annexure A to the case of *Ryan v Kivits* [2022] WADC 67 at paragraph [8] also goes through a list of factors when assessing an application for approval.

[1036] See *Debra Lorraine Maas as Next Friend of Matthew James Maas v Helen Mary O'Neill in her capacity as the Executrix of the estate of the late Michael O'Neill* [2013] WASC 379 at paragraph [13].

[1037] See *McLean v James Plummer as Executor of the Estate of Robert William McLean* [2018] WASC 26 at paragraph [13]. A similar sentiment is expressed in *Williams v Schwarzback* [2015] WASC 296 at paragraph [28].

The court should consider other issues such as the prospects of an appeal and the costs and pressures imposed if the litigation were to continue to trial.[1038]

The court "must consider the proposed compromise from the perspective of the person under the disability, and determine, from that perspective, whether the terms of the compromise are fair and whether the compromise is for that person's benefit".[1039]

Although the court needs to protect a "person under disability" from any lack of skill or experience of their legal advisers, it will attach significant weight to the opinions of those advisers.[1040]

When the Public Trustee decides whether or not to take legal proceedings to recover assets on behalf of a person, it may not just look at legal merits of the claim.[1041] Similarly, some reasons why a compromise is "for the benefit of" the "person under disability" may go beyond those merits. If a person only needs $500,000 to live in comfort and security for the rest of their life, is it worth holding out for twice that amount? Possibly not.

One factor for the court to consider is whether the person under disability could get under emotional strain if the case goes on.[1042] If the litigation is among family members, the court may consider "the importance of family comity and tranquillity" as "the significance of family harmony and the preservation of future good relations have value and importance in themselves".[1043]

Sometimes, counsel gives one long written opinion before settlement negotiations take place. If, after negotiations, the proposed settlement is outside the recommended range, counsel might need to give a short supplementary opinion, saying that notwithstanding the earlier advice, given the risks of litigation and other factors, it's reasonable to compromise.

For an example of when a court refused to approve a compromise, see *Robert Mitford Rowell by Next Friend Angela Joan Rowell & Anor v Calder & Ors [No 2]*.[1044]

[1038] See *McLean* at paragraph [16].
[1039] See *Debra Lorraine Maas as Next Friend of Matthew James Maas v Helen Mary O'Neill in her capacity as the Executrix of the estate of the late Michael O'Neill* [2013] WASC 379 at paragraph [13].
[1040] See *Williams v Schwarzback* [2015] WASC 296 at paragraph [28].
[1041] See **[11.8]**.
[1042] See Annexure A to the case of *Ryan v Kivits* [2022] WADC 67 at point (7) of paragraph [8].
[1043] See *Dion Giuseppi Sergi By Next Friend Aileen Solowiej v Sergi* [2012] WASC 18 at paragraph [44], approved in *Williams v Schwarzback* [2015] WASC 296 at paragraph [28].
[1044] [2007] WASC 144.

[10.18] To whom might the solicitor for a next friend or guardian *ad litem* have to account for the compromise?

- The next friend or guardian *ad litem*.
- The "person under disability" (who might cease to be so in the future, for instance, by turning 18).
- If the person is subject to an administration order under the GA Act, SAT might ask questions about the compromise when the administration order is next reviewed.
- If the client remains under a disability, a person who is concerned about the compromise might raise those concerns with SAT, which could appoint an administrator to investigate the circumstances of the compromise.

[10.19] What advantages does a solicitor have when negotiating on behalf of a "person under disability"?

The solicitor can point out to the other side that generally speaking, it's natural for the court to be sympathetic to a "person under disability", and that the court has a jurisdiction and role to protect that person.

If proceedings are on foot and the solicitor is presented with an unreasonable offer to compromise them, the solicitor can say to the other side: "I doubt that I could persuade counsel to accept this. I doubt that I could persuade the court to accept it. You have to offer more if you want these proceedings to be over."

[10.20] To what extent should the "person under disability" be involved?

The role of a next friend isn't simply to act on the instructions of the person. Rather, it's to conduct the litigation efficiently and in the person's interests.[1045] That said, the person's wishes may still be relevant.

[1045] See *Donaldson v Nolan [No 5]* [2017] WASC 44 at paragraph [10]. For more on the role of a next friend or guardian *ad litem*, see *Michele Laraine Hicks by next friend State Trustee Ltd v John Keith Burstall as executor of the estate of Robin Stanley Burstall* [2021] WASC 167 at paragraphs [18] to [22], though an appeal has been brought against this decision.

When the person is under 18, and that's the only reason for the disability, the age, intelligence and maturity of the person need to be taken into account when deciding how much to involve them. Generally speaking, a 16-year-old would be more involved than a 10-year-old. The distress that the person might experience should also be considered.

When the person is under an administration order, the "best interests" test applies.[1046] That test is also a useful guide when the court has declared the person to be under disability.

[10.21] What about confidentiality clauses?

Sometimes, a settlement deed includes a confidentiality clause. This becomes more complicated if one of the parties is under 18 or has a mental impairment.

Any confidentiality clause needs to set out exactly *who* is to keep *what* confidential.

A person with advanced dementia may never know about the compromise. Others may understand what it means to keep information confidential and may be able to remember that and comply with it. On the other hand, a 12-year-old child may have some idea about the proceedings, but could not be expected to keep anything about them secret.

While it might be reasonable to bind the next friend or an administrator to a confidentiality clause, at least some people under 18 or with a mental impairment should not be so bound.

In any event, there need to be exceptions to confidentiality. For instance, the clause needs to allow an administrator to report the results of the compromise to SAT.

Administrators under the GA Act are already subject to confidentiality provisions.[1047] It may be worth querying whether a confidentiality clause is needed at all.

[1046] The "best interests" test is covered in Chapter 7. For a discussion on the represented person's wishes in the context of that test, see **[7.9]** to **[7.12]**. For some possible questions to ask when deciding whether and how much to consult the represented person, see **[7.12]**.

[1047] See sections 17 and 113, and clause 12 of Schedule 1. The law when the Public Trustee is administrator is more complicated, but the Public Trustee is restricted in what it can release.

[10.22] What practice directions apply in an application to approve a compromise?

Practice Direction 4.2.2 of the Supreme Court's *Consolidated Practice Directions*. With some variations, it also applies in the District Court.[1048]

[10.23] Can a "person under disability" try to stop the court approving a compromise?

A "person under disability" may not be happy with the compromise. Sometimes, it's better for the court to hear from that person before deciding whether or not to approve it. This is what happened in *Donaldson v Nolan [No 5]*,[1049] although the court still gave its approval.[1050]

In *Farrell v Allregal Enterprises Pty Ltd [No 3]*,[1051] the Court of Appeal allowed a guardian to get a copy of counsel's opinion and make submissions.[1052] The court still approved the compromise, but considered what the guardian had to say.

[10.24] If the court has approved a compromise, has the "person under disability" (or someone on the person's behalf) ever brought an action against a next friend on the basis that the compromise was wrong?

Yes.[1053] The merits of such an action are not discussed here.

[10.25] How are costs different?

See **[13.11]**.

[1048] See paragraphs 1.1.1(c) and 11.2.2 of the *District Court Practice Directions – Civil*. See also CPC 8 of the *District Court Circulars to Practitioners – Civil*.
[1049] [2017] WASC 44.
[1050] See paragraphs [23] to [30].
[1051] [2011] WASCA 247.
[1052] See at paragraph [13].
[1053] See *Christine Anne Donnellan (By her next friends Walter Francis Martins and Audrey Constance Martins joint plenary guardians and administrators) v The Public Trustee* [2007] WASC 213 and *Donnellan v The Public Trustee [No 2]* [2010] WASC 214.

CHAPTER 11 – Recovering the assets of people under administration orders

[11.1] What's this chapter about?

The Public Trustee, as administrator under the GA Act,[1054] regularly deals with the alleged misuse of the assets of a person with a mental disability, often after a direction from the State Administrative Tribunal (SAT). This chapter explains how the Public Trustee may get information, preserve the assets or a judgment sum, and try to get something back. It goes through some questions the Public Trustee may ask, because it isn't always worth taking action.

[11.2] What are some general ways in which a person's assets can be misused?

It doesn't have to be sophisticated. Someone may find out the person's PIN, take the card for the person's bank account, go to an ATM and withdraw large sums of money for themselves.

In other cases, the person may sign away or mortgage a house when they don't know what they're doing or are pressured. They may have their signature forged.

The donees of an enduring power of attorney or administrators under the GA Act may treat the person's assets as their own, make poor investments and/or fail to pay bills on time.[1055]

Sadly, there are other methods. Sometimes, it may be a combination of ways.[1056]

For a report on Aboriginal financial elder abuse in the Kimberley, see *No More Humbug!!!*[1057]

[1054] *Guardianship and Administration Act 1990*.

[1055] In *SY and MM* [2013] WASAT 68, a person's nursing home fees were more than $10,600 in arrears. A representative of the home applied for an administration order to be made. SAT found further evidence of the person's assets being misused.

[1056] See *GYM* [2017] WASAT 136 at paragraphs [77] to [81] and *KRM* [2017] WASAT 135 at paragraphs [74] to [78].

[1057] December 2020, produced by Kimberley Birds as part of the Kimberley Community Legal Services Aboriginal Financial Elder Abuse Project.

[11.3] What is the "best interests" test?

Section 70(1) of the GA Act provides that an administrator shall act according to their opinion of the "best interests" of the represented person. Chapter 7 goes through what that means.

[11.4] How might the Public Trustee attempt to obtain information about assets?

If you have full mental capacity and have had your assets taken, you may choose to ask a lawyer what can be done about it. You may not know everything that happened, but you're in a position where (a) you can give the lawyer some useful information and (b) you want to give the lawyer some useful information.

Before being appointed as administrator, the Public Trustee may not know anything about the represented person. After its appointment, as a matter of course, it gets copies of the administration order and the application for it. Sometimes, SAT gives it other material. On occasions, the represented person can and does give useful information to the Public Trustee. But the person may not be able to help, or doesn't want the government involved. The Public Trustee can make inquiries,[1058] but asking people isn't always enough. It might, for instance:

- obtain SAT's reasons for its decision to appoint the Public Trustee as administrator;[1059]
- obtain a copy of the transcript or recording of the SAT hearing that resulted in its appointment as administrator;
- request other documents from SAT;
- apply to SAT for orders requiring the donee (or former donee) of an enduring power of attorney to file and serve a copy of their records and accounts, and requiring the accounts to be audited;[1060]
- apply to SAT, during SAT proceedings, for another party to produce documents or other material, or to provide information;[1061]

[1058] See section 55(2) of the *Public Trustee Act 1941*.
[1059] See sections 74 to 79 of the SAT Act.
[1060] See **[8.2]** under "Intervention by SAT".
[1061] See sections 34(5) and 66(1)(b) of the SAT Act.

