Freedom vs Protection

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

By Michael Bowyer

Freedom vs Protection

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Michael Bowyer has been the Public Trustee's Principal Legal Officer since 2004. He's also acted as the Public Trustee and the Public Advocate on multiple occasions.

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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.

The 2018 High Court case of *Burns v Corbett*[15] 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. Someone else can write a book on it.[16]

[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.[17] That can extend to deciding whether or not to start litigation in the first place. In some ways, things haven't much changed since the War of the Roses. There are still those who mismanage the money of people with impairments; there are still those who are cruel to their own relatives. It 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.[18]

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[12] See Parts 9A and 9B of the GA Act. This book doesn't discuss them, but see the Office of the Public Advocate's website (www.publicadvocate.wa.gov.au). In the case of advance health directives, this includes a link to more detail on the Department of Health's website.
[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] [2018] HCA 15.
[16] But until someone does, see the case of *GS v MS* [2019] WASC 255.
[17] See Chapter 10.
[18] 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.[19] We won't go into trusts that are set up by wills or by family members.[20] We also won't cover the National Disability Insurance Scheme (NDIS).[21]

[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[22] and a WA Legislative Council

[19] See Chapter 13 and Chapter 14.
[20] Textbooks on trusts and/or deceased estates may be of assistance here.
[21] The NDIS website is www.ndis.gov.au.
[22] See *Elder Abuse – A National Legal Response* (ALRC Report 131).

committee[23] 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 has 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 can make their own decisions with support.[24] There's probably more supported than substituted decision-making in WA at present, but the supported decision-making is largely informal.[25]

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.[26] 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 proceedings in SAT have to pay for one themselves. Plenty of hearings take place without

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

[24] See *Equality, Capacity and Disability in Commonwealth Laws* (ALRC Report 124), published in 2014. It did recommend, for some cases, a concept called "fully supported decision-making".

[25] See **[7.14]**.

[26] See Article 12.

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.[27]

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".[28] 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.[29] 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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[27] Both the novel and the movie were called *The Children Act*.

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

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

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 the standards of 2019.

The Spanish language has masculine and feminine words, but the words for "his house", "her house" and "their house" are the same.[30] When the gender of the house's owner isn't clear, an English writer has to choose between "his", "his or her", "their", or alternating between "his" and "her". None are ideal. If possible, where gender is unclear, this book uses "their", which is the least objectionable.[31]

[30] For those interested, it's *su casa*. It can also mean "your house" in some circumstances.

[31] Also, this book is designed to read like a conversation, so please don't take offence at the use of contractions.

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 WA 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. In some cases, though, when the scope and purpose of the legislation is looked at, it means that the person *must* exercise the power, and doesn't have a choice.[32]

A WA 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.[33]

[32] 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].

[33] 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".[34]

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

[34] 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.

PART B – GUARDIANSHIP AND ADMINISTRATION ORDERS

CHAPTER 4 – How guardianship and administration orders are made

[4.1] What's this chapter about?

SAT[35] 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 an overview of how it handles these applications.[36] We won't repeat everything there.

Rather, this chapter discusses the requirements before such orders are made, and answers questions about the process. 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*[37] 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.[38]

[35] The State Administrative Tribunal.

[36] 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.

[37] [2018] HCA 15.

[38] 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[39] governs SAT generally.
- The GA Act[40] specifically relates to guardianship and administration orders (and other things).

If there's any inconsistency between the two, the GA Act prevails.[41]

[4.3] Who can apply for these orders?

Anyone,[42] including family members, friends or social workers. The Public Advocate sometimes does so. The Public Trustee may also do so on occasion.

[4.4] How do you apply?

In theory, applications can be made orally.[43] In practice they're done online via SAT's website. SAT normally requires a Medical Report and a Service Provider Report. Copies can be downloaded from the website. Depending on the circumstances, SAT may require further information.

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

Yes. Sometimes, there may be more than one. Hearings are normally open to the public, although there are restrictions about what can be reported afterwards.[44]

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[39] *State Administrative Tribunal Act 2004*.
[40] *Guardianship and Administration Act 1990*.
[41] 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).
[42] See section 40 of the GA Act.
[43] See section 40 of the GA Act.
[44] See section 61 of the SAT Act and sections 17 and Schedule 1 of the GA Act.

[4.6] Who hears the matter?

SAT has the following types of members:[45]

- the President, who is a Supreme Court judge;[46]
- at least one Deputy President, who is a District Court judge;[47]
- senior members; and
- ordinary members.

An application for an 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;[48]
- the person in respect of whom the application is made;[49]

[45] See section 107 of the SAT Act. In addition, section 116 says that a magistrate is an *ex officio* member of SAT.
[46] See section 108(3) of the SAT Act.
[47] See section 112(3) of the SAT Act.
[48] 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.
[49] 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;[50] and

- the Public Advocate.[51]

There could be a long list of parties to the proceedings. Chapter 5 discusses how they may be represented and who pays 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, although at times SAT may need to provide access, to conduct a fair hearing. Anyone, including someone who isn't a party, can apply to SAT for access. Whether it's given is another matter.[52]

[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 an administration order can and should be made, and if so, the terms of such an order.

In *'G' v 'K'*,[53] 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.[54] 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

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[50] 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 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.

[51] Section 41 requires notice to be given to the Public Advocate. For roles that the Public Advocate might play in the proceedings, see **[5.2]**.

[52] Section 112 of the GA Act governs access. In *KWD* [2011] WASAT 4, SAT went through the three different types of people who could seek documents under that section (see paragraphs [86] to [88]).

[53] [2007] WASC 319.

[54] See paragraph [156].

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.[55]

The extent to which SAT should make its own enquiries is also discussed in the case of *Ms G*.[56]

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

1. ***The person has a "mental disability".***[57]

It isn't enough to be vulnerable,[58] or only to have a physical disability.

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

Note the word "includes". The phrase "mental disability" could encompass other conditions that section 3(1) doesn't specifically mention.[59]

The case of *S and SC*[60] was about an alcoholic who was intoxicated daily, but there was no proof that he had early onset or alcoholic dementia.[61] Member Leslie found that the:

> "… emphasis in the definitions of 'disability' is on the notion that something is 'disabling' or 'incapacitating', rather than as necessarily attaching to a particular recognised condition…. [M]ental disability could be seen as some set of circumstances for a person that is 'mentally disabling', rather than that it fit within a particular diagnostic category."[62]

SAT doesn't need to give a label to the person's cognitive impairment, nor determine its origin.[63]

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[55] See paragraph [157].
[56] [2017] WASAT 108 at paragraphs [49] to [60].
[57] See section 64(1)(a) of the GA Act.
[58] See *Public Trustee and KMH* [2008] WASAT 171.
[59] See *S and SC* [2015] WASAT 138 at paragraph [17] and *FH* [2016] WASAT 95 at paragraph [80].
[60] [2015] WASAT 138.
[61] See paragraph [53].
[62] See paragraph [100].
[63] 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].

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.***[64]

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.[65] This re-states the common law position with respect to an adult. To rebut the presumption, there must be "clear and cogent evidence".[66] In other words, the evidence needs to be compelling.

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.[67]

The GA Act doesn't define **"estate"**. The word's ordinary meaning applies. It incorporates both a person's assets and liabilities.[68] A person's assets include a chose in action, such as a claim for damages arising from a motor vehicle accident.

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)'.[69] That is the **objective** element.

SAT must "set that ability against the requirements of the person's individual estate and circumstances"[70]. 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.[71]

A person with an acquired brain injury and a simple estate might still be able to make reasonable judgments with respect to their 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 estate.

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[64] See section 64(1)(a) of the GA Act.
[65] See section 4(3)(d) of the GA Act.
[66] See *GC and PC* [2014] WASAT 10 at paragraph [36]. See also the discussion in *AQ* [2015] WASAT 139 at paragraphs [117] to [120], which also mentions the *Briginshaw* approach.
[67] See *FS* [2007] WASAT 202 at paragraph [101].
[68] See *SAL and JGL* [2016] WASAT 63 at paragraphs [22] to [23].
[69] See *FS* at paragraph [110], but see also paragraphs [106] to [109].
[70] See *FS* at paragraph [110].
[71] SAT followed Victorian, rather than New South Wales authority. See *FS* at paragraphs [102] to [105].

The size of the estate might be a factor.

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.

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

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.[72] 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.[73]

And 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*.[74] 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*

[72] See *George Lucas's Blockbusting* (2010, HarperCollins, edited by Alex Ben Block and Lucy Autrey Wilson) at pages xvi and 207.
[73] Walt Disney also had trouble convincing people that building a large theme park was a good idea.
[74] See *George Lucas's Blockbusting* at pages xvi, 207 and 221.

(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.

3. ***There is a need for an administrator.***[75]

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.

A man with an intellectual impairment may live with his mother, who helps him to manage his money. But after she dies, he no longer has that support. A decision may also need to be made about whether to challenge the mother's will.

4. ***There is no alternative to making an order that is less restrictive of the person's freedom of decision and action.***[76]

In the case of *AS*,[77] SAT said that this was a separate step to considering the need for an administrator. In *FS*,[78] SAT seems to have considered both sections together. Ultimately, it may not make any difference either way.

