Appointing decision-makers for incapable persons – What scope for mediation?

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ABSTRACT

Significant achievements have resulted from the creation of quasi-judicial boards and tribunals that determine whether a person with a mental disability is in need of an administrator or guardian. Informal hearings and a departure from strict rules of evidence makes processes for judicial decision or review of administrative decisions more accessible to the public. To the extent that the public is able to participate in an appropriate manner in these processes, the processes themselves, and the laws that establish them, have therapeutic qualities. As the many benefits of mediation have become better known and the process more commonly used in courts, tribunals and the community, there is a tendency to propose mediation for all nature of matters. At the same time, depending on the nature of the matter to be decided, mediation may be an inappropriate and even anti-therapeutic process. This article examines the appropriateness of mediation as a process for the determination of applications for the appointment of a decision maker for an incapable person and, using a series of case studies, examines the factors that indicate when mediation is or is not appropriate in this context.

Introduction

Introduction

Few would doubt that less formality and the move away from adversarial processes in many areas of judicial decision-making and administrative review has been beneficial to applicants and disputants. Informal hearings and a departure from strict rules of evidence make processes for judicial decision or review of administrative decisions more accessible to the public. To the extent that the public is able to participate in an appropriate manner in these processes, the processes themselves, and the laws that establish them, have therapeutic qualities. Further, moves to adopt and adapt processes that benefit parties to proceedings and the justice system itself are seen in the widespread introduction of mediation and other settlement-focused processes. [1] This is as much the case in quasi-judicial tribunals and boards as in the courts.

The focus of this article is the use of mediation in proceedings in which an application has been made for the appointment of a decision-maker for an incapable person. The term incapable person [2] is used in this article to refer to a person whose decision-making capacity is impaired as a result of a physical, mental, psychological or intellectual condition or state. [3] The aim of the article is to examine the appropriateness of mediation where this type of application is made. It will be argued that the nature of the matter to be decided means that mediation of these matters is often inappropriate and may even have an anti-therapeutic effect. This is not to deny that there can be benefits to the parties involved [4] and to the administration of justice more generally from using mediation in these and other matters.

This analysis is consistent with the goal of therapeutic jurisprudence, which can be defined as the study of the role of law as a therapeutic agent. [5] As described by Wexler:

[therapeutic jurisprudence concentrates on the law’s impact on emotional life and psychological well-being. It is a perspective that regards the law (rules of law, legal procedures, and roles of legal actors) itself as a social force that often produces therapeutic or anti-therapeutic consequences. [6]

Importantly,

it does not suggest that therapeutic concerns are more important than other consequences or factors, but it does suggest that the law’s role as a potential therapeutic agent should be recognised and systematically studied. [7]
In the context of appointing decision-makers for incapable persons, this recognises that there are concerns other than the psychological, psychiatric or even physical health of an individual and their family and supporters. There are legitimate concerns, eg, to ensure that the financial resources of an incapable person are applied to their care, and not diverted or preserved for the benefit of others. At times this will result in orders being made that do not accord with that person’s express wishes.

There is also scope to situate the issues raised in this article within the framework of preventative law, which is a perspective on law practice that seeks to minimise and avoid legal disputes and to increase life opportunities through legal planning. The goals of this manner of practice include both the clear establishment of legal rights and duties and the avoidance of litigation.

There clearly is potential for lawyers to benefit their clients through preventative law practice in dealing with the legal consequences of adult incapacity. Advising on the use of enduring powers of attorney and other legal instruments that survive incapacity are obvious examples.

Another example of the practice of preventative law is advising on legal and dispute resolution processes. In legal proceedings, for appointment of a substitute decision-maker, it can apply to advising a client about participation and legal representation in the application and resolution stages.

Schneider has described preventative law and alternative dispute resolution as opposite sides of the same coin. As she explains, one seeks to avoid disputes to avoid litigation, the other tries to resolve them without litigation.