- apply to SAT, during SAT proceedings, for an order that a third party produces documents or other material to SAT or to a party to the proceedings;[1062]
- apply for discovery in the Supreme Court;[1063]
- issue a subpoena in the Supreme Court;[1064]
- summons a person to appear before the Public Trustee to answer questions about property to which the Public Trustee may be entitled;[1065]
- summons a person to appear before the Supreme Court to answer questions about that property, and to produce documents;[1066]
- make applications to government agencies under the *Freedom of Information Act 1992*; and/or
- seek disclosure under section 14 of the *Road Traffic (Administration) Act 2008*.

[11.5] How might the Public Trustee attempt to protect or preserve assets, or a potential judgment sum?

Getting an order to pay money or recover an asset isn't enough if the money never gets paid or the asset never gets recovered.

So the Public Trustee might, for instance:

- lodge a caveat on the real estate of the person who is alleged to have misused the assets;[1067]
- apply to SAT for an injunction;[1068]

[1062] See *Public Trustee and BG* [2010] WASAT 195 at paragraph [22], and section 35 of the SAT Act.
[1063] See Orders 26 and 26A of the *Rules of the Supreme Court 1971* (RSC).
[1064] See Order 36B of the RSC.
[1065] See section 55(2) of the *Public Trustee Act 1941*.
[1066] See section 55(3) of the *Public Trustee Act 1941*.
[1067] See section 137 of the *Transfer of Land Act 1893* and the discussion at **[11.6]**.
[1068] See the cases of *Public Trustee and BG* [2010] WASAT 195, *MK* [2013] WASAT 146 at paragraph [31], section 72(1) and paragraph (e) of Part B of Schedule 2 of the GA Act, and section 90 of the SAT Act.

- seek, from a party, an undertaking in SAT to preserve the assets;[1069]
- apply for an interlocutory injunction in the Supreme Court;[1070]
- apply for a freezing order in the Supreme Court;[1071] and/or
- apply for an injunction in the Family Court of WA.

Sometimes, the above may be too heavy handed. It's important not to use a sledgehammer to crack open a nut.

[11.6] What are the advantages and disadvantages of lodging a caveat on the real estate of the person who is alleged to have misused the asset?

Advantages

It doesn't take long and is cheap. At least in the short term, it stops various dealings on the real estate.[1072] It may bring the person to the bargaining table.

Disadvantages

The person who is alleged to have misused the asset must have real estate in the first place. To lodge a caveat, it isn't enough to be owed money. There must be a caveatable interest in the real estate. For instance, it may be the misused asset, or the registered proprietor spent the misused funds on it (such as by paying off a mortgage).

[1069] Undertakings are sometimes given in court proceedings. "It is … a civil contempt to act in breach of an undertaking given to the court on the faith of which the court sanctions a particular course of action or inaction…." (See *Singh v Kaur Bal [No 3]* [2012] WASC 243 at paragraph [55], cited in the Commentary on Order 55 of the RSC in the looseleaf and online service *Civil Procedure Western Australia*, published by LexisNexis.) If a person breaches an undertaking to SAT, the President can report that to the Supreme Court. The Supreme Court has the power to deal with the matter as if it were a contempt of court. (See section 100 of the SAT Act and the cases of *DC* [2021] WASAT 130 and *Attorney General v Morrison [No 2]* [2022] WASC 295. Principles in relation to section 100 are set out in *Re Ruah Legal Services Limited trading as Mental Health Law Centre* [2021] WASAT 28 at paragraphs [6] to [10].)

[1070] See Order 52 of the RSC.

[1071] See Order 52A of the RSC. This was previously known as a Mareva order or Mareva injunction.

[1072] See section 139 of the *Transfer of Land Act 1893*.

Lodging a caveat can lead to proceedings in the Supreme Court about whether or not to remove it.[1073] The Supreme Court might say that the caveat can only stay in place if the person or organisation that lodged it brings a second set of proceedings to enforce the alleged interest in the real estate. Things can quickly escalate. A caveat can affect other parties, such as purchasers and co-owners, who might get involved. The threat of losing a home may "up" the stakes and damage the prospect of an amicable settlement.

If a caveat is lodged "without reasonable cause", the person or organisation who lodged it can be made to pay compensation to "any person who may have sustained damage thereby".[1074] That said, if the registered proprietor isn't planning to sell or mortgage the real estate, it could be difficult for anyone to show any substantial damage.

[11.7] How might the Public Trustee attempt to recover assets, or obtain money for their loss?

Sometimes, having a friendly chat or writing a simple letter of demand can work. If not, depending on the circumstances, it might be appropriate to:

- apply to the Supreme Court for damages, money owing or possession of property of a represented person under section 27 of the *Public Trustee Act 1941*;[1075]
- apply to the Supreme Court for an order requiring a person to deliver, convey, transfer or assign property;[1076]

[1073] The registered proprietor of the real estate can ask Landgate to issue a 21-day notice to the caveator to remove the caveat. If so, the caveator has 21 days to apply to the Supreme Court under section 138B of the *Transfer of Land Act 1893* to extend its operation. Alternatively, the registered proprietor can skip the 21-day notice and apply directly to the court under section 138(2) to have the caveat removed.

[1074] See section 140 of the *Transfer of Land Act 1893*. For an example, see the Supreme Court of WA case of *The Public Trustee as Executor and Trustee of the Will of Hilda Rosamond Wilson (dec) v Murray Lee Wilson* [1999] Library 990178.

[1075] The Supreme Court of WA has interpreted this section narrowly (see *Collins by her next friend The Public Trustee v Price* [1996] Library 960747).

[1076] See section 55(4) of the *Public Trustee Act 1941*.

- take proceedings in the Supreme Court to set aside a transaction on the grounds of lack of capacity,[1077] undue influence and/or unconscionable dealing;[1078]
- take proceedings in the Supreme Court to claim that property is being held on constructive and/or resulting trust;
- take court proceedings against the donee (or former donee) of an enduring power of attorney for breach of their duties;[1079]
- recover money or property in court, that is the subject of an attempted dealing by a represented person;[1080]
- seek (or ask the prosecutor to seek) a reparation order (which can be a compensation order or restitution order), if someone is convicted of a criminal offence;[1081]
- seek compensation for a person deprived of land, either in court or by applying to Landgate;[1082]
- apply to the Supreme Court to remove a trustee;[1083]
- apply for orders in the Family Court of WA; and/or
- take proceedings in the Magistrates Court for possession of real property and profits;[1084]

[1077] For a statement of the law on setting aside a contract due to lack of capacity, see *Lampropoulos v Kolnik* [2010] WASC 193 at paragraphs [92] to [97]. See also *Edna May Collins by her next friend Glenys Lesley Laraine Poletti v May* [2000] WASC 29.

[1078] For a statement of the law on unconscionable dealing, see *Lampropoulos v Kolnik* [2010] WASC 193 at paragraphs [388] to [389].

[1079] For these duties, see section 107 of the GA Act and the case of *KS [No 2]* 2008] WASAT 29 at paragraphs [17], [25] and [50] to [57].

[1080] See sections 77(1) and (2) of the GA Act.

[1081] See sections 39(7) and 40(7) and Part 16 of the *Sentencing Act 1995*.

[1082] See Part XII of the *Transfer of Land Act 1893*.

[1083] See the case of *Angelina Vagliviello (by her next friend The Public Trustee in and for the State of Western Australia) v Vagliviello & anor* [2003] WASC 61.

[1084] See *The Public Trustee v Baker* [2014] WASCA 23.

- take proceedings in SAT under section 82 of the GA Act to set aside various transactions that a person entered into (or agreed to enter into) within two months before being declared be a person in need of an administrator;[1085] and/or

- issue a certificate of loss under section 80 of the GA Act against an administrator and enforce it in court as a debt.[1086]

Leaving aside sections 80 and 82, SAT doesn't have a general power under the GA Act to set aside financial transactions or award compensation.[1087]

[11.8] What are some questions the Public Trustee may ask before taking proceedings to recover assets on behalf of a represented person?

The same or similar considerations would generally apply to other administrators who are faced with the same situation.

These questions should be considered in conjunction with Chapter 7, which deals with the "best interests" test.

1. ***Would the proceedings be statute barred?***

This can involve working out the type of proceedings, the relevant limitation period (if any), whether the time has started running, and whether there are any exceptions or qualifications to that limitation period.

[1085] Section 82 isn't the easiest provision, and can't be used often because two months isn't very long. For an example of where it was used, see the case of *The Public Trustee and MAP* [2010] WASAT 138 [also cited as *Public Trustee v Map* (2010) 73 SR (WA) 200]. In *BMD v KWD* [2008] WASC 196, the Supreme Court considered why the Public Trustee had decided not to make a section 82 application.

[1086] Section 80(6a) provides a right of review to SAT of some, but not all, of the decisions that the Public Trustee makes under section 80. For cases in which SAT conducted such reviews, see *DB and JM and JW* [2006] WASAT 68; *Perpetual Trustees WA Limited and The Public Trustee* (2009) 68 SR (WA) 128, [2009] WASAT 253 and *ILS and SK* [2012] WASAT 203. SAT also considered section 80 in *JW* [2005] WASAT 249, *ET* [2012] WASAT 3 at paragraphs [15] to [25] and *NM* [2020] WASAT 134 at paragraphs [28] to [33].

[1087] In the case of *Y* [2007] WASAT 106 at paragraphs [27] to [28], it ordered that a deed of gift be set aside, but with respect, it did not appear to have the power to do, even if people agreed. See also *KS [No 2]* [2008] WASAT 29 at paragraph [35], *HM [No 2]* [2017] WASAT 92 and *JCM* [2018] WASAT 126 at paragraph [99].

2. *What admissible evidence is there in support of the claim?*

In WA, lawyers are ethically restricted in what they can allege about other people.[1088]

The onus of proof in recovery proceedings can vary, but for the large part, it's on the party making the claim.

In some circumstances, the starting point is that the money that changed hands was a gift. Evidence would be needed to overcome that.

As a matter of law, being under an administration order does not, in itself, bar a person from giving evidence in court. As a matter of practice, it rarely happens. The result may not be good for the represented person. In one matter, for instance, a transaction was documented as a loan by the person to someone else. In the witness box, the person agreed in cross-examination that the transaction was actually a gift.

Admissible, compelling evidence can be hard to get. The transaction might have been in cash. The medical evidence about capacity at the time it happened might be inconclusive. People who are happy to make allegations in a SAT hearing room might be less willing to give sworn evidence in a courtroom. Banks and other institutions only hold documents for so long.