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.[79]

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[75] See section 64(1)(b) of the GA Act.
[76] See section 4(4) of the GA Act, which was previously section 4(2)(c).
[77] [2018] WASAT 1 at paragraphs [51] to [53].
[78] [2007] WASAT 202 at paragraphs [125] to [129].
[79] See *AS* [2018] WASAT 1 at paragraphs [51] to [53].

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 may be an enduring power of attorney, which we'll discuss further in Chapter 8.

In theory, administration orders can be made for a person under 18.[80] 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. And usually, there are viable alternatives to an administrator, such as parents or people acting in place of parents.

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

This book is more about financial management, but for completeness, the requirements for a guardianship order are:

1. ***The person is at least 17 years of age.***[81]

If the person is only 17, the order can only take effect once they turn 18.[82]

2. ***The person is (or will be, on turning 18):***[83]

   (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 that a person is capable of looking after their own health and safety[84] and of making reasonable judgments in respect of matters relating to their person,[85] until SAT

[80] 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.
[81] See sections 43(1a) and 43(2a)(a) of the GA Act.
[82] See section 43(2c).
[83] See sections 43(1)(b) and 43(2a)(b).
[84] See section 4(3)(a).
[85] See section 4(3)(b).

is satisfied to the contrary. As per administration orders, this presumption isn't overcome lightly.

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.

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, including the then-President, has said that a guardianship order can still be made, and did indeed make one.[86] 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*,[87] SAT said:[88]

> "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.

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[86] See *Public Advocate and CEF* [2010] WASAT 54. See also the discussion in *T* [2018] WASAT 128 at paragraphs [24] to [36]. With respect, a contrary view was expressed in *KRM* [2017] WASAT 135.
[87] [2018] WASAT 128.
[88] See paragraph [35].

3. There is (or will be, on the person turning 18) a need for a guardian.[89]

Section 45(2) of the GA Act sets out some of the functions that a guardian can have. When dealing with a particular case, it may be worth going through that list, to see whether there's a need for any of those functions. They are:

(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 the person is well-settled in a nursing home, can afford to live there, and it all seems to be working out as well as can be expected.

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

A person with advanced dementia is unlikely to be working.

(d) Make treatment decisions for the person.

Part 9D of the GA Act allows other people, such as family members, to make treatment decisions, even if there isn't a guardian. But in some cases, the person may be estranged from their relatives. The relatives may be fighting or don't want to make these sorts of decisions.

Sometimes, the person may have already given their medical wishes in an advance health directive.[90] The Office of the Public Advocate's website (www.publicadvocate.wa.gov.au) has information on that, and in turn provides a link to more detail on the Department of Health's website.

(e) Decide what education and training the represented person is to receive.

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

(f) Decide with whom the represented person is to associate.

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.

(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.

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[89] See sections 43(1)(c) and 43(2a)(c).
[90] See Part 9B of the GA Act.

(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. What if, for instance, the child welfare authorities apprehend the person's child, and apply to the Children's Court of WA for an order that they continue to have control of the child? There may be a need for a guardian to make decisions on behalf of the person, such as whether to defend those proceedings.[91]

4. ***There is no alternative to making an order that is less restrictive of the person's freedom of decision and action.***[92]

One alternative could be an enduring power of guardianship.[93] The Office of the Public Advocate's website (www.publicadvocate.wa.gov.au) has information on that.

[4.12] How formal are SAT's hearings?

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,[94] call a person to give evidence,[95] examine a witness on oath or affirmation[96] and compel a witness to answer questions.[97] The Supreme Court has the power, in at least some circumstances, to punish someone who disobeys a SAT order as though it were a contempt of the Supreme Court.[98]

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".[99]

Generally speaking, SAT is bound by the rules of natural justice, but not the rules of evidence.[100]

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[91] Strictly speaking, someone defending such proceedings in the Children's Court of WA on behalf of a mentally impaired person would not be called a guardian *ad litem*.
[92] See section 4(4) of the GA Act, which was previously section 4(2)(c).
[93] See Part 9A of the GA Act.
[94] See section 66 of the SAT Act.
[95] See section 67(1)(a).
[96] See section 67(1)(b).
[97] See section 67(1)(d).
[98] See section 100.
[99] See section 9(b) of the SAT Act.
[100] See section 32 of the SAT Act.

That said, SAT can't simply throw away all the rules of evidence, which have been developed as a way to prevent error and get to the truth.[101]

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 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.

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, and couldn't cope with the workload.

Guardianship and administration applications in SAT are different. Generally, they can't be settled "out of court". SAT may be the only option to help a person with impaired decision-making. There's a public interest in *not* making the participants feel intimidated.

[4.13] Does SAT have to accept all medical evidence it receives?[102]

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.

The case of *TJC*[103] 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 also gave evidence before SAT that was favourable to the mother. SAT, at least generally speaking, accepted what he said.[104] The grandmother appealed.[105] 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

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[101] 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].

[102] The phrase "medical evidence" is used here in its broadest sense. It could include, for instance, evidence from a psychologist.

[103] [2007] WASAT 105.

[104] See paragraph [86] of SAT's original decision.

[105] See *'G' v 'K'* [2007] WASC 319.

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.[106]

Also at common law, a finder of fact can prefer direct evidence given by an eye witness over the opinion of an expert.[107] 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 film footage of the person doing just that. A court is free to accept the film and reject the opinion of the doctor. SAT should be free to do the same.

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".[108]

SAT can therefore take into account the evidence of friends and family, and its own observations of the person who is the subject of the hearing.

Medical evidence may not always go one way. The person the subject of the hearing may have both a GP and a specialist (eg geriatrician or neurologist), who may express different views. The geriatrician or neurologist 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.

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.

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

- 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?

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[106] See paragraph [86] of the Supreme Court's decision.
[107] 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.
[108] See *Beim v Collins* (1954) 28 ALJ 331 at page 332.

- 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?

[4.14] How useful are the Abbreviated Mental Test (AMT) and the Mini-Mental State Examination (MMSE)?

In the AMT, the person is asked ten questions and scores one point for a correct answer and zero for an incorrect answer.

In one version of this test, one of the questions is: "When was the Second World War?"

Not everyone is good at remembering what a UWA History Professor used to call "useless facts". Some people might not know the answer, but that doesn't necessarily mean they lack mental capacity. In any event, what is the answer? This question might be too vague for a quiz night. Do they mean 1939 to 1945? Americans or Russians could argue that for them, the war only began in 1941.

Another question can be: "What is the Queen's name?" At a quiz night, there could be a bunch of people complaining at the judge's table about this one. After all, which Queen? The Queen of England? The Queen of The Netherlands? And do they just want her first name? What about her surname? Her middle names? Does anyone ever use her surname? Do royalty even have surnames? (The answer, all things considered, could be Elizabeth Alexandra Mary Windsor, but maybe they want Elizabeth the Second, or maybe they were after the Queen of Denmark.)

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 mathematically challenged, 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. And what about those for whom English is not their native language?

It also may be possible to "prime" some people for these tests, which in any event may not pick up every type of disorder. Conversely, some people may get nervous when they do tests, particularly if they think a lot rides on the results.

The AMT and MMSE need to be considered in the context of other evidence and may require close scrutiny.[109] 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.[110]

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

They can be either.[111] A plenary order gives broad powers, though they have some in-built restrictions. A limited order is confined to the functions that SAT specifies.[112]

SAT has to impose the least restrictions possible on the person's freedom of decision and action,[113] though again, in some cases, the person may not have any measure of such freedom.

Plenary administration orders are much more common than plenary guardianship orders.

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

SAT can appoint:

- one administrator;
- two or more administrators to act jointly;[114]
- one administrator to perform some functions and another to perform other functions; or
- a combination of the above.

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[109] For case on the limited use of an MMSE, see GG [2019] WASAT 4 at paragraphs [155] to [156].
[110] Tactfully, the organisation for which these lawyers worked is not mentioned here, but it makes frequent appearances in SAT.
[111] For guardians, see section 43 of the GA Act. For administrators, see sections 69, 71(1) and 71(3).
[112] For more on the powers of guardians and administrators, see Chapter 6.
[113] See sections 4(5) and (6) of the GA Act.
[114] As contemplated by section 75 of the GA Act.

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.[115] SAT must take some matters into account, including the represented person's wishes.[116]

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. Joint appointments are reasonably common.

- *Professional people* such as accountants or lawyers may be appointed as administrators, but in their personal capacities. SAT cannot, 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.

- Trustee companies under the *Trustee Companies Act 1987* may be appointed as administrators. The GA Act restricts when they can be appointed.[117]

- *The Public Advocate*, who can only be appointed as guardian when there isn't anyone else willing and suitable to act, or when it's jointly with someone else.[118] Sometimes, the Public Advocate is appointed to perform some functions and someone else is appointed to perform others. 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.[119] In practice, except in rare cases, the Public Trustee can and will do the job. Sometimes, if the Public Trustee has a significant conflict of interest, the Public Advocate is appointed to perform some functions and the Public Trustee is appointed to perform others.

- *The Public Trustee.* We needn't 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. In practice, SAT would normally prefer to appoint a family member who is willing and suitable, but there may not be one. 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.

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[115] See section 68(1) of the GA Act.
[116] See section 68(3).
[117] See section 68(2).
[118] See section 44(5).
[119] See section 68(5).

