

Guardianship and Administration

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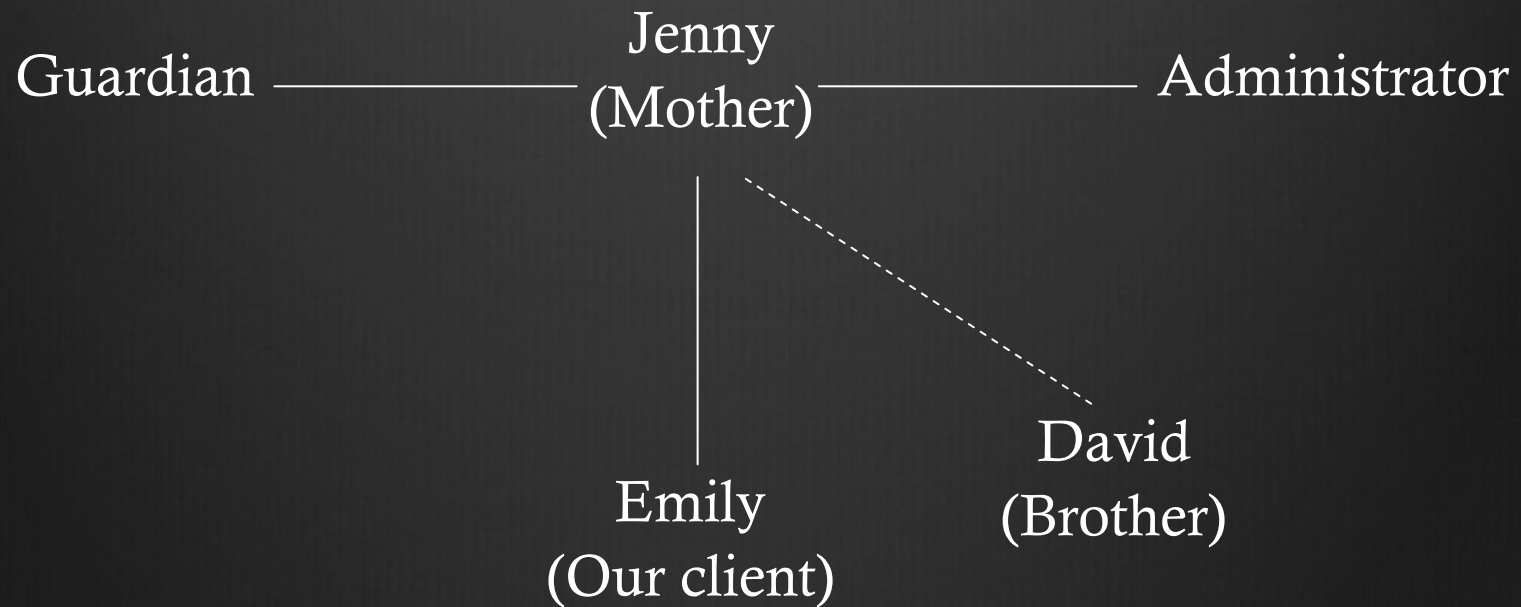
Today's talk is about ...

- ⦿ People who may not be able to make decisions for themselves because of a disability
- ⦿ Human rights
- ⦿ Protections
 - ⦿ Historical protections
 - ⦿ Office of the Public Advocate
 - ⦿ Guardianship & administration
- ⦿ People who want to challenge the protections

People ...

- Introducing
 - Case Study 1
 - Case Study 2

Case Study 1



Case Study 2

- ⦿ James's brother is his administrator
- ⦿ James has an intellectual impairment, which he has had since birth
- ⦿ James has had an administrator for most of his adult life
- ⦿ James is a vendor at The Big Issue and lives independently
- ⦿ James wants the administration order revoked so that he can manage his own money

Protective Jurisdiction of the Common Law

- Parens patriae jurisdiction of the Supreme Court

UN Rights Documents

- UN Declaration on the rights of mentally retarded persons 1971
- UN Declaration on the rights of disabled persons 1975
- Principles for the protection of persons with mental illness and the improvement of mental health care 1991
- Convention on the rights of persons with disabilities 2006
- None of these is mentioned in the *Vic Charter of Human Rights & Responsibilities Act 2006*

Convention on rights of persons with disabilities 2006

- Article 12 Equal Recognition before the law
 - Recognition as persons before the law
 - Enjoy legal capacity on an equal basis with others in all aspects of life
 - Provide support to exercise legal capacity