The fact that a person holds a particular position, or has a particular profession, does not guarantee honest, accurate evidence. During the Profumo scandal,[1089] a member of the House of Commons said:[1090]

> "There are people – and it is to the credit of our poor, suffering humanity that it is so – who will tell the whole truth about themselves whatever the consequences may be. Of such are saints and martyrs, but most of us are not like that. Most people in a tight corner either prevaricate … or, as in this case, they lie."

[1088] See rules 21 and 32 of the operational rules of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules*.

[1089] John Profumo was the United Kingdom's Secretary of State for War. He was accused of an affair with a Christine Keeler, who'd also had a liaison with a Russian naval attaché. This was during the Cold War. Mr Profumo initially denied the allegation, but it turned out to be true.

[1090] The member was called Nigel Birch. See *The Penguin Book of Twentieth-Century Speeches*, edited by Brian MacArthur, 1992, 1993.

3. What admissible evidence is likely to be given against the claim?

It can be easy to forget, in the outrage over what seems to have happened, that there are two – or more – sides to every story.

Not everyone in history who appears to have been duped actually was. Queen Elizabeth the First claimed that she was tricked into signing the death warrant of Mary, Queen of Scots, because it was buried in a pile of papers she'd been given to sign. But it seems that she asked for the warrant to be placed there, to give her an excuse for what she'd done.

Some people may give away large amounts of money because they're tricked or pressured into it, or don't realise what they're doing. Others may choose to do exactly what they're doing, and are trying to put their assets out of the reach of creditors, an ex-spouse or someone who could claim it after their death.

Those against whom recovery is sought may be well and truly capable of giving evidence and defending themselves.

4. ***What are the represented person's assets, liabilities, income and expenditure****?*

These are relevant to some of the other questions.

5. How can the proceedings be financed?

Sometimes, the represented person has enough money to pay for court proceedings. But if not, it's unwise to assume they'll settle at an early mediation, even if that seems the most likely outcome. Anyone taking proceedings on behalf of another person needs to consider the possibility of them going all the way to a trial or defended hearing – and at times beyond.

There can be ways around this problem. For instance, the Public Trustee has in-house lawyers and an indemnity reserve, and can rely at times on external lawyers acting on a no-win no-fee basis. But the Public Trustee isn't budgeted to take on all matters for all people. There's the very real possibility of paying the other side's costs if the proceedings fail.

6. What view does Centrelink take?

Social security law can apply when a person gives away an asset. Centrelink might consider a person to have $1.5 million in assets – which might stop them getting a pension – when they only really have $20,000 and a possible right of recovery. That might be a reason to take proceedings, although how they could be financed is another issue.

7. How long is the represented person expected to live?

This can be difficult to answer. It's said that on his deathbed, King Charles the Second apologised for taking a long time dying.[1091] People who are meant to be "dying" may still be with us ten years later. It may be wrong to assume that a 90-year-old only has, at best, a few years to live. Telegrams from the Queen on someone's hundredth birthday aren't as rare as they once were.

Nonetheless, if the represented person has been diagnosed with a terminal illness and is only expected to live a few months, recovery proceedings might not achieve anything for that person and for that reason alone may not be worthwhile. Nowadays, justice can be a lengthy process. There may have been a time when a person could commit a murder one week, be tried the next week and hanged the week after, but this is not longer so.

8. Has the horse already bolted?

Litigation normally isn't an end in itself. The aim of taking asset recovery proceedings is to recover those assets, or at least a significant portion of them. Sometimes, efforts to preserve those assets (outlined at **[11.5]**) may not have worked. Whoever took the money may have spent it and not have much else.

Sometimes, there could be another solution, like an indemnity insurer to go after, as Doris Day found out. She was one of the most popular movie stars and singers of the fifties and sixties. When one of her husbands died, she found out that his business partner had squandered her fortune, leaving her in debt. In 1974, a court awarded her over $20 million. She only received a portion of that back from indemnity insurers, but it seems it was enough to have been worthwhile.

9. What are the represented person's likely needs between now and the end of their life?

Suppose the assets do get recovered. What then? Is it actually going to make any difference to the person's quality of life? If not, that's a factor (but only a factor) against taking proceedings.

Some represented persons might currently have enough assets and income to meet their financial needs for the rest of their lives, but possibly not if proceedings are taken. In such a situation, it may not be worth risking their quality of life. Section 70(1) of the GA Act talks

[1091] He was another monarch you probably wouldn't want managing your money. When a Captain Blood tried to run off with the Crown Jewels, Charles the Second didn't have him punished, but restored his estates in Ireland and gave him a pension. There was speculation that His Majesty may have put him up to the job. Charles the Second was married, but had more than a few mistresses and children.

about the best interests of the represented person, rather than a duty to create a windfall for their heirs. In other cases, those financial needs could only be met by taking legal proceedings.[1092]

10. Is the potential defendant providing care and support for the represented person?

Sometimes, the suspected wrongdoer is also caring for the represented person at home. This role could be very demanding, and there might not be anyone else to do it. Section 70(2)(b) of the GA Act talks about encouraging "the represented person to live in the general community and participate as much as possible in the life of the community". Section 70(2)(g) talks about maintaining "any supportive relationships the represented person has". Like all the factors in section 70(2), they aren't conclusive. In some cases, isolating the person might be part of the abuse, which could get worse if proceedings are brought.

11. Does the represented person want the proceedings to be taken?

Sometimes, the wishes of the represented person have no bearing on whether or not to take legal proceedings. The reason or reasons not to take them may be too strong. But in other cases, those wishes, if they can be ascertained, may be the most important consideration. See **[7.9]** to **[7.12]**.

12. Does the represented person have a will, and if so, what does it say?

See **[7.11]**.

13. Did the represented person have the chance to put things right?

If the alleged misuse is said to have happened when the person was mentally capable, what did the person do about it afterwards? All other things being equal, the longer the person had the chance to do something about the problem, and didn't, the harder it can be for someone else to do something about it later.[1093]

[11.9] How can the Public Trustee seek directions about whether or not to take proceedings on behalf of a represented person?

See Chapter 9.

[1092] See, for instance, *The Public Trustee v Baker* [2014] WASCA 23.

[1093] With respect to a power of attorney, there is "a suggestion that, even if the donee has acted outside the authority and for their own purposes, the transaction may be seen as ratified by the donor unless the donor acts reasonably quickly to repudiate the action as soon as it is discovered". See *KS [No 2]* [2008] WASAT 29 at paragraph [55].

PART D – COURT TRUSTS

CHAPTER 12 – What's a trust?

[12.1] What are the elements of a trust?

Before talking about court trusts, we need to know what a trust is.

Some trusts are set up for purposes, usually charitable. We won't go into them here. Other trusts generally need:[1094]

1. trust property (which can be real estate, like a house; and/or personal property, like cash or shares);

2. a trustee or trustees in whom the property is vested;

3. one or more beneficiaries; and

4. an obligation by the trustee to deal with the trust property for the benefit of the beneficiaries.

A court can force trustees to perform their duties under the trust. In WA, that court is generally (but not always) the Supreme Court.

Usually (but not always), a document records the establishment of the trust and sets out at least some of its terms. This can, for instance, be a deed, will or court order.

[12.2] Is the administrator of a represented person under the GA Act[1095] the same as a trustee?

Not quite.

[1094] See *Law of Trusts* by WA Lee, Michael Bryan, John Glover, Ian Fullerton and HAJ Ford, published by Thomson Reuters as a looseleaf service, as at 2018, at paragraph [1.010]. This service is also available online as *Ford and Lee: the Law of Trusts*.

[1095] GA Act means the *Guardianship and Administration Act 1990*. For what is a plenary administrator under the GA Act, see Chapter 4, Chapter 6 and Chapter 7 of this book.

The assets of a represented person don't vest in an administrator.[1096] They remain in the name of the represented person, even though the administrator has the power to deal with them. A represented person who owns real estate is still registered on the title as the owner, although the administrator can lodge a caveat over it.

On the other hand, the assets of a trust vest in the trustee. If the trust owns real estate, the trustee is registered on the title as the owner.

Neither a plenary administrator under the GA Act, nor a trustee, can do whatever they want with the assets over which they have power. A plenary administrator owes obligations to the represented person;[1097] a trustee owes obligations to the beneficiaries.

[12.3] What laws govern trusts in WA?

In WA, much of the law of trusts comes from the general law, based on earlier court decisions. WA also has the *Trustees Act 1962*, but it isn't a code, it doesn't set out all the relevant law, and some of its provisions can be overridden.[1098] Other Acts of Parliament also deal with trusts in WA. For instance, several provisions of the *Public Trustee Act 1941* can apply when the Public Trustee is trustee.

[1096] See section 69(4) of the GA Act.
[1097] See, for instance, Chapter 7.
[1098] See section 5 of the *Trustees Act 1962*.

CHAPTER 13 – How the Supreme or District Courts of WA can establish trusts for claimants in personal injuries cases

This chapter only deals with a specific type of trust established by the Supreme or District Court of WA, usually by the latter.[1099]

[13.1] What happens if the court makes an award in a personal injuries case to a "person under disability"?

The court normally doesn't give the award directly to the injured claimant.[1100] Instead, under its *parens patriae* jurisdiction, and applying the RSC,[1101] it normally gives the award to a trustee, to hold on trust for the person. The Public Trustee calls this a "court trust" (although it also uses that expression to describe some other trusts).

[13.2] What is the nature and purpose of such a court trust?

In *Cadwallender v Public Trustee*,[1102] Justice EM Heenan of the Supreme Court of WA explained the following:

- These trusts, including when they are established by the District Court, are done so under the *parens patriae* jurisdiction.[1103]

[1099] This chapter doesn't specifically cover trusts established by the Court of Appeal, which are rarely created. The relevant principles and laws are similar to those that apply to trusts created in other Supreme Court civil proceedings. This chapter also doesn't consider trusts established or amended as the result of an appeal to the District Court under the *Criminal Injuries Compensation Act 2003*. Criminal injuries compensation trusts are discussed at **[14.4]**. The powers of the Supreme Court of another Australian state or territory are discussed at **[14.2]**.

[1100] In this chapter, "injured claimant" includes a person who has a claim under the *Fatal Accidents Act 1959*.

[1101] RSC means the *Rules of the Supreme Court 1971*. The *parens patriae* jurisdiction is discussed at **[1.1]**. Its relationship to Order 70 of the RSC is discussed at **[10.1]**. Order 70 and much of the subject matter of this chapter are also covered in the Commentary on Order 70 of the RSC in the looseleaf and online service *Civil Procedure Western Australia*, published by LexisNexis.

[1102] [2003] WASC 72.

[1103] See paragraphs [27] to [31] of that decision. The *parens patriae* jurisdiction is explained at **[1.1]**.