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.[120] There isn't a similar provision for administrators. A conflict of interest therefore does not, in itself, render a person or body unsuitable to be an administrator. Sometimes, though, the conflict of interest is so great that SAT appoints a different person or body.[121] Split appointments may also be a way of managing this.

[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.[122] 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.

[120] Although sections 44(3) and (4) qualify that.
[121] See *AS* [2018] WASAT 1.
[122] See section 4(2) of the GA Act.

[4.20] Can SAT make different orders to what is 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.

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

Only with SAT's permission.[123] It has a protective role to play, so if it thinks the person might require an administrator, it might keep the proceedings going. Things could get taken out of your hands altogether.

[4.22] What if a person's estate needs to be administered in a hurry?

SAT normally must give at least 14 days' notice of the hearing to various people,[124] but in exceptional circumstances, up to a point, it can waive or shorten this requirement.[125] It 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.[126]

[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.[127] For more on this, see the Private Administrators' 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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[123] See section 46(1) of the SAT Act.
[124] See section 41(1) of the GA Act.
[125] See section 41(3) of the GA Act.
[126] See section 65 of the GA Act.
[127] See section 80 of the GA Act and the Private Administrators' 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?

- 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.[128] 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.[129]

- Section 19 of the GA Act allows the Supreme Court to hear appeals from a "determination" of three members.[130]

- Section 105 of the SAT Act also gives an avenue of appeal to the Supreme Court, although questions have arisen as to when it can be used.[131]

- The Supreme Court might also be asked to exercise its powers of judicial review.[132] For example, in *HB v His Honour Judge T Sharp*,[133] the Supreme Court was asked to stop one of SAT's Deputy Presidents from hearing a particular application.

- Section 83 of the SAT Act can be used to rectify some mistakes, though there are limits on this.[134] It's roughly the equivalent to what is known in courts as the "slip rule". If, for instance, one of the names on an administration order is misspelt, this can cause problems when dealing with financial institutions. Section 83 can be used to correct the spelling error.[135]

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[128] The meanings of "determination" and "Full Tribunal" are in section 3(1) of the GA Act.
[129] It is a merits review. For an example, see *AH* [2019] WASAT 2.
[130] See, for instance, *"M" v Office of the Public Advocate* [1997] Library 970242; *Martin v Office of the Public Advocate* [1999] Library 990150; *'G' v 'K'* [2007] WASC 319; *SG v AG* [2008] WASC 123 and *BMD v KWD* [2008] WASC 196.
[131] See *RM v MF* [2012] WASC 367 and *S v State Administrative Tribunal of Western Australia [No 2]* [2012] WASC 306. Whatever the situation, a decision that is not a "determination" could be the subject of an appeal under section 105 of the SAT Act.
[132] See *S v State Administrative Tribunal of Western Australia [No 2]* [2012] WASC 306 at paragraph [27].
[133] [2016] WASC 317.
[134] See *S v State Administrative Tribunal of Western Australia [No 2]* [2012] WASC 306 at paragraphs [107] to [115].
[135] In addition, 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. It isn't clear whether this has ever been used in an application for a guardianship or administration order. There could be a question, at least in

There is also the Part 7 review, discussed below.

[4.25] What is a Part 7 review?

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.[136] That said, the order doesn't need to be reviewed if the represented person dies in the meantime.

SAT is also obliged to review guardianship and administration orders in certain circumstances.[137] Various people and bodies, including the Public Trustee, can ask SAT for a review. Others need leave (SAT's permission) to do so.[138]

At a Part 7 review, SAT often makes a new order on the same or substantially similar terms as before. But not always.

An order may be revoked, and no new one made, because the represented person has recovered sufficiently from their impairment. Or maybe a guardian had been appointed to decide where the person should live, that now seems to be working out well, and no-one is questioning it. Or there may no longer be a need for an administrator because a court case has been resolved.

Alternatively, 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.

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 in circumstances and/or a lapse of time. In practice, that distinction can get blurry, particularly because Part 7 reviews are generally simpler.

A Part 7 review is a fresh set of proceedings. It isn't a continuation of what has gone before.[139]

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some cases, as to whether this section 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).

[136] See section 84 of the GA Act.

[137] See section 85 of the GA Act.

[138] See sections 86 and 87 of the GA Act.

[139] See *KWD* [2011] WASAT 4 at paragraphs [63] to [83].

[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, [140] 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.[141] 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.[142]

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.[143]

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[140] One of the other ways is discussed at **[6.1]**.
[141] See **[4.10]**.
[142] See **[4.13]**.
[143] 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.[144] 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 the subject of the hearing.[145]

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.[146]

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.[147] That didn't apply under the old section 35 procedure.

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[144] See **[4.15]**.
[145] See section 4(7) of the GA Act and **[7.9]** to **[7.12]**.
[146] See **[5.2]**.
[147] 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.[148] 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.[149]

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.[150] 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.[151] 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.[152] 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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[148] See **[4.16]**.
[149] See sections 74 to 79 of the SAT Act.
[150] See Chapter 9.
[151] See **[4.25]**.
[152] See **[4.25]**.

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 SAT,[153] 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.[154] But in SAT proceedings under the GA Act,[155] 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?

They include the following:

A lawyer acting directly for the represented person or proposed represented person[156]

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.

Assume, for instance, the client is Bob and 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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[153] The State Administrative Tribunal.

[154] For how that works in civil proceedings in the Supreme and District Courts, see Chapter 10.

[155] *Guardianship and Administration Act 1990*.

[156] 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.

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.[157]

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
- report on any matter that SAT asked be investigated.[158]

[157] See sections 17B, 41 and 89 of the GA Act.
[158] See section 97(1)(b) of the GA Act.

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.[159] This makes the Public Advocate a party to any such application,[160] but the office doesn't 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. The officer isn't bound by those 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.

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"[161] and taking account the person's wishes. They also include matters such as protecting the represented person from abuse, neglect and exploitation.[162]

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.

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[159] See section 41 of the GA Act.
[160] 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.
[161] But not contrary to the *Legal Profession Act 2008*.
[162] For more on the "best interests" test, see Chapter 7.

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.[163]

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.[164] It isn't clear if this has ever happened.

Expert or professional assistance

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.[165]

Litigation guardian

Section 40(2) of the SAT Act[166] says:

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[163] For section 70, read section 51. See Chapter 7 for the "best interests" test.
[164] See *'G' v 'K'* [2007] WASC 319 at paragraph [78].
[165] See section 64(1) of the SAT Act.
[166] *State Administrative Tribunal Act 2004*.

> "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."[167]

In this context, the word "may" normally means that a person doesn't have to do something.[168] 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.[169]

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.[170] Generally speaking, it has an obligation to observe natural justice.[171]

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.[172]

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*.[173]

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[167] The relevant rule is rule 39 of the *State Administrative Tribunal Rules 2004*.
[168] See **[2.3]**.
[169] See section 4(2) of the GA Act and Chapter 7.
[170] See section 4(7) of the GA Act and **[7.9]** to **[7.12]**.
[171] See section 32(1) of the SAT Act.
[172] 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]**).
[173] [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.

The Public Trustee performing its PAS function

The Public Trustee's Private Administrators' Support (PAS) team examines the accounts of most private administrators.[174] At times in that role, the Public Trustee may advocate for the retention or removal of the administrators.[175]

[5.3] Can a lawyer act for a represented person?

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
- 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? 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.[176]
- 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.[177]
- Generally speaking, SAT has an obligation to observe natural justice.[178]

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[174] See section 80 of the GA Act and the Private Administrators' Guide published by the Public Trustee and Public Advocate.
[175] See, for instance, *FV and Public Trustee* [2016] WASAT 86.
[176] See section 4(3) of the GA Act.
[177] See section 4(7) of the GA Act and **[7.9]** to **[7.12]**.
[178] See section 32(1) of the SAT Act.

- SAT has to impose the least restrictive alternative.[179]

- A single member of SAT can make the wrong decision. A three-member panel of SAT (including a judge) can correct it on review.[180]

- 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.[181]

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".[182]

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.[183] Normally, if a client loses capacity, the solicitor no longer has authority to act.[184]

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*.[185] 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.[186]

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 desirable to have legal representation when challenging a declaration of incapacity.

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[179] See sections 4(4), (5) and (6) of the GA Act and **[4.10]** and **[4.15]**.
[180] See section 17A of the GA Act and **[4.24]**.
[181] See section 86 of the GA Act and **[4.25]**.
[182] See section 36 of the SAT Act, when read with the definition of "party" in section 3(1) of the GA Act.
[183] 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.
[184] 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.
[185] (1908) 5 CLR 858, [1908] HCA 15.
[186] For a discussion of the language used in this case which would now be considered offensive, see **[1.7]**.

In the case of *S v State Administrative Tribunal of Western Australia [No 2]*,[187] 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[188] 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".[189]

There is a distinction between:[190]

- acting for a represented person 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.

[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.

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[187] [2012] WASC 306.

[188] *Rules of the Supreme Court 1971*.

[189] 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].

[190] 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]).

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.

[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.[191]

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.[192]

There is a series of costs determinations relating to appearing in SAT,[193] which set out the rates at which lawyers can charge. Lawyers can only charge higher than those rates if there's a valid costs agreement in place. [194] There are also other protections, designed to stop lawyers overcharging.[195]

Cost recovery from another party at a hearing

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[191] See *EA and KD, TA, LA, BA & VT [No 2]* [2007] WASAT 175 at paragraph [18].