Safeguards to prevent abuse in relation to legal capacity

- Respect for the rights, will and preferences of the person in measures relating to the exercise of legal capacity
 - Free of conflicts of interest
 - No undue influence
 - Are proportional
 - Are tailored to the person's circumstances
 - Apply for the shortest time possible
 - Subject to a regular review by a competent, independent and impartial authority or judicial body

Charter of Human Rights and Responsibilities

- ⦿ S8. Recognition and equality before the law
 - ⦿ Every person has the right to recognition as a person before the law.
 - ⦿ Right to protection of the law
- ⦿ S7. Allows for limitation of rights
 - ⦿ Justified / proportionate / reasonable / necessary

Victorian legislation on Disability

- ⦿ *Guardianship & Administration Act 1986*
- ⦿ *Mental Health Act 1986*
- ⦿ *Disability Act 2006*

Guardianship and Administration

⚙ **Guardian** is appointed to make lifestyle decisions such as where someone lives, the medical treatment they receive, access to services, persons etc

⚙ **Administrator** is appointed to manage a person's legal and financial affairs

Criteria for appointment of a guardian or administrator

- ⦿ Age - 18 years old
- ⦿ Disability (intellectual, mental, brain injury, physical, dementia)
- ⦿ Unable, by reason of disability, to make reasonable judgments about lifestyle / financial issue
- ⦿ Need for guardian / administrator
- ⦿ Least restrictive of person's freedom of decision and action
- ⦿ In person's best interests

Guardianship and Administration Orders

- ⚙ **Guardianship**

- ⚙ Limited / plenary
- ⚙ Temporary (21 days)

- ⚙ **Administration**

- ⚙ Plenary / limited
- ⚙ Temporary (21 days)

Public Advocate

- ⦿ Advocate for people who have a disability
 - ⦿ Advocacy is in the person's best interests
- ⦿ Guardian
- ⦿ Protect from abuse, neglect & exploitation
- ⦿ Community Visitors Program
- ⦿ Independent Third Person Program

Basic powers of an Administrator

- ⚙ Part 5 Division 3 (G & A Act)
 - ⚙ Invest money
 - ⚙ Make gifts
 - ⚙ Seek advice from VCAT
 - ⚙ Sign and do what is necessary to give effect to any power or duty

Other powers of an administrator

- Part 5 Div 3A (G & A Act)
 - General care & management of estate
 - Exercise all rights, statutory or otherwise, that the represented person has (s58B(1)(b))
 - Specific powers on s58B(2)
 - Powers related to the RP s58B(3)
 - Pay money to the RP
 - Give property for personal use of RP

Powers of the represented person vis-à-vis the world

- ⦿ Powers retained depends on the extent of the order made
- ⦿ Section 52
 - ⦿ Incapable of dealing with any money or property
 - ⦿ Incapable of becoming liable under any contract
 - ⦿ If RP does these things - void / no effect
 - ⦿ Won't invalidate dealing done in good faith where person could not have known the person was a represented person

Administrator and legal matters

- S58B(2)(1)
 - Bring and defend actions and other legal proceedings in the name of the represented person



Represented person's powers vis-à-vis the administrator

- ⊗ Obligations of administrator (s49(2))
 - ⊗ Encourage person to become capable to look after their financial affairs
 - ⊗ To consult with RP
- ⊗ Representation to administrator
- ⊗ Complaints
 - ⊗ Internal processes
 - ⊗ State Trustees Limited - ombudsman
- ⊗ Legal remedies
 - ⊗ Application to VCAT under s56
 - ⊗ Reassessment of order under s61
 - ⊗ Civil suit for negligence

Contracting the services of a lawyer

- ❁ Contract with administrator
- ❁ Client provides instructions
- ❁ Capacity to instruct
 - ❁ Let lawyer know wishes
 - ❁ Not require fully informed instructions
- ❁ Supervision by Administrator
 - ❁ Over-servicing

If she doesn't save she won't be able to pay for her funeral!

I hate my administrator. I can't live on what he gives me.



Challenging an administration order

- ⊗ On the grounds of -
 - ⊗ Disability (expert evidence)
 - ⊗ Capacity to make reasonable judgments
 - ⊗ Evidence of capacity to pay bills
 - ⊗ Trial period
 - ⊗ Need
 - ⊗ Least restrictive option

Challenging an administrator

Case Study 1

- ⊗ VCAT hearing – s.55 of the *Guardianship and Administration Act 1986*
 - ⊗ Administrator requested advice from VCAT
 - ⊗ Guardian opposes – best interests and wishes of RP
 - ⊗ Outcome?

Case Study 2

- ⊗ Initial hearing
- ⊗ Neuropsychological report
- ⊗ Second hearing
- ⊗ Assessment of trial period
- ⊗ Administrator stood down
- ⊗ Outcome