- The sole beneficiary of the trust is the injured claimant. The trustee might, pursuant to a moral obligation, make payment to a person who provided gratuitous services to the injured claimant, but is not legally obliged to do so.[1104]

- The trust is intended to provide compensation for the claimant to be used during their lifetime, rather than establish a capital sum to be kept intact and then be passed on to others. "Hence, any management of the fund created by the damages should proceed by recognising that the money is intended for the use and enjoyment of the claimant, both as to capital and income, and that it is not objectionable for the capital to be progressively reduced over time."[1105]

- The administration of the trust will vary according to the disabilities and needs of the claimant and the various factors which were recognised by the court when awarding the damages or approving the settlement which created the fund.[1106]

- The only justification for having such a trust is the protection of the person as a result of their own incapacity.[1107]

- The District Court (if it established the trust) has the ongoing power, under the *parens patriae* jurisdiction, to supervise the trust. Order 70 rule 12(2) of the RSC specifically gives the court the power to "give directions for the application of the income or of the capital and income of the investment for the maintenance, welfare, advancement or otherwise for the benefit of the person under a disability".[1108]

It's also clear that the Supreme Court has powers to supervise a trust established by either that court or the District Court.

[1104] See paragraphs [43] and [48] of that decision and **[13.7]**.
[1105] See paragraph [44] of that decision. Powers to make advances are discussed at **[13.12]**.
[1106] See paragraph [44].
[1107] See paragraph [45]. There is, with respect, some judicial disagreement on the possible extent of this (see **[13.17]**).
[1108] See paragraphs [31], [39], [40] and [42] of the decision.

[13.3] If a person doesn't have a next friend, can the court nonetheless order that the damages be placed on trust, with the Public Trustee (or some other body) as trustee?

In 1991, the Supreme Court said no,[1109] but with respect, there may be scope to re-visit that.[1110] The issue would arise if the claimant's impairment doesn't stop them giving instructions to lawyers in a personal injuries case, but does affect their ability to manage the proceeds of a judgment. That would be rare, but it could happen. There is also a question, discussed at **[13.17]**, whether the Supreme or District Court has the power to *continue* a trust for a person whose disabilities are only physical. That begs a further question: can (and if so, should) the court *establish* a trust for such a person?

[13.4] How does the court choose the trustee?

Section 37(1) of the *Public Trustee Act 1941* says: "The investments of moneys under the control or subject to any order of the Supreme Court shall be made by the Public Trustee." The Supreme Court has interpreted this narrowly.[1111] In personal injuries cases, the Supreme and District Courts can choose other trustees.

Order 70 rule 12(1) of the RSC says, in part, that "the money shall, unless otherwise ordered by the Court, be paid to the Public Trustee for investment on behalf of the person under disability".

The Supreme Court has said that "there is a pre-disposition towards the Public Trustee". Some of the reasons were "the role of the Crown as *parens patriae*, the fact that the Public Trustee is a statutory office holder established specifically to administer estates that require protection and the existence of flexibility within schemes for disabled persons". If "no application is made or if no good reason is shown for preferring a private trustee, the Public Trustee will assume the role".[1112]

[1109] See *Taylor v Walawski* [1991] Library 8992.

[1110] The reasoning of this decision seems to focus on Order 70 of the RSC being the source of the court's power to create such trusts. With respect, more recent cases such as *Wood v Public Trustee* (1995) 16 WAR 58, [1995] Library 950567 and *Cadwallender v Public Trustee* [2003] WASC 72 at paragraph [31] give or suggest the *parens patriae* jurisdiction as the source. According to *S v State Administrative Tribunal of Western Australia [No 2]* [2012] WASC 306 at paragraph [45], quoting from *Fletcher (as trustee of the Brian Fletcher Family Trust) v St George Bank Ltd* [2010] WASC 75 at paragraph [21], court rules cannot modify substantive law.

[1111] See *Tate v WA Government Railways Commission* [1966] WAR 169 at page 170 and *Morris v Zanki* (1997) 18 WAR 260 at page 285, [1997] Library 970374 at pages 40 to 42.

[1112] See *Morris v Zanki* (1997) 18 WAR 260 at page 286, [1997] Library 970374 at pages 42 to 43.

The factors to take into account when choosing the trustee include at least the following:[1113]

1. ***The long-term financial security of the trustee.***[1114]
2. ***The need to have some independent entity or person to protect the interests of the person under disability.***

The court in *Morris v Zanki* appeared to be wary, at least generally speaking, of people or bodies other than the Public Trustee or a trustee company under the *Trustee Companies Act 1987* dealing with the award of damages.[1115] That said, *Morris v Zanki* dealt with a large sum of money. The safeguards for a small amount may be different. There may be good reasons, in special cases, for a court to appoint an individual as trustee, or, if there's a suitably broad administration order under the GA Act,[1116] order that the money be paid to an individual as administrator. That said, it might not happen often.

3. ***The wishes of the family of the person under disability.***
4. ***Whether there is harmony and a good working relationship between the family and the trustee.***

Although these are not conclusive, they can be significant considerations.[1117]

[1113] See the District Court of WA decisions of *Verge v Mitchell* [1997] Library 970278 at page 7 and *Ryan v Kivits* [2022] WADC 67 at paragraph [14], though the five factors are expressed differently in each case.

[1114] See:

- *Morris v Zanki* (1997) 18 WAR 260 at page 293, [1997] Library 970374 at pages 55 to 56
- *Verge v Mitchell* [1997] Library 970278 at pages 7 to 8
- *Trout v Minister for Health* [2012] WADC 172 at paragraphs [19] to [20]
- *Layne Carmel Dixon by her next friend Andrew Nigel Dixon v Clarke* [2017] WASC 310 at paragraph [24]
- *Ryan v Kivits* [2022] WADC 67 at paragraphs [15] and [18].

[1115] See *Morris v Zanki* (1997) 18 WAR 260 at page 293, [1997] Library 970374 at page 55.

[1116] *Guardianship and Administration Act 1990*.

[1117] See:

- *Morris v Zanki* (1997) 18 WAR 260 at page 294, [1997] Library 970374 at page 58
- *Verge v Mitchell* [1997] Library 970278 at page 8
- *Trout v Minister for Health* [2012] WADC 172 at paragraph [26]
- *Layne Carmel Dixon by her next friend Andrew Nigel Dixon v Clarke* [2017] WASC 310 at paragraph [25]
- *Ryan v Kivits* [2022] WADC 67 at paragraphs [16] to [18].

5. ***The level of the fees likely to be charged by the trustee.***

Comparing fees can be difficult, but in any event, the court doesn't have to go with the cheapest alternative.[1118]

If the court does not order "otherwise", the Public Trustee holds the moneys as trustee of a court trust, rather than, for instance, as administrator under the GA Act.

[13.5] Is the court trustee allowed to place money from the trust into superannuation?

Yes, according to more than one Supreme Court of WA decision, assuming that the power to advance money from the trust is broad enough.[1119] In some cases, this can result in very large tax savings.

There is a contributions cap, but it can be exceeded in some circumstances.[1120] However:

- there is only 90 days to do this, usually from payment of the award;
- medical evidence needs to be obtained; and

[1118] See:

- *Morris v Zanki* (1997) 18 WAR 260 at pages 294 to 295, [1997] Library 970374 at pages 58 to 59
- *Verge v Mitchell* [1997] Library 970278 at page 8, which said that the level of fees "should be taken into account" but was "likely to be a less significant consideration"
- *Trout v Minister for Health* [2012] WADC 172 at paragraphs [25] to [26], which discussed getting fee comparisons
- *Layne Carmel Dixon by her next friend Andrew Nigel Dixon v Clarke* [2017] WASC 310 at paragraph [26]
- *Ryan v Kivits* [2022] WADC 67 at paragraphs [19] to [21].

[1119] See *Perpetual Trustee Company Ltd v Cheyne* (2011) 42 WAR 209, [2011] WASC 225, in particular at paragraphs [36] to [49], and *Re Hoang Minh Le; ex parte The Public Trustee* [2012] WASC 31. The District Court of WA decision of *McInnes (by her next friend Gail McInnes) v Insurance Commission of Western Australia* [2011] WADC 17 was not followed.

[1120] The test, which is not the simplest, is not discussed here.

- an administration order from the State Administrative Tribunal (SAT) may be needed.[1121] The exact extent of such orders may depend on whether there's any other need for an administrator.

Given the 90-day time limit, it may be necessary to seek these orders urgently, but not always. If the court trustee is already the plenary administrator, the existing order would be broad enough. When it comes up for review, SAT would have to reconsider the need for it to be so broad. If there was no need, that would be the time to make a limited administration order to deal with superannuation.

SAT might appoint the court trustee as limited administrator with powers with respect to the superannuation and someone else as limited administrator to deal with other parts of the represented person's estate.[1122] One potential issue is that GA Act places limits on when trustee companies under the *Trustee Companies Act 1987* may be appointed as administrators.[1123]

Superannuation is not an end in itself. If it becomes taxed in the same way as court trusts, there may be no reason, or less reason, to place the proceeds of a court trust into superannuation.

One problem with this system is that it reduces the court's ability to oversee the award. If SAT revokes its administration order altogether, the represented person can lawfully get control of their superannuation (which may be the bulk of the award) without the court's approval.[1124]

[13.6] What orders should be sought if the Public Trustee is to be appointed?

The court could be asked to make complicated orders concerning superannuation, but the Supreme Court has recommended a simpler approach. It said that "the District Court could direct that the trustee have power to apply the income and capital of the trust fund for the

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[1121] See *Perpetual Trustee Company Ltd v Cheyne* (2011) 42 WAR 209, [2011] WASC 225 at paragraphs [22] and [65]. For applying for administration orders generally, see Chapter 4. For a discussion on advocacy and representation at guardianship and administration hearings in SAT, see Chapter 5. For an example of an administration order made in these circumstances, see *SMC* [2015] WASAT 41.

[1122] The question of whether an administrator under the GA Act can make a binding death benefit nomination for superannuation is dealt with in *SM* [2019] WASAT 22.

[1123] See section 68(2) of the GA Act and the cases of *PMB and LJB* [2015] WASAT 96 at paragraphs [18] and [46], *RK* [2021] WASAT 13 at paragraphs [95] to [99] and *JH* [2021] WASAT 23 at paragraphs [77] to [99].

[1124] See *LS* [2019] WASAT 97 and *Levi Jake Saunders by his Next Friend Claire Marie Matthews v Turner* [2020] WADC 133 at paragraphs [132] to [133].

maintenance, welfare, advancement or otherwise for the benefit of the person under the disability".[1125]

Taking that into account, there are three model orders, depending on the circumstances.