[192] 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 *Legal Profession Act 2008* governs what lawyers can charge.

[193] As at July 2019, the latest was the *Legal Profession (State Administrative Tribunal) Determination 2018*.

[194] See section 271 of the *Legal Profession Act 2008*.

[195] To go through them in detail would considerably expand the length of this book, but see, for instance, Part 10 of the *Legal Profession Act 2008*.

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.[196]

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.[197]

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".[198]

[196] See *Perpetual Trustees WA Limited and The Public Trustee* (2009) 68 SR (WA) 128, [2009] WASAT 253.

[197] See Order 66 rule 1(1) of the RSC. There are several "ifs" and "buts" to that.

[198] See *GA and EA and GS* [2013] WASAT 175 at paragraphs [42] and [43]. In that case, 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. For another example of a costs order under section 87(2) in proceedings under the GA Act, see *PHQ and LPQ* [2015] WASAT 5. 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 (see *SC* [2018] WASAT 116 at paragraphs [25] and [26]). All other things equal, it would seem to 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" (see *SC* at paragraph [27]). SAT can apply section 87(2) differently in proceedings under different Acts, such as in vocational regulation (see *Medical Board of Western Australia and Roberman* [2005] WASAT 81 (S) at paragraph [30]).

Section 16(4) of the GA Act allows one party's costs to come out of the estate of the person in respect of whom the application is made. Again, costs orders under this section are the exception, not the norm. SAT has said:[199]

> "This may include situations where:
>
> - it is unlikely that an application would have been made to the Tribunal and the (proposed) represented person benefit from the protection of an order had not legal advice been sought by the applicant;
> - there are serious allegations that the (proposed) represented person is suffering from abuse and legal advice and representation is required to present a reasoned case to the Tribunal in a timely manner;
> - conflict between significant parties is of such magnitude that it is unlikely they could present a coherent case to the Tribunal in respect of the history and needs of the (proposed) represented person without legal assistance;
> - the application is of such complexity that legal advice and representation is required to present a reasoned case to the Tribunal in a timely manner;
> - the application is contentious and unique; for example sterilization; and
> - the application raises a special point of law."

Part of the rationale for restricting costs orders under section 16(4) was that SAT:[200]

> "… 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. In many cases, they're the only way of protecting vulnerable

[199] See *EA and KD, TA, LA, BA & VT [No 2]* [2007] WASAT 175 at paragraph [57].
[200] See paragraph [43].

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[201] to investigate the misuse of an EPA[202] executed by someone who had been under the care of what used to be called DCP,[203] who later had DSC[204] assisting them, and recommend whether to make someone an RP[205] and appoint the PT,[206] or whether instead, to appoint someone else and have the PTO's PAS team[207] 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".[208]

That said, it takes at least three years 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 [209] 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.

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[201] Office of the Public Advocate.
[202] Enduring Power of Attorney.
[203] Department for Child Protection.
[204] Disability Services Commission.
[205] Represented Person.
[206] Public Trustee.
[207] Public Trust Office's Private Administrators' Support team.
[208] See section 32(6)(b) of the SAT Act.
[209] [2007] WASAT 105.

On appeal to the Supreme Court, Justice Jenkins made this comment:[210]

> "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.

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".

In *GA and EA and GS*,[211] 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".[212]

How the amount of costs is worked out

The SAT member or panel hearing the matter doesn't have to fix costs,[213] but invariably does so, adopting "a broad and relatively robust fashion".[214] In *GA and EA and GS*, SAT applied the relevant costs determination as a guide.[215]

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.[216] If, at the end of the litigation,

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[210] See *'G' v 'K'* [2007] WASC 319 at paragraph [117].
[211] [2013] WASAT 175.
[212] See paragraphs [54] and [55].
[213] See section 89 of the SAT Act.
[214] See *JHR* [2017] WASAT 154 at paragraph [75].
[215] See paragraph [56].
[216] See **[10.3]**.

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.[217] 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.[218]

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.

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*,[219] 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.[220] SAT agreed.[221]

Things could have been different if the administrators hadn't acted appropriately or hadn't needed a lawyer.

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[217] For more on that type of trust, see Chapter 13.
[218] No written reasons were given (or sought) for that decision. There may have been other decisions on this.
[219] [2016] WASAT 86.
[220] See paragraph [48].
[221] 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.

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.[222]

Cost recovery by a legal representative appointed by the administrator

If this situation[223] 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.[224] Presumably, SAT would pay the rest.

Cost recovery by a litigation guardian

When SAT appoints a litigation guardian, it can make orders concerning the costs of that litigation guardian.[225]

[5.6] Can SAT apply for Legal Aid?

A little known and little used provision of the GA Act says:[226]

> "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

[222] 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.
[223] Discussed at **[5.2]**.
[224] See section 64(2) of the SAT Act.
[225] We need not get into cost recovery by the Public Trustee performing its PAS function.
[226] See clause 13(4) of Schedule 1, which has effect because of section 17.

> 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*,[227] but legal aid was refused.[228]

[227] [2006] WASAT 133.
[228] 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 restrictions, a **plenary guardian** has 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".[229]

The GA Act[230] specifically sets out some of those powers,[231] but they're not the only powers a plenary guardian has.

A limited guardian has whatever powers SAT gives them, but they can only be powers that a plenary guardian could have.[232]

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".[233] 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[234] makes an administration order, it can be **limited** or **plenary**.

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.

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."

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[229] See section 45(1) of the GA Act.
[230] GA Act means the *Guardianship and Administration Act 1990*. See section 71(3).
[231] See section 45(2) of the GA Act. They are set out at **[4.11]**.
[232] See section 46 of the GA Act.
[233] See section 64(1), now repealed.
[234] The State Administrative Tribunal.

> "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."

Part A of Schedule 2 of the GA Act is based on the old section 68(1) of the *Mental Health Act 1962*. But 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.

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;[235]
- using agents;[236] and
- seeking directions.[237]

At least in some cases, a plenary administrator could place the represented person's assets into superannuation.[238]

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[235] See section 69(2) of the GA Act.
[236] See section 76 of the GA Act. Section 50 of the *Public Trustee Act 1941* is also relevant when the Public Trustee is administrator.
[237] See Chapter 9.
[238] 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.

[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.[239]

[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 Office of State Revenue.

- 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.[240]

- The GA Act requires a guardian and an administrator to "act according to his opinion of the best interests of the represented person", though there are, in turn, some limits on that.[241]

- Neither a guardian nor an administrator can make a will on behalf of the represented person.[242] 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.[243] If a plenary guardian or plenary administrator considers that the

[239] 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.
[240] See Chapter 9.
[241] See Chapter 7.
[242] See sections 45(4) and 71(2a) of the GA Act.
[243] 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.

represented person lacks the capacity to make a will, they can apply to the Supreme Court for what is called a "statutory will".[244]

Limits on guardians

A guardian can't do the following on behalf of the represented person:[245]

- vote in any election;
- 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.

A guardian can't, on behalf of the represented person, plead guilty or not guilty in criminal proceedings.[246]

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.

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[244] 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. 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.

[245] See section 45(3) of the GA Act.

[246] 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. But 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.

- A guardian can't consent to a termination of a pregnancy. The law allows a termination to be performed in a number of circumstances. If "informed consent" is required, only the pregnant woman herself can give it.[247]

- A plenary guardian (or a limited guardian with enough power) can consent to medical treatment which isn't for the purpose of sterilisation, even if it results in sterilisation.[248] For instance, the guardian could consent to a hysterectomy if it's done to treat cancer. However, SAT's approval is needed if the purpose of the treatment is to make the person sterile.[249] Either way, it should be a last resort.[250]

Limits on administrators

- SAT's approval is needed before making various types of gifts.[251]

- An administrator can approve the represented person making a disposition or entering into a contract, etc, but normally needs the approval of SAT. There are exceptions to that.[252]

- 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.[253]

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[247] See *KS and CL* [2015] WASAT 9.
[248] See *JS and CS* [2009] WASAT 90 at paragraph [69].
[249] See *JS and CS* and sections 45(4A) and 56 to 63 of the GA Act.
[250] See *JS and CS* at paragraph [32].
[251] See section 72(3) of the GA Act. That said, in *FS* [2007] WASAT 202, SAT (including the then-President) appeared, with respect, to limit the sorts of transactions that fell within that provision 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]).
[252] See section 77 of the GA Act.
[253] 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, 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].

[6.5] Where is there more information on the powers of administrators?

The Public Trustee and Public Advocate have published the Private Administrators' Guide.

CHAPTER 7 – The "best interests" test for guardians and administrators

[7.1] What's the purpose of the GA Act?[254]

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.[255] 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:[256]

> "… 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.[257] 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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254 *Guardianship and Administration Act 1990*.

255 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.

256 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].

257 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.[258]

[7.2] To whom does the "best interests" test apply in the GA Act?

SAT[259]

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[260] 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.[261] 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

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[258] 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.

[259] The State Administrative Tribunal.

[260] *State Administrative Tribunal Act 2004*.

[261] 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).

circumstances of the case. That said, at least generally speaking, SAT needs to consider the rights of the other parties who appear before it.