In exploring the role of preventative law, Stolle explains that while therapeutic jurisprudence provides a starting point for analysing law, its processes and its practice, it does not give the practitioner practical procedures for achieving therapeutic outcomes. Preventative law provides this for legal practitioners. Likewise, mediation theory and practice provide the analytical and assessment tools to determine when the mediation process will be capable of achieving therapeutic and other goals. In what follows, the author will outline the law relating to the appointment of decision-makers for incapable persons. The author will then outline the aspects of mediation theory and practice that are relevant to determining suitability of the process. Finally, the author will apply these to the legal process by which decision-makers for incapable persons are appointed and suggest what the significant indicators are as to suitability of mediation in these matters.

The appointment of substitute decision-makers for incapable persons

The appointment of substitute decision-makers for incapable persons

Society has developed legal rules and processes that allow for the appointment of legal decision-makers for persons found to be incapable of making decisions for themselves. For a long time this jurisdiction has been vested in Australian Supreme Courts, exercising their equitable parens patriae jurisdiction. Traditionally, the decision to appoint a substitute decision-maker would be exercised by a judge or master of the Supreme Court. In each of the Australian States and Territories, as in many countries, there is now legislation that provides for the appointment of guardians and administrators of incapable persons and other related matters.

There is some variation in the substantive law that governs when an appointment can be made, who should be appointed and the functions to be performed by the appointing body and appointed decision maker, but the underlying principle governing appointment is essentially the same, namely that any orders made must be in the best interest of the incapable person.

The areas of substitute decision-making can be described generally as relating to lifestyle matters and financial matters. Lifestyle matters include decisions about where a person lives, with whom they live, with whom they have contact, their employment, what services they use, and their medical care and treatment. A person appointed as a substitute decision-maker on these matters will be appointed a guardian for the incapable person. Financial matters relate to management of a person’s financial estate during their lifetime, and a person appointed to make decisions on these matters will be appointed an administrator. As incapacity may affect some but not all aspects of a person’s decision-making ability, guardians and administrators may be conferred with plenary or limited functions.

The appointments are fiduciary in nature, and the exercise of the power is supervised by the appointing body.

The legislation introduced in Australia over the last two decades or so has transferred the jurisdiction of the Supreme Court usually to specialised boards or tribunals. While this transfer, and the adoption of less adversarial and less formal processes by those boards and tribunals, has seen a change in manner in which these matters are determined, the fundamental nature of the appointments has remained the same.

Not all of the States and Territories make specific provision in their legislation for the use of mediation in guardianship and appointments has remained the same.

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administration matters. [17] This is not to say that mediation cannot be and is not used in the absence of specific statutory provisions. It also does not discount the possibility that families and agencies involved with a person with a decision-making disability voluntarily use the mediation process for planning or dispute resolution.

In this article, the discussion of the issues identified above are based on the law in Western Australia. The article is concerned specifically with mediation of issues arising out of applications made to the State Administrative Tribunal for appointments or other orders under the Guardianship and Administration Act 1990 (WA) (the G&A Act). [18] The issues raised, however, about the use of mediation in these proceedings may be equally significant to mediation of other matters that involve an incapable person or concern a person without full legal capacity. [20] Similarly, the issues about the suitability of mediation in applications under the Western Australian legislation are likely to be the same or similar under legislation that exists in other jurisdictions.

Appointments under the Guardianship and Administration Act 1990 (WA)

Appointments under the Guardianship and Administration Act 1990 (WA)

The State Administrative Tribunal (the tribunal) has jurisdiction under the G&A Act to:

- make orders for the appointment of guardians and administrators of people with what might be generally termed a decision-making disability; [21]
- review orders which have been made previously; [22] and
- consider applications for intervention into Enduring Powers of Attorney (EPA) and other applications in respect of EPAs. [23]

In dealing with proceedings under the G&A Act the tribunal is bound to observe the following principles:

(2)(a) 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.

