

Probate & Administration - Personal Representatives and Grants

Legal Personal Representatives - Terminology

- Legal personal representative (“LPR”) is an umbrella term, meaning an executor or an administrator
- An LPR has a fiduciary role, and must act in the best interests of the beneficiaries
- Legislation
 - *The Administration and Probate Act 1958 (Vic) (AP Act)* gives the Supreme Court jurisdiction to grant probate or administration and deal with deceased estate matters
 - *s 12 AP Act* authorises the Registrar of Probates to make grants in uncontroversial matters

LPRs - Overview

- Executor(s):
 - A Will usually appoints an executor, who administers the estate of the Will maker, including implementing the the terms of the Will
 - Will should clearly identify persons appointed to act as executor
 - *In the Goods of Baylis*
 - Usual situation: the Will nominates an executor(s) and they apply for a grant of probate (‘proving the Will’)
 - 85% of applications for a grant in 2022/2023 and 2023/2024
- Administrator(s):
 - if the deceased has a Will but:
 - there is no executor appointed OR
 - if the appointed executor cannot act,

- then the beneficiaries (as the persons interested in the deceased's estate) apply for a grant of 'letters of administration with the Will annexed' – in this situation the LPR is called the 'administrator'
 - 2% of applications for a grant in 2022/2023 and 2023/2024
- Administrator(s):
 - If the deceased died without a Will ('intestate'), then the major beneficiary (as the person with the largest interest in the deceased's estate) applies for a grant of 'letters of administration'
 - in this situation the LPR is called the 'administrator'
 - 11% of applications in 2022/2023 and 2023/2024

Appointment of Executors

- Will should clearly identify the person(s) appointed as the executor(s)
- *In the Goods of Baylis (1865) LR 1*: appointment of 'any two of my sons' was not specific enough and was void for uncertainty codicils should state clearly whether any newly appointed executor is appointed in addition to, or as a replacement for, the original executor(s) appointed in the Will where there is a 'latent ambiguity', the court may admit evidence as to the Will maker's intention

Medical treatment decision maker

- Recording wishes about medical treatment
- a person can make an advance care directive (ACD) which sets out binding instructions or preferences regarding medical treatment e.g. if my kidneys fail then
- an advance care directive may contain either or both of:

- an instructional directive: an express statement about medical treatment that you consent to or refuse the commencement or continuation of; or
 - a values directive: a statement about your preferences and values to be used as the basis upon which any medical treatment decisions are to be made
 - an advance care directive has specific witnessing requirements:
 - one of the witnesses must be a registered medical practitioner
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- in relation to powers of attorney VCAT can:
 - suspend, cancel or vary the appointment of an enduring power of attorney
 - decide if an appointment is valid
 - determine the liability of attorneys
 - resolve disputes between attorneys
 - order compensation for loss caused by an attorney who does not comply with their duties
 - decide whether a transaction by the attorney is valid
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- in relation to appointments of medical treatment decision makers VCAT can:
 - decide the validity of an advance care directive
 - review a medical treatment decision
 - review the appointment of a medical treatment decision maker
 - provide advice or direction to a medical treatment decision maker or health practitioner about an advance care directive or someone's medical treatment
 - review a decision about a medical research procedure
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- What happens if a person loses decision making capacity and has not appointed an attorney before losing capacity?
- VCAT has jurisdiction to appoint someone to make decisions on behalf of the person who has lost capacity ('represented person'): the Guardianship and Administration Act 2019 (Vic) ('GA Act') is the governing legislation
- two types of orders are made by VCAT in this situation:
 - an administration order appoints an administrator(s) to make decisions about financial and legal affairs of a represented person [aligns with a principal appointing an attorney for financial matters]
 - a guardianship order appoints a guardian(s) to make decisions about lifestyle issues for a represented person [aligns with a principal appointing an attorney for personal matters]

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- What happens if a person loses decision making capacity and has not appointed an attorney before losing capacity? – continued
 - VCAT will only appoint an administrator or guardian if satisfied that the represented person does not have decision making capacity
 - the administrator or guardian appointed by VCAT may not be the person(s) who the represented person would have chosen to appoint if the represented person had capacity
 - where VCAT appoints an administrator, the administrator must submit an annual 'Account by Administrator' (ABA) that is reviewed by a contractor engaged by VCAT