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,[262] nor appoint an administrator if the person doesn't have a "mental disability".[263]

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;[264]
- whether to close a hearing to the public;[265]
- who to appoint as guardian;[266]
- whether to consent to a sterilisation;[267]
- who to appoint as administrator;[268]
- how to exercise its jurisdiction under Part 6, which deals with Estate Administration;[269] and
- what orders to make when reviewing, under Part 7, a guardianship or administration order.[270]

[262] See section 44(5).
[263] See section 64(1)(a) and *Public Trustee and KMH* [2008] WASAT 171.
[264] See section 16(4) and **[5.5]**.
[265] See section 17, and clause 11(2) of Schedule 1.
[266] See section 44(1)(a).
[267] See section 63(1).
[268] See section 68(1)(c).
[269] See section 71(5), which says, amongst other things, that SAT may take a liberal view of the best interests of the represented person.
[270] 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 shall act according to his 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 he 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 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 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.
>
> (3) Nothing in subsection (2)(a) shall be read as authorising a guardian to act contrary to the *Legal Profession Act 2008*."

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.[271] 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;
>
> (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.

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[271] 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."

(3) Nothing in subsection (2)(a) shall be read as authorising an administrator to act contrary to the *Legal Profession Act 2008*.

(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 mentioned in two other places in the GA Act.[272]

[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.[273]

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).[274]

[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?

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[272] 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".

[273] For more on directions to guardians and administrators, see Chapter 9.

[274] It isn't clear why not. The Parliamentary Debates to the *Guardianship and Administration Amendment Bill 1999* don't assist.

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".[275] The same would apply to section 51 and guardians. 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*,[276] 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,[277] which considered section 70 and indicated that a heavy onus rests on a person seeking review of a trustee's decision.[278] 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.[279]

The court analysed the Public Trustee's decision and found that the party challenging it had failed to establish that it was wrong.[280] 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".[281] It added that the GA Act "allows a large amount of latitude to both the administrator and the Tribunal in dealing with what they may see as the best interests of the represented person".[282]

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[275] 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* [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.

[276] [2008] WASAT 127.

[277] See *BMD v KWD* [2008] WASC 196.

[278] See paragraph [17] of the decision. For what is a trust, see Chapter 12.

[279] See also paragraphs [12] to [14].

[280] See paragraph [40].

[281] See *Perpetual Trustees WA Limited and The Public Trustee* (2009) 68 SR (WA) 128, [2009] WASAT 253 at paragraph [54].

[282] See paragraph [57]. SAT said that section 72(3) was a specific qualification on that.

Similar considerations would apply for guardians. In *TR and CJ*,[283] CJ's parents were her guardians. SAT found that they:[284]

- 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."[285]

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".[286] But it added that section 51 "provides guidance as to what is involved in the concept of acting in a person's best interests".[287]

SAT summed it up as follows:[288]

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[283] [2013] WASAT 119.
[284] See paragraph [47].
[285] See paragraph [46]. Some lettering has been omitted.
[286] See *VM* [2013] WASAT 154 at paragraph [62].
[287] See paragraph [63].
[288] See *EP and AM* (2006) 41 SR (WA) 176, [2006] WASAT 11 at paragraph [117].

> '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.[289] 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.

[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*,[290] when SAT said:[291]

> "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."

[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:[292]

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[289] See Chapter 9.
[290] [2005] WASAT 142.
[291] See paragraph [57].
[292] See *BMD v KWD* [2008] WASC 196 at paragraph [15].

> "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.

[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 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*[293] was the review of an administration order. The administrator was a retired accountant and old family friend and didn't charge for his services.[294] He didn't appear to have considered section 70(2),[295] but SAT still reappointed him, noting:[296]

> "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."

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[293] [2009] WASAT 250.
[294] See paragraph [18].
[295] See paragraph [23].
[296] See paragraph [31].

[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".

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".

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".

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".[297]

The same comments would apply to guardians.

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. Or they might have a fluctuating condition in which they are highly functioning and coherent for most of the time. 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 frequently, and may depend on who they're with at the time. They may really be someone else's wishes.

- 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

[297] See *The Public Trustee v Baker* [2014] WASCA 23 at paragraph [30].

increasingly obvious that he's very much in love.[298] 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.

  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 of SAB and NRDC.[299] 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".[300] 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.[301] In practice, some decisions need the co-operation of the represented person. A plenary guardian could consent to a person having physiotherapy treatment, but it may be futile if the person refuses to do the recommended exercises. A guardian's powers don't extend to levitation.

[7.10] What's the difference between determining wishes and placing weight on them?

[298] For those who've never heard of it, the song is also called "I'm Not in Love".
[299] [2010] WASAT 130.
[300] See paragraph [29].
[301] See sections 50 and 79 of the GA Act.

In 'G' v 'K',[302] the Supreme Court said, with respect to a guardianship hearing:

- The first obligation of SAT is to ascertain the views and wishes of the person concerned if it's possible to do so. If they can be ascertained, a separate issue arises as to how much weight should be put on them.[303]

- 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.[304]

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 is not a hypothetical academic proposition. It happens. SAT doesn't have to follow the wishes of such a person.

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?

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.

A will explains what's to happen after death. For the following reasons, it could also be useful to SAT or an administrator during the person's life:

1. It *might* show how special or important someone is to the represented person.[305] 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.

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

[302] [2007] WASC 319.
[303] See paragraphs [84] and [155].
[304] See paragraph [85].
[305] This could also be of use to a guardian.

obvious retort can be: "But he's not dead and he needs it now."[306] 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.[307]

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.[308]

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.

That all said:

1. A will only takes effect on death.

2. It may not be valid, particularly if it was executed at a time when the represented person was mentally impaired.

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[306] 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.

[307] This involves a doctrine called "ademption". For a discussion, see *JEB* [2016] WASAT 65 at paragraphs [32] to [53]. An administrator can apply to SAT under section 72(1) and paragraph (e) of Part B of Schedule 2 of the GA Act. Pursuant to paragraph (f), when deciding whether to make such orders, SAT has the power to see the will.

[308] See *JEB* [2016] WASAT 65 at paragraphs [91] to [92].

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.[309] 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."[310] 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.

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.

[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?

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[309] See sections 14 and 14A and Part XI of the *Wills Act 1970*.

[310] 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.

- 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.[311]
- 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.
- 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."
- In at least some cases, there may be an overriding duty to protect the public. The Hon Peter Blaxell said in a Special Inquiry:[312]

[311] See, for instance, *TR and CJ* [2013] WASAT 119 at paragraph [34].

[312] 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.*

> "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,[313] about 52,000 experienced recurring mental illness which significantly affected their quality of life,[314] and about 59,000 had acquired brain injuries.[315] 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.

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?[316]

No.

- SAT has to look at the person's actual circumstances. If she actually only has $5,000, can manage that well enough, and is unlikely to get much more in the near future, SAT can't make an administration order because she can make reasonable judgments with respect to her estate.[317]

- If she does have $5,000, and has difficulty managing that, but can do so with the help of supportive friends or family, SAT can't make an administration order because there's a less restrictive alternative.[318]

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[313] Source: Dementia Australia WA.
[314] It's around 2% of the population. Source: Mental Health Commission.
[315] It's around 2.3% of the population. Source: Headwest.
[316] It's assumed that there's no other need for an order, such as a possible claim for damages.
[317] See **[4.10]**.
[318] See **[4.10]**

- 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.[319]

- 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.

- 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.[320]

- Administrators are required, at times, to try to work out the wishes of the represented person, although they're not bound by those wishes.[321]

There are other concepts, such as enduring powers of attorney,[322] which have some aspects of both substituted and supported-decision making. There are different types of trusts,[323] 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 for 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.

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[319] See **[4.15]**.
[320] See sections 4(7) and 68(3)(b) of the GA Act and **[7.9]** to **[7.12]**.
[321] See section 70(2)(e) of the GA Act and **[7.9]** to **[7.12]**.
[322] Covered briefly in Chapter 8.
[323] See, for instance, Chapter 13 and Chapter 14.

CHAPTER 8 – Administration orders vs enduring powers of attorney

[8.1] What's an administrator under the GA Act?

See Chapter 4 to Chapter 7.

[8.2] What's an enduring power of attorney?

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.[324]

A valid enduring power of attorney (EPA) is made when the donor is an adult with "full legal capacity".[325]

Usually, it 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 SAT[326] declares that the donor is legally incapable. This is a "dormant EPA".[327]

The donor can appoint:[328]

- a sole donee (or attorney): a single person or organisation;
- joint donees, who must act together and agree on all decisions that are made; or
- joint and several donees, who can make decisions together and/or independently.

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[324] *Guardianship and Administration Act 1990*.
[325] See section 104(1a) of the GA Act.
[326] The State Administrative Tribunal.
[327] See sections 104 to 106 of the GA Act.
[328] See the definition of "donee" in section 102 of the GA Act, plus Form 1 of Schedule 3 of that Act.

There can be substitute donees, which are not discussed here.[329]

The Office of the Public Advocate's website (www.publicadvocate.wa.gov.au) has more detailed publications about enduring powers of attorney.

[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.

[329] See section 104B of the GA Act.

	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 and administrators

[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 do it? If they ask you for guidance, do you give it, or tell them to work it out for themselves?