If the only reason for the trust is that the injured claimant is under 18:

> *Within [number] days of [a certain event happening, such as extraction of the orders], the defendant is to pay the sum of $[money amount] to the Public Trustee for investment on behalf of the plaintiff ("the trust fund") until the plaintiff attains the age of 18 years, such investment not limited to the Common Account.*
>
> *The Public Trustee has the power to apply the income and capital of the trust fund for the maintenance, welfare, advancement or otherwise for the benefit of the plaintiff.*
>
> *There be liberty for the Public Trustee or a party to apply with respect to the trust fund.*

If the injured claimant is under 18, but has a mental impairment that should stop them getting the money when they turn 18:[1126]

> *Within [number] days of [a certain event happening, such as extraction of the orders], the defendant is to pay the sum of $[money amount] to the Public Trustee for investment on behalf of the plaintiff ("the trust fund") until further order, such investment not limited to the Common Account.*
>
> *The Public Trustee has the power to apply the income and capital of the trust fund for the maintenance, welfare, advancement or otherwise for the benefit of the plaintiff.*
>
> *There be liberty for the Public Trustee or a party to apply with respect to the trust fund.*

If the injured claimant is over 18:

> *Within [number] days of [a certain event happening, such as extraction of the orders], the defendant is to pay the sum of $[money amount] to the Public Trustee for investment on behalf*

[1125] See *Re Hoang Minh Le; ex parte The Public Trustee* [2012] WASC 31 at paragraph [24]. The court used wording from Order 70 rule 12(2) of the RSC.

[1126] Can an order establishing a court trust, for an injured claimant who is under 18, specifically say that the trust ends when the claimant turns a specific age, but more than 18? The Public Trustee has seen at least one such order. In *Tanner by his next friend Julie Lee White v Bresland* [2005] WADC 18, the District Court said that this was not possible (see paragraphs [4] to [13]). With respect, there appears to be some judicial disagreement as to the extent to which the *parens patriae* jurisdiction can be applied (see the discussion at **[13.17]**).

of the plaintiff ("the trust fund") until further order, such investment not limited to the Common Account.

The Public Trustee has the power to apply the income and capital of the trust fund for the maintenance, welfare, advancement or otherwise for the benefit of the plaintiff.

There be liberty for the Public Trustee or a party to apply with respect to the trust fund.

These words might need to be modified to take into account moneys being held back to pay for Centrelink, NDIS and/or Medicare. They also assume that the injured claimant is the sole plaintiff, and that the terms of any compromise are set out in the court orders, rather than in a deed that the court approves.

The money amount should include all the money that is going to the Public Trustee on trust, including anything that is allowed for the costs of future fund management.[1127]

To give the Public Trustee flexibility with investment decisions, the order should state that "such investment" is "not limited to the Common Account".[1128]

[13.7] Who decides whether to reimburse the providers of past gratuitous services?

There can be years between an incident that gives rise to damages (such as a car accident or botched operation) and the court making an award.

The claimant may receive paid care as a result of the incident. The costs of that care may be included as part of the damages.

Sometimes, the care is provided without charge by, for instance, a parent or spouse. If that care takes place before the award is made, it's called "past gratuitous services". Similar unpaid care after the award is made is called "future gratuitous services".

[1127] Costs of future fund management are discussed at **[13.10]**.

[1128] Section 39C(1) of the *Public Trustee Act 1941* gives broad powers of investment to the Public Trustee. Order 70 rule 12(1) of the RSC says that if the court so orders, moneys may be invested by the Public Trustee in investments outside the Common Account. If this is not stated in the orders, an investment outside the Common Account might be "contrary to the terms or conditions of the instrument of appointment, the instrument creating the trust or any other instrument or order affecting the holding of the moneys by the Public Trustee", as per section 39C(2) of the *Public Trustee Act 1941*.

Subject to various matters, the court may award damages to the claimant arising out of the need for that care.

At least generally speaking, an injured claimant isn't legally obliged to reimburse the provider of any past gratuitous services.[1129] There could be a moral obligation to do so.[1130]

But what happens when the injured claimant is a "person under disability"? Who decides, on that person's behalf, whether or not to pay the provider of the past gratuitous services, and if so, how much? Is it the court that makes the award, or the trustee that the court appoints? There have, with respect, been differing views.[1131] In practice, though, the District Court generally doesn't make orders on this and leaves it up to the trustee.

[13.8] If the injured claimant has an administrator under the GA Act, can the court decide not to establish a trust? Instead, can it order that the money be paid to the administrator, to hold as administrator, rather than as trustee?

Yes, but that's not what normally happens.

[13.9] If the injured claimant has an administrator under the GA Act, can the administrator demand that the court trustee pays or transfers the trust assets to the administrator?

No. An administration order doesn't override an order that establishes a court trust, even if SAT specifies that the administrator has the power to receive moneys from any court proceedings.[1132]

[1129] See the High Court case of *Kars v Kars* (1996) 187 CLR 354 at page 372, [1996] HCA 37.
[1130] See *Cadwallender v Public Trustee* [2003] WASC 72 at paragraphs [43] and [48].
[1131] See *Jones v Moylan* (1997) 18 WAR 492, [1997] Library 970626; *Jones v Moylan [No 2]* (2000) 23 WAR 65, [2000] WASCA 361 and *Tanner by his next friend Julie Lee White v Bresland* [2005] WADC 18 at paragraphs [14] to [35]. With respect, it would seem that the court's *parens patriae* jurisdiction (discussed at **[1.1]**) may be broad enough to authorise the payment if appropriate.
[1132] See sections 3A and 83 of the GA Act and *Wood v Public Trustee* (1995) 16 WAR 58, [1995] Library 950567. In *Re Tracey* [2016] QCA 194, the Queensland Court of Appeal came to a similar conclusion, but that court was dealing with Queensland, not WA, legislation. A possible exception is if the court order says that the trust is to end at 18 and no further court order is made.

[13.10] What about costs of future fund management?

Generally speaking, there are fees to manage a court trust. The Public Trustee and other professional trustees may give *estimates* of those fees. When more than one organisation wants to be trustee, these estimates can impact on who gets the trust. Also, the costs of future fund management may be something that the defendant has to pay as part of the award. They can add significantly to the size of an award.[1133]

An *estimate* is different from a *quote*. If you give a quote for a job, you're saying, "This is how much I'm going to charge if I do the job." If you give an estimate, you're in effect saying, "I don't know how much I'm going to charge, but this is how much I estimate it will be."

Factors that could affect a fee estimate include the amount of money, the projected length of time it's supposed to last, amounts that the claimant may owe (such as legal costs and reimbursement to Centrelink or Medicare), whether any of the trust fund will be used to buy a house, and whether the providers of past gratuitous services will be paid something.

Justice Michael Kirby[1134] described the task of the court in determining the costs of future fund management as "impossibly artificial".[1135] There's room to challenge the assumptions and methodology used in any estimate given. It's pretty much guaranteed that the actual costs of managing the award will be different. For instance, the claimant may live longer or shorter than expected; the investments may go better or worse than expected; the calls on the trust fund may be more or less than expected.

Generally speaking, the amount that's allowed for future fund management is held with the rest of the award.[1136]

In *Levi Jake Saunders by his Next Friend Claire Marie Matthews v Turner*,[1137] a court trust lasted for a much shorter time than expected. The District Court decided that the claimant didn't have to repay the unused portion of the damages award that was allocated to the trustee's fees.[1138]

[1133] The defendant clearly has to pay when the defendant's negligence caused the incapacity (see *Willett v Futcher* (2005) 221 CLR 627, [2005] HCA 47 at paragraph [49]). There also doesn't seem to be any dispute that the defendant has to pay for management when the claimant is under 18. We won't get into what happens where the claimant had a pre-existing mental impairment that had nothing to do with the defendant's negligence.

[1134] His Honour at the time was President of the New South Wales Court of Appeal, but went on to be a High Court justice.

[1135] See *GIO v Rosniak* (1992) 27 NSWLR 665 at page 676.

[1136] The words "generally speaking" are used because an order may set out something different.

[1137] [2020] WADC 133.

[1138] See paragraphs [89] to [124].

The High Court has said that the costs of managing the fund management component of damages are compensable. That is: the fees on fees on fees on fees on fees on fees and so on.[1139]

What if there's a cheaper alternative to the organisation the court appoints? In *Morris v Zanki*,[1140] the Supreme Court, on an appeal, awarded a large court trust to National Australia Trustees. The Public Trustee's estimated fees in that case were cheaper, but the court took into account all of the circumstances, including the wishes of the injured claimant's family.

That said, the court found that there was "no suggestion in the evidence that the Public Trustee could not handle this investment".[1141] The Public Trustee's fee estimate therefore formed the basis of the damages component for fund management. That didn't stop National Australia Trustees charging its fees.[1142]

Despite all that's said above, the parties may tentatively agree all other damages at $100,000. The defendant may then only offer $2,000 for the costs of future fund management.

What if the estimate of the costs of future fund management is $30,000? The claimant's next friend and lawyers would have to decide whether or not to accept the total offer of $102,000, and the court approving the compromise (if it gets there) would have to consider whether it's reasonable.

Personal injuries compromises can have swings and roundabouts. The $2,000 might be too low, but the other $100,000 might be generous. If liability is a real issue, and there's a strong risk of the claimant getting nothing at trial, $2,000 might be worth taking.

[13.11] Should the trustee pay the costs of the proceedings?[1143]

When a regular personal injuries case is settled and the injured claimant is a mentally capable adult:

- The defendant is normally ordered to pay the legal costs of the claimant.
- Usually, the defendant only has to pay what's called **party/party costs**.

[1139] See *Gray v Richards* (2014) 253 CLR 660, [2014] HCA 40. This assumed that costs of future fund management were compensable in the first place.
[1140] (1997) 18 WAR 260, [1997] Library 970374.
[1141] See page 295. We don't go here into what might happen if the Public Trustee is appointed over another suitable but cheaper organisation.
[1142] The High Court has hinted that it may look at this issue in the future (see *Gray v Richards* (2014) 253 CLR 660 at page 670, [2014] HCA 40 at paragraph [25]).
[1143] For a discussion on the payment of costs of related proceedings in SAT, see **[5.5]**.

- Sometimes, the claimant's lawyers take that as full payment of their costs.

- Often, they seek an extra amount from the claimant, which is known as **solicitor/client costs**.

- A claimant who isn't happy with this extra amount has the right to get the bill taxed. The word "taxed" is misleading, because it suggests that the Australian Taxation Office or the WA Office of State Revenue is involved. But in this context, "taxed" means that the lawyer seeking those costs draws up an itemised bill, which a court officer assesses.