(b) Every person shall be presumed to be capable of;

(i) looking after his own health and safety;

(ii) making reasonable judgments in respect of matters relating to his person;

(iii) managing his own affairs; and

(iv) making reasonable judgments in respect of matters relating to his estate, until the contrary is proved to the satisfaction of the State Administrative Tribunal.

(c) A guardianship or administration order shall not be made if the needs of the person in respect of whom an application for such an order is made could, in the opinion of the State Administrative Tribunal, be met by other means less restrictive of the person's freedom of decision and action.

(d) A plenary guardian shall not be appointed under s 43(1) if the appointment of a limited guardian under that section would be sufficient, in the opinion of the State Administrative Tribunal, to meet the needs of the person in respect of whom the application is made.

(e) An order appointing a limited guardian or an administrator for a person shall be in terms that, in the opinion of the State Administrative Tribunal, impose the least restrictions possible in the circumstances on the person's freedom of decision and action.

(f) In considering any matter relating to a represented person or a person in respect of whom an application is made the State Administrative Tribunal shall, as far as possible, seek to ascertain the views and wishes of the person concerned as expressed, in whatever manner, at the time, or as gathered from the person's previous actions.

In summary, this section establishes that:

• the best interests of the represented person is the primary concern;
• there is a presumption of competency;
• there is a least restrictive alternative principle;
• there is a least restrictive orders principle; and
• the wishes of the represented person are to be ascertained, as far as possible.

There are provisions of the G&A Act that determine who may be appointed guardian or administrator. [24] In both instances the tribunal may appoint an individual over the age of 18 who consents to being appointed or, in the case of administration, a corporate trustee (including the Public Trustee) and in the case of guardianship, the Public Advocate.

In Western Australia, the Public Advocate is a public officer on whom various functions are conferred by the G&A Act, including:

• making applications under the Act;
• acting as a guardian or administrator, solely or jointly with another person; and
• at hearings before the tribunal to:
  – seek to advance the best interests of the represented person or person to whom the proceedings relate;...
present to the tribunal, Judge or Court any information in his possession that is relevant to the hearing; and
investigate and report to the tribunal, Judge or Court on any matter or question referred by a court or by the tribunal, Judge or Court. [25]

In appointing a guardian, the tribunal must form the opinion that the person:
(a) will act in the best interests of the person in respect of whom the application is made;
(b) is not in a position where his interests conflict or may conflict with the interests of that person; and
(c) is otherwise suitable to act as the guardian of that person. [26]

In determining whether a person is suitable for the purposes of subs (c) above the tribunal must take into account, as far as possible:
(a) the desirability of preserving existing relationships within the family of the person in respect of whom the application is made;
(b) the compatibility of the proposed appointee with that person and with the administrator (if any) of that person’s estate;
(c) the wishes of the person in respect of whom the application is made; and
(d) whether the proposed appointee will be able to perform the functions vested in him.

Similar provisions apply to the appointment of an administrator. The tribunal must be satisfied that the appointee will act in the best interests of the person in respect of whom the application is made and is otherwise suitable to act as the administrator of the estate of that person. [28] In determining suitability the tribunal shall take into account as far as possible:
(a) the compatibility of the proposed appointee with the person in respect of whom the application is made and with the guardian (if any) of that person;
(b) the wishes of that person; and
(c) whether the proposed appointee will be able to perform the functions proposed to be vested in the administrator. [29]

The Act provides that the Public Advocate is not to be appointed as a guardian or administrator unless there is no other person (or corporate trustee) who is suitable and willing to act. [30]