SAT[330] 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[331] are relevant?[332]

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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[330] The State Administrative Tribunal.

[331] *Guardianship and Administration Act 1990*.

[332] 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".[333]

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. **Section 43(3)** says the same for guardianship orders.

In *AM*,[334] 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.[335]

In *TR and CJ*,[336] 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.

[333] See paragraph (b).
[334] [2015] WASAT 87.
[335] See paragraphs [196] and [200].
[336] [2013] WASAT 119, discussed at **[7.5]**.

[9.3] Are any provisions of the SAT Act relevant?

Section 73(1) of the SAT Act[337] 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.[338]

[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.[339] Here, it seems clear that SAT doesn't have to give directions, even when asked.

In *Perpetual Trustees WA Limited and The Public Trustee*,[340] 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:[341]

> "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

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[337] *State Administrative Tribunal Act 2004*.

[338] 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).

[339] See **[2.3]**.

[340] (2009) 68 SR (WA) 128, [2009] WASAT 253.

[341] See paragraphs [109] and [110].

> 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 Administrators' Guide published by the Public Trustee and Public Advocate.

In *FC and Public Trustee*,[342] the Public Trustee applied for directions about spending a represented person's money. SAT said:[343]

> "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.

[342] [2006] WASAT 133.
[343] See paragraph [81].

[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:[344]

> "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 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* [345] is also relevant here, even though the legislation isn't exactly the same.

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.[346]

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*,[347] 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.

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[344] See paragraph [111].
[345] [2011] TASSC 31.
[346] See paragraph [44].
[347] [2017] WASAT 65.

Amongst other things, SAT said that the law firm could sue for recovery of the alleged debt,[348] and that SAT "should be cautious in directing an administrator in the ordinary conduct of the management of a represented person's estate".[349]

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.[350]

SAT also said:[351]

> "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)."

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.

In the case of *NJH*,[352] 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".

[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.

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[348] See paragraph [112].
[349] See paragraph [116]. SAT quoted from *Public Guardian v Guardianship and Administration Board* [2011] TASSC 31.
[350] See paragraphs [117] to [120].
[351] See paragraph [121].
[352] [2018] WASAT 62.

For instance, in *Re Estate of Vitalina Ferrari; ex parte The Public Trustee as Plenary Administrator of the Estate of Vitalina Ferrari*,[353] 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.

Guardians and other administrators might, in theory at least, be able to ask the Supreme Court for directions under its *parens patriae* jurisdiction.[354] The extent to which the court would be prepared to give such directions is unclear.

[353] [1999] WASC 50.

[354] The *parens patriae* jurisdiction is explained at **[1.1]**.

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 in the Supreme and District Courts of WA.[355]

[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,[356] 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.[357] 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.[358]

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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[355] 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.

[356] See **[1.1]**.

[357] 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.

[358] 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.[359] And again, the RSC apply, with some variations, to civil proceedings in the District Court.[360]

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.

[10.2] Who is a "person under disability"?

A "person under disability" is: [361]

- under 18 years of age;
- subject to a guardianship and/or administration order under the GA Act;[362] 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".[363]

[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

[359] 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.

[360] See rule 6 of the *District Court Rules 2005*.

[361] 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.

[362] *Guardianship and Administration Act 1990*.

[363] For an example of where the Supreme Court made such a declaration, see *Donaldson v Nolan [No 5]* [2017] WASC 44 at paragraph [8].

whether the person does have capacity. If this doesn't happen, the proceedings could be set aside as being irregular.[364] Normally, if a client loses capacity, the solicitor no longer has authority to act.[365]

The District Court has a practice direction that normally requires an application to be made to SAT[366] for a guardianship or administration order.[367] 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. Either way, the court could ask the Public Advocate to investigate capacity.[368]

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:[369]

- 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".[370]

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[364] See *Allregal Enterprises Pty Ltd v Carpaolo Nominees Pty Ltd* [2009] WASCA 33 at paragraph [8].
[365] See *Yonge v Toynbee* [1910] 1 KB 215, cited in the Commentary on Order 70 of the RSC in *Civil Procedure Western Australia*.
[366] The State Administrative Tribunal.
[367] See paragraph 12.2.2 of the District Court's *Consolidated Practice Directions & Circulars to Practitioners Civil Jurisdiction*.
[368] See section 97(1)(c) of the GA Act.
[369] 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)).
[370] 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*?

The short answer is generally yes, because Order 70 rule 2(1) requires it.[371]

However, Order 1 rule 3A of the RSC says that the inherent power of the court to control the conduct of a proceeding is not affected by those rules.

In the case of *S v State Administrative Tribunal of Western Australia [No 2]*,[372] 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 disability". Justice EM Heenan applied Order 1 rule 3A, and found that she didn't need a next friend when appealing against the decision that had made her a "person under disability".[373]

His Honour also said that rules of court cannot amend or modify the operation of laws enacted by Parliament.[374] 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.[375]

[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.[376]

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[371] See *Farrell v Allregal Enterprises Pty Ltd [No 3]* [2011] WASCA 247 at paragraph [7].
[372] [2012] WASC 306.
[373] 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.
[374] 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].
[375] See paragraph [46].
[376] See Order 70 rules 3 and 4 of the RSC.

[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.[377]

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.[378] 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.[379]

If proceedings are already on foot when the Public Trustee is appointed administrator, it may also be necessary, or at least highly desirable, for the court formally to make an order appointing the Public Trustee as next friend or guardian *ad litem*.[380]

[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.

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[377] See Order 70 rules 3(4) and 4(3)(a).

[378] See **[10.5]**.

[379] We won't cover what happens if this situation arises in a probate action. If it arises in any other case, Order 70 rule 3(3) should prevail over Order 70 rule 3(4).

[380] There is a question as to how Order 70 rule 3(4) interacts with Order 70 rules 3(5) and (6). We won't discuss how Order 70 rule 4, which applies to probate actions, operates in this situation.

[10.10] Can the "person under disability" make the application for removal?

Yes, at least in some cases.[381]

That said, 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.

[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. This includes an acceptance of an offer to consent to judgment. That rule is designed "to ensure that the settlement is fair and reasonable".[382]

[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,[383] 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.

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[381] 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.
[382] See *Trout v Minister for Health* [2012] WADC 172, although in that case, for technical reasons, the application was treated as being under Order 70 rule 11.
[383] *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*.

[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"[384] 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.

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.[385]

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[384] See **[2.3]**.

[385] For how SAT appoints administrators, see Chapter 4 and Chapter 5.

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 conduct. 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?

- 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.[386]

[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?

[386] See Chapter 9.

Counsel's opinion is needed unless the court dispenses with it. 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.

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 lawyer", unless the single judge orders otherwise.[387]

In *Farrell v Allregal Enterprises Pty Ltd [No 3]*,[388] the court said what was meant by an "independent lawyer", 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.[389] Although the rule isn't exactly the same, this case is clearly relevant to Order 70 rule 10 (and rule 11) of the RSC.

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.

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[387] See rule 60(4) of the *Supreme Court (Court of Appeal) Rules 2005*.
[388] [2011] WASCA 247.
[389] See paragraphs [17] to [19].

[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".

[10.17] What should the court consider when deciding whether or not to approve a compromise?

The general principles are:[390]

- 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

[390] 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].

given".[391] 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".[392] 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.[393]

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".[394]

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.[395] 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.

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.

[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.

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[391] 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].
[392] See *McLean v James Plummer as Executor of the Estate of Robert William McLean* [2018] WASC 26 at paragraph [13].
[393] See *McLean* at paragraph [16].
[394] 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].
[395] See **[11.8]**.

- 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.[396] That said, the person's wishes may still be relevant.

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.[397] That test is also a useful guide when the court has declared the person to be under disability.

[10.21] What about confidentiality clauses?

[396] See *Donaldson v Nolan [No 5]* [2017] WASC 44 at paragraph [10].

[397] 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]**.

When settling claims, it's often standard to include 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.[398] It may be worth querying whether a confidentiality clause is needed at all.

[10.22] What practice direction applies in an application to approve a compromise?

Practice Direction 4.2.2 of the Supreme Court's *Consolidated Practice Directions*. It also applies in the District Court.[399]

[10.23] Can a "person under disability" try to stop the court approving a compromise?

A "person under disability" may be highly functioning and not at all 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]*,[400] although the court still gave its approval.[401]

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[398] 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.
[399] See paragraph 4.1.1(c) of the District Court's *Consolidated Practice Directions & Circulars to Practitioners Civil Jurisdiction*.
[400] [2017] WASC 44.
[401] See paragraphs [23] to [30].

In *Farrell v Allregal Enterprises Pty Ltd [No 3]*,[402] the Court of Appeal allowed a guardian to get a copy of counsel's opinion and make submissions.[403] 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. See *Donnellan v The Public Trustee [No 2]*.[404] The merits of such an action are not discussed here.

[10.25] How are costs different?

See **[13.11]**.

[402] [2011] WASCA 247.
[403] See at paragraph [13].
[404] [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,[405] regularly deals with the alleged misuse of the assets of a person with a mental disability, often after a direction from SAT.[406] 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 needn't 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 and pocket large sums of money.

In other cases, the person may sign away or mortgage a house when they don't know what they're doing or are put under pressure. Or their signature may be 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.

Sadly, there are other ways.