Order 66 rule 24 of the RSC says that in proceedings when the claimant is a "person under disability", any **solicitor/client costs** that are to be paid by the claimant, or out of the award, must be taxed.[1144]

This rule doesn't apply in any of the following circumstances:[1145]

- The lawyers acting for the injured claimant take what they receive from the defendant as full payment of their costs.

- Another person or body (like a parent) pays the solicitor/client costs and doesn't seek to be reimbursed from the claimant or the court trust.

- The court fixes the amount of solicitor/client costs.

The purpose of the rule is to protect the "person under disability", but with respect, it has its problems. It does not depend on the amount of the costs in issue. There is no exception for a small bill that is uneconomical to tax. There is no distinction between money that is held in trust by a professional trustee and money that a layperson manages. It may discourage some lawyers from representing people who are under 18 or mentally impaired. Leaving aside appeals, it does not apply to criminal injuries compensation. The Public Trustee has paid costs

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[1144] See *Smith v Hanrahan [No 2]* [2006] WADC 74 at paragraph [39], which appears, with respect, to be incorrectly named as *R v Hanrahan [No 2]*.

[1145] It also may not apply in some cases where the Public Trustee is the next friend, due to the special provisions of the *Public Trustee Act 1941*. Section 309 of the repealed *Legal Profession Act 2008* may have provided a further exception. However, section 180(4) of the *Legal Profession Uniform Law (WA)* says: "A costs agreement cannot provide that the legal costs to which it relates are not subject to a costs assessment." We won't go into arguments about how Order 66 rule 24 may apply to barristers' fees. There's also a provision in Order 66 rule 24 about a solicitor's lien for costs not being prejudiced. Another possible qualification is if, prior to the costs being taxed, the lawyer undertakes to pay back any costs that are reduced, or is paid an interim amount that is less than, or the minimum of, what the lawyer would get on taxation.

in criminal injuries compensation matters for years, generally without problems, even though those awards can be larger than some awards made by the District Court. It does not apply if the injured claimant loses the case and does not get an award.

Nonetheless, unless or until the rule is changed, it is part of the regime under which professional trustees in WA operate.

[13.12] What powers does the Public Trustee have to make advances from the trust?

The first step is to look at the document that establishes the trust. This could be the court order, a deed that the court approves or maybe a combination of the two. It might contain broad powers to make advances along the lines of the model orders at **[13.6]**, namely:

> *The Public Trustee has the power to apply the income and capital of the trust fund for the maintenance, welfare, advancement or otherwise for the benefit of the plaintiff.*

It could have something similar. It might contain some explicit restrictions on advances,[1146] though that would be rare.

The second step is to check if any further court order amends the terms of the trust, although that would also be rare.[1147]

If the terms of the trust are silent on whether advances can be made, the *Trustees Act 1962* and the *Public Trustee Act 1941* apply.

If the injured claimant is under 18, section 58(1)(a) of the *Trustees Act 1962* allows the Public Trustee to spend **all of the income** for that person's maintenance (including past maintenance), education (including past education), advancement or benefit.[1148]

Section 59 of the *Trustees Act 1962* allows the Public Trustee to spend **up to half the capital** (or $2,000, if the capital is less than $4,000) on the maintenance (including past maintenance), education (including past education), advancement or benefit of the injured claimant (regardless of the person's age).

[1146] For example: "The Public Trustee shall not make any advances while the plaintiff is living with his mother."

[1147] For an example, see *Re Hoang Minh Le; ex parte The Public Trustee* [2012] WASC 31.

[1148] We don't go here into whether it gives any powers if the injured claimant is over 18.

In addition, the Public Trustee has extra powers under section 49 of the *Public Trustee Act 1941* to advance **the whole or any part of the income and capital** of the trust.[1149] The exact extent of those powers may be subject to some debate,[1150] but it covers spending money on at least the following:

- **Maintenance** of the injured claimant, or their spouse or de facto partner, or any child, parent or other person dependent on the injured claimant.[1151] The word "maintenance" includes the following:[1152]
    - the usual types of holiday expenses
    - allowances
    - costs of engaging carers, including allowances, indemnity insurance and wages
    - upkeep, repairs, registration and running of motor vehicles
    - food
    - transport
    - rent
    - board and lodging
    - medicine
    - clothing
    - passport renewal
    - speech therapy
    - footwear
    - suit hire
    - incontinence pads
    - medical expenses
    - physiotherapy
    - wheelchair repairs
    - membership of organisations
    - chemist
    - reimbursement for past maintenance.

[1149] In *Public Trustee v Larkman* (1999) 21 WAR 295, [1999] WASCA 93, the Supreme Court (on appeal) said that the Public Trustee's power under section 49(1)(n) of the *Public Trustee Act 1941* was in addition to a trustee's powers to make advances under the *Trustees Act 1962* (subject to any express prohibition). Paragraph (n) is not the only paragraph in section 49(1) that allows the Public Trustee to make advances. It would appear that the principle in *Public Trustee v Larkman* can be applied to other paragraphs in section 49(1).

[1150] The extent, for instance, of section 49(1)(r) is not discussed here.

[1151] See section 49(1)(n).

[1152] The meaning of "maintenance" was discussed in *Public Trustee v Larkman* (1999) 21 WAR 295, [1999] WASCA 93 at paragraphs [30] and [34].

- **Education** of the injured claimant or their children.[1153]
- Paying the **debts** of the injured claimant.[1154]
- **Insuring** against fire, accident, loss or damage any real property (eg real estate) or personal property (eg a car) that is either owned by the trust or in which the injured claimant has an insurable interest.[1155]
- Paying for the **repair, maintenance, upkeep or renovation** of any real or personal property either owned by the trust or which the injured claimant owns or co-owns.[1156]
- **Funeral expenses** of the injured claimant.[1157]

The Public Trustee also has the power, for instance, to charge its fees and to pay tax owed by the trust.

If the Public Trustee thinks that the terms of the trust should be changed, it can apply to court.[1158]

[13.13] If the Public Trustee has the power to make an advance, what factors are relevant when deciding whether to make it, and if so, how much?

The Public Trustee isn't an ATM and shouldn't automatically meet any request that is made, even if it has the power to pay. Generally speaking, the reason for the trust is that the injured claimant is too young and/or has a mental disability, and is vulnerable to being exploited financially.

Some relevant factors include:

- *How long is the money expected to last?* Some large trusts for people with catastrophic injuries are expected to last their entire lifetime (unless the money goes into superannuation). Others are never expected to last that long.

[1153] See sections 49(1)(n) and 49(1)(na).
[1154] See section 49(1)(g).
[1155] See section 49(1)(p).
[1156] See section 49(1)(q).
[1157] See section 49(1)(n).
[1158] This happened in *Re Hoang Minh Le; ex parte The Public Trustee* [2012] WASC 31.

- *What are the injured claimant's short-term needs?* There may be tension between short-term and long-term needs. This isn't new. President Franklin D Roosevelt was criticised for his policies of spending money during the Great Depression. Critics claimed that the economy would sort itself out in the long run. The President's relief administrator[1159] responded: "People don't eat in the long run. They eat every day."

- *Can someone else pay for whatever is sought?* With some court trusts, an injured claimant may be precluded from getting Centrelink payments for many years and relies on the court trust for all their expenses.

Although a trustee isn't bound by the "best interests" test in section 70 of the GA Act, the considerations when applying that test may be a useful guide.[1160]

Most personal injuries cases in the District Court don't go to trial, but are compromised.[1161] Sometimes, the Public Trustee gets a written opinion by a barrister in support of the compromise. In cases that go to trial, the court would be expected to publish written reasons for its decision. These written opinions or reasons may be of help, but the Public Trustee isn't bound to spend the money in accordance with how the award was calculated.

[13.14] Can a court trustee make gifts?

The GA Act restricts when an administrator can make gifts.[1162] There isn't an equivalent legislative provision for trustees. Without going into every possibility, the terms of a court trust normally allow the trustee to make at least some payments for the "benefit" of the injured claimant. So the question may be: does a gift to a third party "benefit" the injured claimant?

An injured claimant may indirectly benefit if money from their trust is used to buy a $50 birthday present for their sibling. It's common for adults to give birthday presents to close family members, and they may feel bad if they don't do so. A $50,000 birthday present is probably another matter. Some gifts, though, may be substantial and still may indirectly benefit the injured claimant, such as a payment to the provider of past gratuitous services.[1163]

[1159] Harry Hopkins.
[1160] See Chapter 7.
[1161] For that process, see Chapter 10.
[1162] See section 72(3) and **[6.4]**.
[1163] See **[13.7]**.

[13.15] Can a court trustee seek directions from a court?

A court trustee can seek directions from the Supreme Court under section 92 of the *Trustees Act 1962*.[1164] That court also has *parens patriae* jurisdiction. If the Public Trustee is the trustee, it can also seek directions from that court under section 58 of the *Public Trustee Act 1941*.

If the Supreme Court established the trust, the trustee could also use Order 70 rule 12(2) of the RSC.

With respect, it hasn't always been clear what ongoing powers the District Court has, after establishing a trust, to supervise it, but two relevant authorities are *Cadwallender v Public Trustee*[1165] and *Perpetual Trustee Company Ltd v Cheyne*.[1166]

[13.16] Do the courts, as a matter of course, review what happens to the trust?

No. There isn't a law similar to Part 7 of the GA Act.[1167]

[13.17] When does the court trust end?

If the court trust is established when the injured claimant is under 18, and the claimant then turns 18:

- If the order specifically says that the trust ends when the claimant turns 18, that's when it should end, unless a court makes a further order to extend it.[1168]

[1164] Section 92 uses the word "Court". According to section 6(1), this means the Supreme Court. For an example of when it happened, see *Perpetual Trustee Company Ltd v Cheyne* (2011) 42 WAR 209, [2011] WASC 225. For other examples of the use of section 92, though not by a court trustee, see *Wood (as Co-Executor and Trustee of the Will of the deceased) v Wood [No 4]* [2014] WASC 393 and *Australian Executor Trustees Ltd (as Administrator of the Estate of Reece William Hodder) v Hodder* [2018] WASC 48.

[1165] [2003] WASC 72. See in particular paragraph [50].

[1166] (2011) 42 WAR 209, [2011] WASC 225. Paragraph [49] of this decision could be read as suggesting that Order 70 rule 12(2) of the RSC is limited to when the Public Trustee is trustee.

[1167] For an explanation of Part 7 of the GA Act, see **[4.25]**.

[1168] If there's a concern that the beneficiary has a mental impairment and can't manage the assets, a court application could be made to extend the trust. Alternatively, an application could be made to SAT for an administration order under the GA Act.

- If the order says that the trust lasts "until further order" or "until further order of the Court", the trust shouldn't automatically end when the claimant turns 18. A further court order is needed.