Key issues for determination in guardianship and administration proceedings

Key issues for determination in guardianship and administration proceedings

In determining what orders it should make when an application for administration or guardianship has been made, the tribunal has to address three key issues.
• the CAPACITY issue [31] – the tribunal must be satisfied on a threshold basis that the person in respect of whom an administration order is sought is unable, by reason of a mental disability, to make reasonable judgments in respect of matters relating to all or any part of his estate. [32] In relation to guardianship, the tribunal must be satisfied that the person is: incapable of looking after his own health and safety; unable to make reasonable judgments in respect of matters relating to his person; or in need of oversight, care or control in the interests of his own health and safety or for the protection of others. [33]
• the NEED issue – in both cases, the tribunal must be satisfied that the person, notwithstanding their incapacity, is in need of a guardian or administrator. [34]
• the WHO issue – once it has been determined that a person lacks capacity to make financial and/or lifestyle decisions and they need an administrator and/or a guardian, the tribunal must determine who to appoint in accordance with the requirements discussed above.

The nature of proceedings under the G&A Act

The nature of proceedings under the G&A Act

The manner in which hearings under the G&A Act are conducted reflects the main objectives of the tribunal, which are set out in s 9 of the State Administrative Tribunal Act 2004 (WA) (SAT Act) as:
(a) to achieve the resolution of questions, complaints or disputes, and make or review decisions, fairly and according to the substantial merits of the case;
(b) to act as speedily and with as little formality and technicality as is practicable, and minimise the costs to parties; and
(c) to make appropriate use of the knowledge and experience of tribunal members.

Applications under the G&A Act are dealt with in hearings which are usually presided over by one member of the tribunal, but in more complex matters by three members. The evidence is presented
in written reports, submissions and orally at the hearing. In keeping with s 9 of the SAT Act set out above, proceedings are conducted informally and evidence is usually unsworn. There is an expectation that the person whom the application concerns will be present at the hearing, even if they are only able to make a limited or no contribution. Their attendance will be excused, however, if it is judged that it would be detrimental to them to attend. Legal representation is permitted but is not usual, and costs of attending and representation are not generally allowed.

There is an absence of legal formality in the hearings, and the proceedings are conducted in a manner that demonstrates respect and empathy for the incapable person and the parties. Those present at the hearing are given an opportunity to speak and to ask questions. Family members and close friends are often experiencing high emotions about the issues raised by the applications, and the tribunal seeks to handle these sensitively, while focusing on the purpose of the hearing and the best interests of the incapable person.

Matters under the Act, including applications for appointment or review of appointments of administrators and guardians, can be referred to mediation by the tribunal under s 54 of the SAT Act. Before turning to look at factors relevant to assessment of the suitability of these matters for mediation, the author will first overview the mediation process and general indicators of suitability for mediation.

**Mediation: Definition, features and attributes**

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As is common in other jurisdictions, mediation is not defined in the Western Australian legislation referred to here. It is convenient to refer to the definition provided by the National Alternative Dispute Resolution Advisory Council (NADRAC):

> Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. [35]

There are many features of the mediation process that make it an effective and often a therapeutic process. While not all these features are present in all circumstances in which mediation is used, drawing on Boule, [36] the mediation process can be summarised in point form as:

- interests focused;
- voluntary;
- consensual;
- flexible;
- participatory;
- informal;
- norm creating;
- collaborative;
- person-centred;
- relationship-oriented;
- future-focused;
- private, confidential; and
- transparent.

It is well recognised that different models of mediation exist and the more or less that the different features referred to above are present the more one model of mediation will vary from another.

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Opinions vary on how many models there are and how they can best be described. [37] For the purposes of discussion here it is sufficient to refer to the following three, described by Sourdin as: [38]

- Facilitative – in this process-oriented and problem-solving approach the parties, rather than the mediator, provide the solution to their dispute. The mediator is the facilitator of the process rather than an authority figure providing substantive advice or pressure to settle.
- Evaluative – this is substance-orientated mediation, at the other end of the scale from facilitative mediation. The mediator is
often an authority figure who evaluates the case based on her or his experience and offers advice on how the dispute should be resolved.