[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?

[405] *Guardianship and Administration Act 1990*.

[406] The State Administrative Tribunal.

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,[407] but asking people isn't always enough. It might, for instance:

- obtain SAT's reasons for decision to appoint it as administrator;[408]
- 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 all records and accounts kept by the donee of dealings and transactions made by the donee in connection with the power, and requiring such records to be audited;[409]
- apply to SAT for a party to SAT proceedings to produce documents or other material, or to provide information;[410]
- apply to SAT to an order for the production by third parties of documents or other material to SAT or to a party to SAT proceedings;[411]
- apply for discovery in the Supreme Court;[412]
- issue a subpoena in the Supreme Court;[413]

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[407] See section 55(2) of the *Public Trustee Act 1941*.
[408] See sections 74 to 79 of the SAT Act.
[409] See section 109(1) of the GA Act and the case of *KS [No 2]* [2008] WASAT 29.
[410] See sections 34(5) and 66(1)(b) of the SAT Act.
[411] See *Public Trustee and BG* [2010] WASAT 195 at paragraph [22], and section 35 of the SAT Act.
[412] See Orders 26 and 26A of the *Rules of the Supreme Court 1971* (RSC).
[413] See Order 36B of the RSC.

- summons a person to appear before the Public Trustee to answer questions about property to which the Public Trustee may be entitled;[414]
- summons a person to appear before the Supreme Court to answer questions about that property, and to produce documents;[415]
- 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;[416]
- apply to SAT for an injunction;[417]
- seek, from a party, an undertaking in SAT to preserve the assets;[418]
- apply for an interlocutory injunction in the Supreme Court;[419]

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[414] See section 55(2) of the *Public Trustee Act 1941*.
[415] See section 55(3) of the *Public Trustee Act 1941*.
[416] See section 137 of the *Transfer of Land Act 1893* and the discussion at **[11.6]**.
[417] See *Public Trustee and BG* [2010] WASAT 195, section 72(1) and paragraph (e) of Part B of Schedule 2 of the GA Act, and section 90 of the SAT Act.
[418] 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 could report that to the Supreme Court. The Supreme Court could punish the person as though it were a contempt of court (see section 100 of the SAT Act).
[419] See Order 52 of the RSC.

- apply for a freezing order in the Supreme Court;[420] 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.[421] 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).

Lodging a caveat can lead to proceedings in the Supreme Court about whether or not to remove it.[422] The Supreme Court might insist that a condition of extending and/or not removing the caveat is that the person or organisation who 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, thus expanding the fight to other fronts. The threat of losing a home may "up" the stakes and damage the prospect of an amicable settlement.

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[420] See Order 52A of the RSC. This was previously known as a Mareva order or Mareva injunction.

[421] See section 139 of the *Transfer of Land Act 1893*.

[422] 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.

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".[423] 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, for instance, 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*;[424]
- apply to the Supreme Court for an order requiring a person to deliver, convey, transfer or assign property;[425]
- take proceedings in the Supreme Court to set aside a transaction on the grounds of lack of capacity, undue influence and/or unconscionable conduct;
- 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;[426]
- take proceedings in SAT 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;[427]

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[423] 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.

[424] The Supreme Court of WA has interpreted this section narrowly (see *Collins by her next friend The Public Trustee v Price* [1996] Library 960747).

[425] See section 55(4) of the *Public Trustee Act 1941*.

[426] 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].

[427] See section 82 of the GA Act. It 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) 73 SR (WA) 200, [2010] WASAT 138.

- recover money or property in court, that is the subject of an attempted dealing by a represented person;[428]
- issue a certificate of loss against an administrator and enforce it in court as a debt;[429]
- 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;[430]
- seek compensation for a person deprived of land, either in court or by applying to Landgate;[431]
- apply to the Supreme Court to remove a trustee;[432]
- apply for orders in the Family Court of WA; and/or
- take proceedings in the Magistrates Court for possession of real property and profits.[433]

[428] See sections 77(1) and (2) of the GA Act.
[429] See section 80 of the GA Act.
[430] See sections 39(7) and 40(7) and Part 16 of the *Sentencing Act 1995*.
[431] See Part XII of the *Transfer of Land Act 1893*.
[432] 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.
[433] See *The Public Trustee v Baker* [2014] WASCA 23.

[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.

2. ***What admissible evidence is there in support of the claim?***

In WA, lawyers are ethically bound not to draw or settle any court document that alleges serious misconduct by someone when, amongst other things, there's no proper basis for the allegation and no admissible evidence in support of it.[434]

The onus of proof in recovery proceedings can vary, but for the large part, it's on the party making the claim. Depending on the transaction, the represented person may in some cases have to overcome what's called the presumption of advancement.

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 happy 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.

[434] See rule 36(3) of the *Legal Profession Conduct Rules 2010*.

The fact that a person holds a particular position, or has a particular profession, does not guarantee honest, accurate evidence. During the Profumo scandal,[435] a member of the House of Commons said:[436]

> "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."

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

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[435] John Profumo was the United Kingdom's Secretary of State for War. He was accused of an affair with a Christine Keeler, while she was also having an affair with a Russian naval attaché. This was during the Cold War. Mr Profumo initially denied the allegation, but it turned out to be true.

[436] The member was called Nigel Birch. See *The Penguin Book of Twentieth-Century Speeches*, edited by Brian MacArthur, 1992, 1993.

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.

Up to a point, there are 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. And there's the very real possibility of paying the other side's costs if the proceedings fail.

6. ***What view does Centrelink take of the transaction?***

Social security law has deeming provisions which can apply when a person gives away an asset. Centrelink might deem 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.[437] 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 aren't as rare as they once were.

Nonetheless, if the represented person has been diagnosed with a terminal illness and only is expected to live a few months, recovery proceedings might not achieve anything for that person and for that reason alone may not be worthwhile. 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. Justice nowadays tends to take longer.

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 still 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

[437] 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.

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 enough, it seems, to have made it 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 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.[438]

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. That 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.

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?

[438] See, for instance, *The Public Trustee v Baker* [2014] WASCA 23.

If the alleged misuse is said to have happened when the person was mentally capable, what did the person do about it afterwards? There is "a suggestion that, even if the donee [of a power of attorney] 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".[439]

Even if a power of attorney isn't involved, it's fair to say that all other things being equal, the longer the person had the chance to do something about the problem, and didn't, the harder it is for someone else to do something about it later.

[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.

[439] 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:[440]

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[441] the same as a trustee?

Not quite.

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[440] 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*.

[441] GA Act means the *Guardianship and Administration Act 1990*. For what is a plenary administrator under the GA Act, see Chapter 4 to Chapter 9.

The assets of a represented person don't vest in an administrator.[442] 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;[443] a trustee owes obligations to the beneficiaries.

[12.3] What laws govern trusts in WA?

WA has the *Trustees Act 1962*, but it isn't a code. It doesn't set out all the relevant law. Some of its provisions can be overridden.[444] Much of the law of trusts comes from the general law, based on judge-made precedent. The *Trustees Act 1962* isn't even the only Act that deals with trusts in WA. The *Public Trustee Act 1941*, for instance, contains several provisions that can apply when the Public Trustee is trustee.

[442] See section 69(4) of the GA Act.
[443] See, for instance, Chapter 7.
[444] 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.[445]

[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.[446] Instead, under its *parens patriae* jurisdiction, and applying the RSC,[447] 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*,[448] 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.[449]

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[445] 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]**.

[446] In this chapter, "injured claimant" includes a person who has a claim under the *Fatal Accidents Act 1959*.

[447] 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.

[448] [2003] WASC 72.

[449] 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.[450]

- 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."[451]

- 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.[452]

- The only justification for having such a trust is the protection of the person as a result of their own incapacity.[453]

- 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".[454]

It's also clear that the Supreme Court has powers to supervise a trust established by either that court or the District Court.

[450] See paragraphs [43] and [48] of that decision and **[13.7]**.
[451] See paragraph [44] of that decision. Powers to make advances are discussed at **[13.12]**.
[452] See paragraph [44].
[453] See paragraph [45]. There is, with respect, some judicial disagreement on the possible extent of this (see **[13.17]**).
[454] 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,[455] but with respect, there may be scope to re-visit that.[456] 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.[457] 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".[458]

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[455] See *Taylor v Walawski* [1991] Library 8992.

[456] 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.

[457] 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.

[458] See *Morris v Zanki* (1997) 18 WAR 260 at page 286, [1997] Library 970374 at pages 42 to 43.

Two significant considerations may be the wishes of the injured claimant's family and the fees, but neither are conclusive.

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.[459] 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,[460] order that the money be paid to an individual as administrator. That said, it might not happen often.

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.[461] In some cases, this can result in very large tax savings.

There is a contributions cap, but it can be exceeded in some circumstances.[462] A court trustee only has 90 days, usually from payment of the award. Medical evidence needs to be obtained.

An administration order from SAT[463] could also be needed.[464] The exact extent of such orders may depend on whether there's any other need for an administrator.

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[459] See *Morris v Zanki* (1997) 18 WAR 260 at page 293, [1997] Library 970374 at page 55.

[460] *Guardianship and Administration Act 1990*.

[461] 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.

[462] The test, which is not the simplest, is not discussed here.

[463] The State Administrative Tribunal.

[464] 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.