- If the order is silent about when the trust should end, the Public Trustee respectfully considers, on balance, that it depends on why the trust was established. If the only reason was that the claimant was under 18, the trustee doesn't need to go to court for an order terminating the trust.[1169]

Otherwise, a court trust normally ends when the first of the following happens:

- All of the assets and income are spent.

- The injured claimant dies. The assets and income (after payment of any outstanding debts and expenses) form part of the claimant's deceased estate.[1170]

- A court orders that it end. Normally, the court would have to be satisfied that the claimant has sufficient mental capacity to deal with the trust assets. The onus is on the claimant to prove that.[1171] There are, with respect, differing views as to whether the court has the power to continue a trust for a person whose disabilities are only physical, but if it does have such a power, the circumstances would probably have to be extreme.[1172] It raises the question: when, in the name of protection, can the State limit the freedom of adults to make their own decisions?[1173] If the Supreme Court

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[1169] See *Cadwallender v Public Trustee* [2003] WASC 72 at paragraph [45], where the Supreme Court said: "Such an incapacity deemed to exist by reason of infancy alone will disappear on the beneficiary attaining the age of majority and then the beneficiary will be entitled to call for the transfer of the entire corpus of the trust estate." Note with respect, however, *Newton v Public Trustee* [1999] WASC 179. See also *Newton v The Public Trustee [No 2]* [2000] WASC 118. Sometimes, it's obvious that the trust was meant to end at 18. In other cases, it might not be clear.

[1170] See *Cadwallender v Public Trustee* [2003] WASC 72 at paragraph [44].

[1171] See *Levi Jake Saunders by his Next Friend Claire Marie Matthews v Turner* [2020] WADC 133 at paragraphs [63] to [65]. The presumptions of capacity that apply in SAT proceedings under the GA Act (discussed at **[4.10]** and **[4.11]**) don't apply here.

[1172] See *Perpetual Trustees (WA) Ltd v Naso* (1999) 21 WAR 191, [1999] WASCA 80, *Cadwallender v Public Trustee* [2003] WASC 72, and the comments of Justice Fraser (with whom Chief Justice Holmes agreed) in *Re Tracey* [2016] QCA 194 at paragraph [47]. The District Court exercised such a power in *Max Elio Naso by his next friend Sabatino Naso & Anor v Cottrell [No 2]* [2001] WADC 7, approved in *Levi Jake Saunders by his Next Friend Claire Marie Matthews v Turner* [2020] WADC 133 at paragraph [55].

[1173] At **[7.1]**, we discuss how the GA Act attempts to balance the right for adults to make their own decisions with the need to protect adults with mental disabilities from being abused and

established the trust, the application to terminate it should go to that court. With respect, different cases have said different things what should happen if the District Court established the court trust, but that court has dealt with such applications.[1174]

[13.18] In an application to terminate a court trust, what evidence should be provided?

The claimant who seeks to get the trust terminated should normally give oral evidence,[1175] and also get medical evidence of capacity.[1176] If possible, at least one expert used when the claim was made should be engaged again.

There isn't a standard set of questions to ask a medical expert, but the following could be useful:[1177]

- Is the claimant generally competent to understand the nature and effect of the application to vest the trust property in them?
- Is the claimant generally competent to manage their affairs?
- To what extent has the claimant recovered from their mental incapacity?

It's important that a medical expert is told, and acknowledges, the composition and value of the trust. Some people might be capable of managing $9,000, but not $900,000. It's unlikely to be enough for a doctor only to say something like: "I think this person can manage her affairs."

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exploited. As explained at **[4.10]** and **[4.11]**, a person whose disabilities are only physical can't be placed under an administration order, though can be placed under a guardianship order.

[1174] We won't go through all the cases here. In *Cadwallender v Public Trustee* [2003] WASC 72 at paragraph [51], the Supreme Court said that both the District and Supreme Courts have jurisdiction, but that it would be more appropriate in future cases for the District Court to deal with such matters. In *Levi Jake Saunders by his Next Friend Claire Marie Matthews v Turner* [2020] WADC 133 at paragraphs [29] to [50], the District Court reviewed the authorities and considered that it had the power.

[1175] See *Levi Jake Saunders by his Next Friend Claire Marie Matthews v Turner* [2020] WADC 133 at paragraph [58].

[1176] The phrase "medical evidence" is used here in its broadest sense. It could include, for instance, evidence from a psychologist.

[1177] The first two questions are adapted from paragraphs [1] and [2] of the decision of *Newton v The Public Trustee [No 2]* [2000] WASC 118.

The trustee may provide the court with information that it considers relevant. If, for instance, it's aware of third parties who are seeking substantial access to the trust for their own purposes, the trustee may consider itself obliged to bring that to the court's attention.

[13.19] What orders should be sought, if the court is to terminate a court trust of which the Public Trustee is trustee?

The orders may vary from case to case, but the following is a useful guide:

> *Declare that the plaintiff is no longer a person under a disability within the meaning of that term in Order 70 of the Rules of the Supreme Court 1971.*
>
> *Declare that the plaintiff at all times since [date] when this [type of summons, eg chamber summons] summons was issued, has had the capacity to conduct these proceedings on [his or her] own behalf without the need for a next friend.*
>
> *Amend the title of the proceedings to delete the reference to the next friend [name of next friend].*
>
> *The court trust established by the [name of the court] on [date] in [action number] ("the court trust") is terminated.*
>
> *As soon as practicable after the extraction of these orders, the Public Trustee is to transfer, to the plaintiff, all property of the court trust (minus any outstanding fees, taxes and expenses).*

Again, this assumes that the injured claimant is the sole plaintiff. If one of the assets is real estate, it could be worth mentioning that specifically in the orders. If the claimant owes money to the Public Trustee, that needs to be addressed in some way. Depending on the circumstances, a costs order might also be necessary.

[13.20] Sometimes, the beneficiary of a court trust (the injured claimant) is also subject to an administration order under the GA Act. If the administration order is revoked, does this automatically end the trust?

No. SAT doesn't have the power to terminate court trusts.[1178] The court has to make its own inquiry.[1179]

Even if the District Court receives pretty much the same evidence, there could be good reasons to keep the court trust on foot. For instance:

- SAT must revoke an administration order if the represented person no longer has a "mental disability".[1180] As we've seen, the District Court has kept a court trust going when the beneficiary's disabilities were only physical.[1181]

- We've also seen that the presumptions of capacity that apply in SAT proceedings under the GA Act don't apply in applications to terminate court trusts.[1182]

- SAT might find that the represented person still has a mental disability, but no longer needs an administrator.

- The represented person might be able to manage small amounts of money, but not the large amount that's in trust.[1183]

[1178] See sections 3A and 83 of the GA Act and *Wood v Public Trustee* (1995) 16 WAR 58, [1995] Library 950567, but note, with respect, *Perpetual Trustees (WA) Ltd v Naso* (1999) 21 WAR 191, [1999] WASCA 80 and *Newton v The Public Trustee* [1999] WASC 179, which make references to the GA Act.

[1179] See *Levi Jake Saunders by his Next Friend Claire Marie Matthews v Turner* [2020] WADC 133 at paragraphs [51] to [56].

[1180] See **[4.10]** and **[4.25]**.

[1181] See *Max Elio Naso by his next friend Sabatino Naso & Anor v Cottrell [No 2]* [2001] WADC 7, referred to at **[13.17]**, and *Levi Jake Saunders by his Next Friend Claire Marie Matthews v Turner* [2020] WADC 133 at paragraph [55].

[1182] See **[4.10]**, **[4.11]**, **[13.17]** and *Levi Jake Saunders by his Next Friend Claire Marie Matthews v Turner* [2020] WADC 133 at paragraphs [55] and [63] to [65].

[1183] For the requirements for an administration order, see **[4.10]**.

[13.21] What are structured settlements?

Section 16 of the *Motor Vehicle (Third Party Insurance) Act 1943* specifically allows the court, in various proceedings, to award general damages by way of a lump sum, periodical payments or both. The Insurance Commission may make periodical payments before a case is settled or goes to trial, but almost always wants the award, after a trial or compromise, to be only by way of a lump sum.

Sections 14 and 15 of the *Civil Liability Act 2002* also provide for structured settlements. We won't go into what types of claims those sections apply.

[13.22] What is CISS?

The *Motor Vehicle (Catastrophic Injuries) Act 2016* establishes a catastrophic injuries support scheme, or CISS. Section 3(1) says it's "the scheme provided for in this Act for the lifetime care and support of certain people catastrophically injured in motor vehicle accidents". This book doesn't go into payments made under CISS, just as it doesn't go into the National Disability Insurance Scheme (NDIS).

[13.23] What about interim trusts?

It can take years for a personal injuries claim to be resolved. During that time, in some cases, the Insurance Commission may pay for the claimant's support. That may be by way of payments directly to goods and services providers. The Supreme Court, with the agreement of the Commission, has often established a trust, in at least some cases with the Public Trustee as trustee, into which the Commission may make payments from time to time.

Anyone who now wishes to establish such a trust needs to be aware of the decision of *Re Trustees Act 1962 (WA); Ex Parte Sang Hyun Gwon by his next friend Raymond William Webb*.[1184]

[1184] [2018] WASC 127. With respect, what might be argued in future cases is not discussed here.

CHAPTER 14 – Trusts established by other courts or an assessor

[14.1] Does Chapter 13 apply to the trusts set out in this chapter?

Much of it does, though there isn't enough space to go fully into that.

[14.2] Can the Supreme Court of another Australian state or territory establish a court trust, to be governed by WA law, with the WA Public Trustee as trustee?

Yes, according to the Supreme Court of the Northern Territory personal injuries case of *Renehan v Leeuwin Ocean Adventure Foundation Ltd & Anor*.[1185] The court considered that it had two possible sources of power: the *parens patriae* jurisdiction and cross-vesting legislation.

Such a trust might be appropriate when the injured claimant is living in WA.

The orders would depend on matters such as whether the trust was to end on the injured claimant turning 18. The following might be appropriate if the claimant is over 18:[1186]

> *Within [number] days of [a certain event happening, such as extraction of the orders], the defendant is to pay the sum of $[money amount] to the Public Trustee in and for the State of Western Australia ("the WA Public Trustee") for investment on behalf of the plaintiff ("the trust fund") until further order of the Supreme Court of Western Australia, such investment not limited to the Common Account.*
>
> *The WA Public Trustee has the power to apply the income and capital of the trust fund for the maintenance, welfare, advancement or otherwise for the benefit of the plaintiff.*
>
> *There be liberty for the WA Public Trustee to apply to the Supreme Court of Western Australia with respect to the trust fund.*
>
> *The trust fund be governed by the laws of Western Australia, including but not limited to the Public Trustee Act 1941.*

[1185] [2006] NTSC 28 at paragraphs [49] to [50].