- Transformative[^39] – the emphasis in this process is not on problem-solving but on the nature of the process itself. In this model, the mediator’s role is to foster empowerment and recognition in the parties; this is done by encouraging the parties to communicate and make decisions more effectively, subject to their own choices and limits.
- (Sourdin notes that a related process is therapeutic mediation where professional therapeutic techniques are used to encourage communication and behavioural concerns).[^40]

Facilitative and evaluative mediation can also be described as forms of settlement mediation. Particularly when employed in a court or tribunal setting, the primary goal of these processes is settlement of the legal dispute. This is not to say that therapeutic benefits of the process cannot be a concurrent or secondary goal of these processes, whether through improved communication and understanding between the parties, or through the outcome of the mediation where there is resolution of all or part of a dispute. In contrast, settlement is not the primary goal in transformative mediation.

Whichever model of mediation is adopted, there are common factors that will indicate whether the process is suitable for the particular matter or dispute. In the first edition of his book on mediation, Boulle draws on earlier literature,[^41] and summarises the following indicators of mediation as a suitable process as where:
- the conflict between the parties is moderate;
- the parties are committed to achieving a negotiated settlement;
- there is a continuing relationship between the parties;
- there is a rough equality of bargaining power between the parties;
- the parties have the capacity and abilities to negotiate, or have representatives who can negotiate on their behalf;
- there is more than a single issue in dispute;
- there are adequate resources for a meaningful mediation;
- there are no clear legal principles or other standards to guide the parties’ decision-making;
- the parties can accept that the process is private and that the outcome will be confidential; and
- there is some external encouragement for the parties to settle by mediation.

Many of these factors are present in matters that come before the tribunal. For this reason mediation is frequently used by the tribunal. The application of these factors to G&A matters will be discussed further below.

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Mediation: Concerns about and indicators of unsuitability

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There is extensive literature in which concerns have been expressed about the misuse of mediation and when it is likely to be unsuitable.[^42] Astor and Chinkin offer the salient reminder that mediation is not suitable for all disputes or all parties, because, '[T]he parties must be willing to do, and capable of doing, what the process requires of them.'[^43] To this one could add, that the process must be capable of achieving the legislative purpose, where one exists, to which it relates.

What follows is a brief overview of the types of concerns that have been expressed, indicators of unsuitability, and reasons why people avoid using mediation. The counterpoint to the indicators of suitability set out above are indicators of when mediation is unsuitable.[^44] These are summarised by Boulle as where:
- broad matters of policy are at stake;
- the dispute involves a pure legal question;
- the parties are using process for ulterior motives;
- there is a risk of personal danger to participants;
- the dispute requires findings of fact, credibility;
- one or more parties is in a disturbed emotional or psychological state;
- there is a dispute over non-negotiable values or principles; and
- there is a remedy only a court can provide.

These indicators are a framework for analysing the suitability of mediation to deal with matters arising under the G&A Act. Before turning to look at mediation in that context, however, brief mention will be made of other general concerns relating to the use of mediation.

In the second edition of his monograph on mediation,[^45] Boulle refers to persistent concerns about the justice implications of mediation in relation to both its internal procedures and its effects on individuals and broader societal implications.[^46] He refers in particular to concerns that mediation is driven by the goals of settlement and outcomes at all costs, making it less sensitive to the many other dimensions of justice.[^47] Boulle concludes that, despite having claims to providing access to justice, mediation tends to
be viewed negatively in comparison with the claimed values and virtues of the formal justice system. He goes on to discuss the concerns commonly expressed about:

- procedural fairness;
- substantive fairness;
- the public interest;
- the privatisation of justice; and
- second-class justice.

Each of these raises important issues for every mediator and mediation program and it is important that they are not lost sight of as mediation becomes more commonplace in judicial and quasi-judicial settings.