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 could 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.[465]

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.

[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 maintenance, welfare, advancement or otherwise for the benefit of the person under the disability".[466]

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.*

[465] 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.
[466] 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.

If the injured claimant is under 18, but has a mental impairment that should stop them getting the money when they turn 18:[467]

> *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 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 and/or Medicare. They also assume that the injured claimant is the sole plaintiff, and that the terms of the compromise are set out in the court orders, rather than in a deed that the court approves.

To give the Public Trustee flexibility with investment decisions, the order should state that "such investment" is "not limited to the Common Account".[468]

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[467] 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]**).

[468] 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

[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".

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.[469] There could be a moral obligation to do so.[470]

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.[471] In practice, though, the District Court generally doesn't make orders on this and leaves it up to the trustee.

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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*.

[469] See the High Court case of *Kars v Kars* (1996) 187 CLR 354 at page 372, [1996] HCA 37.

[470] See *Cadwallender v Public Trustee* [2003] WASC 72 at paragraphs [43] and [48].

[471] 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.

[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.[472]

[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.[473]

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."

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[472] 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.

[473] 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.

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[474] described the task of the court in determining the costs of future fund management as "impossibly artificial".[475] 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.[476] If the eventual cost turns out to be more than what was allowed, the defendant doesn't have to top up the amount at a later date. If the eventual cost turns out to be less than what was allowed, the balance doesn't have to be paid back to the defendant. This is an example of the operation of the "once-and-for-all" principle that governs lump sum personal injuries awards.

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.[477]

What if there's a cheaper alternative to the organisation the court appoints? In *Morris v Zanki*,[478] 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".[479] The Public Trustee's fee estimate therefore formed the

[474] His Honour at the time was President of the New South Wales Court of Appeal, but went on to be a High Court justice.
[475] See *GIO v Rosniak* (1992) 27 NSWLR 665 at page 676.
[476] The words "generally speaking" are used here because an order may set out something different.
[477] 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.
[478] (1997) 18 WAR 260, [1997] Library 970374.
[479] See page 295. We don't go here into what might happen if the Public Trustee is appointed over another suitable but cheaper organisation.

basis of the damages component for fund management. That didn't stop National Australia Trustees charging its fees.[480]

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?[481]

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**.
- 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 a bill, and a court officer assesses them.

[480] 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]).
[481] For a discussion on the payment of costs of related proceedings in SAT, see **[5.5]**.

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.[482]

This rule doesn't apply in any of the following circumstances:[483]

- 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 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.

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[482] 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]*.

[483] 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 *Legal Profession Act 2008* may provide a further exception. We won't go into arguments about how Order 66 rule 24 may apply to barristers' fees. There is 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.

[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,[484] 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.[485]

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.[486]

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).

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.[487] The exact extent of

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[484] For example: "The Public Trustee shall not make any advances while the plaintiff is living with his mother."

[485] For an example, see *Re Hoang Minh Le; ex parte The Public Trustee* [2012] WASC 31.

[486] We don't go here into whether it gives any powers if the injured claimant is over 18.

[487] 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).

those powers may be subject to some debate,[488] 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.[489] The word "maintenance" includes the following:[490]
    - 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.

- **Education** of the injured claimant or their children.[491]

- Paying the **debts** of the injured claimant.[492]

[488] The extent, for instance, of section 49(1)(r) is not discussed here.
[489] See section 49(1)(n).
[490] The meaning of "maintenance" was discussed in *Public Trustee v Larkman* (1999) 21 WAR 295, [1999] WASCA 93 at paragraphs [30] and [34].
[491] See sections 49(1)(n) and 49(1)(na).
[492] See section 49(1)(g).

- **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.[493]

- 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.[494]

- **Funeral expenses** of the injured claimant.[495]

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.[496]

[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.

- *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[497] responded: "People don't eat in the long run. They eat every day."

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[493] See section 49(1)(p).
[494] See section 49(1)(q).
[495] See section 49(1)(n).
[496] This happened in *Re Hoang Minh Le; ex parte The Public Trustee* [2012] WASC 31.
[497] Harry Hopkins.

- *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.[498]

Most personal injuries cases in the District Court don't go to trial, but are compromised.[499] 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 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.[500] 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.[501]

[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*.[502] 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*.

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[498] See Chapter 7.
[499] For that process, see Chapter 10.
[500] See section 72(3) and **[6.4]**.
[501] See **[13.7]**.
[502] 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

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*[503] and *Perpetual Trustee Company Ltd v Cheyne*.[504]

[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.[505]

[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.[506]
- 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

393 and *Australian Executor Trustees Ltd (as Administrator of the Estate of Reece William Hodder) v Hodder* [2018] WASC 48.

[503] [2003] WASC 72. See in particular paragraph [50].

[504] (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.

[505] For an explanation of Part 7 of the GA Act, see **[4.25]**.

[506] 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.

reason was that the claimant was under 18, the trustee doesn't need to go to court for an order terminating the trust.[507]

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.[508]
- 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. 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.[509] It raises the question: when, in the name of protection, can the State limit the freedom of adults to make their own decisions?[510] If the Supreme Court 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.[511]

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[507] 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.

[508] See *Cadwallender v Public Trustee* [2003] WASC 72 at paragraph [44].

[509] 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.

[510] 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 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.

[511] 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. The Public Trustee is not aware of any recent challenge to the District Court's power to do this.

[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 provide an affidavit, and also get medical evidence of capacity.[512] 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:[513]

- 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."

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.*

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[512] The phrase "medical evidence" is used here in its broadest sense. It could include, for instance, evidence from a psychologist.

[513] 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.

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 would need 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.[514]

If SAT revokes an administration order, that *might* assist the Supreme or District Court in determining whether or not the claimant has regained their mental capacity, but not necessarily. For instance, there may no longer be a need for an administrator, or the claimant can manage small amounts of money, but not the large amount that's in trust.[515]

[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

[514] 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.

[515] For the requirements for an administration order, see **[4.10]**.

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*.[516]

[516] [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*.[517] 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:[518]

> *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.*

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[517] [2006] NTSC 28 at paragraphs [49] to [50].

[518] 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 and/or Medicare. They also assume that the injured claimant is the sole plaintiff, and that the terms of the 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.[519]

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 the compromise aren't in a deed. But these are at least a good start:[520]

> *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.

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[519] See rule 77 of the *Magistrates Court (Civil Proceedings) Rules 2005*.

[520] 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*.[521] 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.[522]

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.[523]

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.

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[521] 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).

[522] See *SJB* [2012] WACIC 17.

[523] 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?

To administer a deceased estate, 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);
- 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.[524]

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.[525]

For example, the Public Trustee was the executor of the will of a Sally Greenham, who disappeared in 1987. A police investigation in 1992 failed to find any trace of her, but gave rise to the suspicion that her husband had killed her. During the course of the investigation, the husband committed suicide, so was never charged with anything. In 1995, the Supreme Court gave the Public Trustee leave to swear to her death. The Public Trustee was able to obtain a grant of probate.[526]

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[524] GA Act means the *Guardianship and Administration Act 1990*. Administrators under the GA Act are covered in Chapter 4 to Chapter 9 of this book.

[525] For the procedure for this, see rule 34 of the *Non-contentious Probate Rules 1967*.

[526] See *The Public Trustee as the Executor of the Wills of Sally Beatrix Greenham, deceased and Jeffery Greenham, deceased v The Royal Society for the Prevention of Cruelty to Animals (Inc) & Ors* [1996] Library 960645. That judgment was not specifically about granting leave to swear death, but mentioned it in passing at page 4.

[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".

[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.[527]

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.[528]

4. The Public Trustee is subject to the *Freedom of Information Act 1992*.

5. The Public Trustee is subject to Ministerial supervision. 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.[529]

6. The Public Trustee enters into an annual agreement with its Minister.[530]

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.[531]

8. The Public Trustee has a Common Account, into which some of the moneys of its trusts, estates and clients is invested.[532] The Common Account is government guaranteed.[533]

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[527] See section 48 of the *Public Trustee Act 1941*.
[528] See section 47(2) of the *Public Trustee Act 1941*.
[529] See section 46 of the *Public Trustee Act 1941*.
[530] See section 6B of the *Public Trustee Act 1941*.
[531] See, for instance, sections 38A and 38B of the *Public Trustee Act 1941*.
[532] See section 39A of the *Public Trustee Act 1941*.
[533] 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).[534] The Treasurer can (and does) set investment guidelines for the Common Account and PTIFs.[535]

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.[536]

11. Some of the Public Trustee's decisions are reviewable by the Ombudsman, who can make recommendations and report to Parliament.[537]

12. The Public Trustee has internal checks and balances 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.[538]

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,[539] SAT[540] reviews the administration order periodically.[541] It can give the Public Trustee directions.[542]

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[534] These are referred to in the *Public Trustee Act 1941* as "strategic common accounts". See section 39B.
[535] See sections 39D and 47B of the *Public Trustee Act 1941*.
[536] See section 40 of the *Public Trustee Act 1941*.
[537] See the *Parliamentary Commissioner Act 1971*.
[538] See the *Corruption, Crime and Misconduct Act 2003*.
[539] *Guardianship and Administration Act 1990*.
[540] The State Administrative Tribunal.
[541] See **[4.25]**.
[542] See Chapter 9.

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