[1186] The wording follows, in part, the Supreme Court's general observations in *Re Hoang Minh Le; ex parte The Public Trustee* [2012] WASC 31 at paragraphs [22] to [24].

These words might need to be modified to take into account moneys being held back to pay for Centrelink, NDIS and/or Medicare. They also assume that the injured claimant is the sole plaintiff, and that the terms of any compromise are set out in the court orders, rather than in a deed that the court approves.

There could be an alternative to a trust. If the WA State Administrative Tribunal (SAT) makes an administration order under the WA *Guardianship and Administration Act 1990* (the GA Act), the Supreme Court of the other Australian state or territory might order that the award be paid to that administrator, as administrator.

[14.3] Can the Magistrates Court of WA establish a trust?

Yes.[1187]

Again, the following model orders might need to be modified to take into account moneys being held back to pay for Centrelink and/or Medicare. They also assume that the injured claimant is the sole plaintiff, and that the terms of any compromise aren't in a deed. But these are at least a good start:[1188]

> *Within [number] days of [a certain event happening, such as extraction of the orders], the defendant is to pay the sum of $[money amount] to the Public Trustee to hold on trust for the plaintiff ("the trust fund").*
>
> *The Public Trustee has the power to apply the income and capital of the trust fund for the maintenance, welfare, advancement or otherwise for the benefit of the plaintiff.*

Leaving aside appeals, Order 66 rule 24 of the RSC does not apply in the Magistrates Court, there is no equivalent to it in the *Magistrates Court (Civil Proceedings) Rules 2005*, and no requirement for solicitor/client costs to be taxed.

[1187] See rule 77 of the *Magistrates Court (Civil Proceedings) Rules 2005*.

[1188] The wording again follows, in part, the Supreme Court's general observations in *Re Hoang Minh Le; ex parte The Public Trustee* [2012] WASC 31 at paragraphs [22] to [24]. Given how rule 77 of the *Magistrates Court (Civil Proceedings) Rules 2005* now reads, it isn't necessary specifically to say that the Public Trustee may invest outside its Common Account.

[14.4] Can an Assessor of Criminal Injuries Compensation direct that all or part of an award of criminal injuries compensation be held on trust for the victim?

Yes, under section 30(2) of the *Criminal Injuries Compensation Act 2003*.[1189] The Public Trustee calls this another type of "court trust", even though the assessor is not literally a "court".

An assessor has said that the discretionary powers to establish a trust are broad, and that capacity includes the notion of vulnerability.[1190]

The District Court may also establish or amend such a trust, following an appeal against an assessor's decision.

Leaving aside appeals, Order 66 rule 24 of the RSC doesn't apply in applications under the *Criminal Injuries Compensation Act 2003*, there's no equivalent to it in that Act, and no requirement for solicitor/client costs to be taxed.[1191]

An order creating such a trust, with the Public Trustee as trustee, can include something like:

> "… and I direct that in paying and applying these moneys the Public Trustee shall not be bound by the provisions of section 59(a) of the *Trustees Act 1962*."

The intention here is to allow the Public Trustee to spend all of the capital on the maintenance, education, advancement and benefit of the beneficiary.

[1189] In *Larkman v Public Trustee* [1998] Library 980566, Justice Miller of the Supreme Court of WA held at pages 14 to 15 that section 37(1) of the *Public Trustee Act 1941* did not apply to such a trust. That decision went on appeal. In *Public Trustee v Larkman* (1999) 21 WAR 295, [1999] WASCA 93, the court overturned Justice Miller's decision, but not his Honour's finding on section 37(1).

[1190] See *SJB* [2012] WACIC 17.

[1191] For a discussion on the payment of costs of related proceedings in SAT, see **[5.5]**.

PART E – SOME OTHER USEFUL THINGS TO KNOW

CHAPTER 15 – Managing a missing person's assets

[15.1] What grants can the Supreme Court make after a person's death?

Before talking about a missing person, let's go into what can happen after someone dies.

To administer the estate of a deceased person, an order or grant from the Supreme Court is often (although not always) needed. There are three main types:

Grant of probate

This is made when:

- the deceased person dies **testate** (meaning that they die leaving a valid, unrevoked will);
- the will appoints a person or body as executor; and
- the court agrees that the executor should be allowed to administer the estate.

The word "probate" can be confusing, because it can also refer more generally to the law of deceased estates. The Supreme Court's probate jurisdiction covers more than making grants of probate.

Grant of letters of administration with the will annexed

This is made when:

- the deceased person dies **testate** (meaning that they die leaving a valid, unrevoked will);
- the will doesn't have an executor, or the executor is unwilling, unable or unsuitable to administer the estate; and
- the court agrees that another person or body should be allowed to administer the estate.

The person or body who obtains the grant and administers the estate is called the administrator.

Grant of letters of administration

This is made when:

- the deceased person dies **intestate** (meaning that they die without a valid will); and
- the court agrees that a person or body should be allowed to administer the estate.

Again, the person or body who obtains the grant and administers the estate is called the administrator.

There can be more than one executor or administrator. An administrator of a deceased estate isn't the same as an administrator under the GA Act.[1192]

Before issuing one of the above grants, the Supreme Court must be satisfied that the person whose estate is to be administered is in fact dead. Normally, a death certificate is enough to prove this.

[15.2] What happens if a person has gone missing and no death certificate has been issued?

The Supreme Court can give permission for the applicant to state in an affidavit that the person is dead. This is called granting leave to swear to the death of the person.[1193]

[15.3] What if a missing person's estate needs to be managed?

It may take some time to satisfy a court that a missing person is actually dead. Meanwhile, debts might need to be paid; a house might need to be repaired or rented out; wasting assets like a car might need to be sold. Section 37A(1)(d) of the *Public Trustee Act 1941* allows the Public Trustee to apply to the Supreme Court for orders to care for the property as manager where "it is not known whether the owner of any real or personal property in the State is dead or alive".

[1192] GA Act means the *Guardianship and Administration Act 1990*. For what is an administrator under the GA Act, see Chapter 4, Chapter 6 and Chapter 7 of this book.

[1193] For the procedure for this, see rule 34 of the *Non-contentious Probate Rules 1967*. For an example, see *Re Application for Grant of Presumption of Death; Ex parte Craig Charles Park* [2022] WASC 230.

[15.4] When should the Public Trustee apply to manage the estate of a missing person?

Applications under section 37A(1)(d) are relatively rare. If the Supreme Court makes an order with respect to a missing person, the person might come back alive. There's a risk that in the meantime, the Public Trustee does something contrary to that person's wishes. Balanced against that is the risk of damage being done if the estate isn't managed. This is a variation on the freedom versus protection theme in this book.

The *Public Trustee Act 1941* doesn't spell out when the Supreme Court should make an order, but the following questions may be relevant:

1. For how long has the person been missing?
2. How strong is the evidence that the person is missing?
3. What do the police think happened?
4. Is the person likely to be dead?
5. Is the coroner performing (or about to perform) an investigation which might result in a death certificate being issued?
6. When is there likely to be an application for leave to swear death?
7. Can the estate be dealt with informally?
8. If not, how urgent is the need for an order?
9. What would the Public Trustee need to do under an order?

CHAPTER 16 – How the Public Trustee is accountable for what it does

[16.1] What are general ways in which the Public Trustee is accountable?

1. The Public Trustee has the means to discharge its corporate liability. It has an indemnity insurer (RiskCover) and an Indemnity Reserve. The Consolidated Account of State of WA can also be used. Amounts can be written off.

2. The Public Trustee is subject to the *Financial Management Act 2006* and the *Auditor General Act 2006* with respect to financial administration, audit and reporting.[1194]

3. The Public Trustee has an obligation, in certain circumstances, to provide accounts and other documents to a person who has an interest in an estate that the Public Trustee is administering.[1195]

4. The Public Trustee is subject to the *Freedom of Information Act 1992*.

5. The Public Trustee's Minister (who tends to be either the Attorney General or Minister for Justice) can, at least generally speaking, access the Public Trustee's records and demand information.[1196]

6. The Public Trustee enters into an annual agreement with its Minister.[1197]

7. The Public Trustee's fees are set following a process involving its Minister and Treasury. They must be laid before each House of Parliament and can be disallowed by either house.[1198]

8. The Public Trustee has a Common Account, into which some of the moneys of its trusts, estates and clients is invested.[1199] The Common Account is government guaranteed.[1200]

[1194] See section 48 of the *Public Trustee Act 1941*.
[1195] See section 47(2) of the *Public Trustee Act 1941*.
[1196] See section 46 of the *Public Trustee Act 1941*.
[1197] See section 6B of the *Public Trustee Act 1941*.
[1198] See, for instance, sections 38A and 38B of the *Public Trustee Act 1941*.
[1199] See section 39A of the *Public Trustee Act 1941*.
[1200] See section 42 of the *Public Trustee Act 1941*.

9. The Public Trustee also invests some of the moneys of its trusts, clients and estates in Public Trustee Investment Funds (PTIFs).[1201] The Treasurer can (and does) set investment guidelines for the Common Account and PTIFs.[1202]

10. The Treasurer needs to approve the terms and duration of any contract or arrangement between the Public Trustee and a person who manages the Common Account or a PTIF. The Treasurer also needs to approve the person.[1203]

11. Some of the Public Trustee's decisions are reviewable by the Ombudsman, who can make recommendations and report to Parliament.[1204]

12. The Public Trustee has internal checks, balances, policies and procedures against fraud and bad decisions. Junior staff, for instance, have to refer certain matters to more senior staff.

13. Alleged misconduct by Public Trustee staff can (and, in some cases, must) be referred to the Corruption and Crime Commission.[1205]

14. The Public Trustee is part of the Department of Justice. Some decisions relating to the running of the Public Trustee are taken by Head Office. For instance, the Director General is the employing authority for all Public Trustee staff.

[16.2] What are additional ways?

The Public Trustee can also be scrutinised in other ways, depending on what function it's performing.

For example, when the Public Trustee is administrator under the GA Act,[1206] the State Administrative Tribunal (SAT) reviews the administration order periodically.[1207] It can give the Public Trustee directions.[1208]

[1201] These are referred to in the *Public Trustee Act 1941* as "strategic common accounts". See section 39B.
[1202] See sections 39D and 47B of the *Public Trustee Act 1941*.
[1203] See section 40 of the *Public Trustee Act 1941*.
[1204] See the *Parliamentary Commissioner Act 1971*.
[1205] See the *Corruption, Crime and Misconduct Act 2003*.
[1206] *Guardianship and Administration Act 1990*.
[1207] See **[4.25]**.
[1208] See Chapter 9.

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