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A different but equally valuable perspective is provided by Mayer, as to the reasons why, on a more individual level, mediation is not sought often or is actively resisted. Mayer describes these as factors, not absolute criteria for when mediation is sought or avoided. They are:

- the conflict is too intense or not intense enough;
- the stakes are too high or too low;
- people are too angry or not angry enough;
- people feel too powerless or too powerful;
- people have an excellent alternative to negotiation or no alternative but to capitulate;
- issues are too complex or there is only a single issue involved;
- there are no relationship issues or the main concern is an acrimonious relationship; and
- there has been no history of conflict, or the history of conflict is extremely long.

Mayer makes the pertinent observation that often mediation is rejected even though it might have something of value to offer. The result is, he says, that the potential value of mediation is overlooked because parties still find it either too demanding or not sufficiently powerful or safe.

With all of these concerns in mind, the author will review the legislative framework within which matters before the tribunal may be mediated and then apply these various factors to mediation in the G&A context.

Provisions relating to mediation in the State Administrative Tribunal

Provisions relating to mediation in the State Administrative Tribunal

In keeping with the principles set out in s 9 of the SAT Act, the tribunal seeks to use the most appropriate process, including mediation, to deal with matters before it. The power to refer matters to mediation is conferred by s 54 of the SAT Act which provides:

1. At an initial directions hearing or at any other stage of a proceeding, the tribunal may refer the matter, or any aspect of it, for mediation by a person specified as a mediator by the tribunal.
2. The person specified as a mediator has to be a person who has been approved by the President as a person who may act as a mediator.
3. The referral may be made with or without the consent of the parties.
4. The purpose of a mediation is to achieve the resolution of the matters by a settlement between the parties.
5. The rules may specify how notice of the mediation is to be given, how the mediation is to be conducted, and the fees to be paid by a party for the mediation.
6. Unless the mediator directs otherwise, the mediation is to be held in private.
7. Except to the extent that the rules may specify the procedure for a mediation, the mediator may determine the procedure for the mediation.
8. If the mediator is a tribunal member and a settlement appears to be reached at the mediation, the mediator may reduce the terms of settlement to writing and make any orders necessary to give effect to the settlement.
9. If a settlement is not reached at the mediation or the mediator is not a tribunal member, the mediator is to report on the outcome of the mediation to the tribunal as constituted when it made the referral.
10. If the mediator is a tribunal member, the member cannot take any further part in dealing with the proceeding after the mediation unless all parties agree to him or her doing so.

Evidence of anything said or done in the course of mediation is not admissible at any later stage of the proceeding unless all parties agree to the admission of the evidence or other limited circumstances apply. This creates a confidential environment for parties...
to a matter to discuss, in an open manner, the issues, their concerns and possible terms of settlement. The SAT Act contemplates a mediator who is also a tribunal member making a determination of the matter if there is no settlement.\footnote{If this is to occur, the member must ensure that all parties agree at the outset to this change in role, as provided for in s 54(10).} If this is to occur, the member must ensure that all parties agree at the outset to this change in role, as provided for in s 54(10).\footnote{To the author's knowledge, G&A Act matters have only been referred by the tribunal following an adjournment for that purpose. After the mediation the matter has been referred back to the member before whom it was part heard. If a matter were referred to mediation prior to a hearing being commenced, there is no reason in principle why the mediator, if he or she is a tribunal member, could not seek the parties' agreement to determining the matter in the event that the issues are not or cannot be resolved by the parties.} To the author's knowledge, G&A Act matters have only been referred by the tribunal following an adjournment for that purpose. After the mediation the matter has been referred back to the member before whom it was part heard. If a matter were referred to mediation prior to a hearing being commenced, there is no reason in principle why the mediator, if he or she is a tribunal member, could not seek the parties' agreement to determining the matter in the event that the issues are not or cannot be resolved by the parties.\footnote{The terms of s 54(4), which provides that the purpose of a mediation is to achieve the resolution of the matters by a settlement between the parties, strongly suggest that the model to be used will be a settlement model.\footnote{It will depend on the nature of the matter the subject of the mediation and the approach adopted by the mediator whether the model used is closer to the facilitative or the evaluative model. Section 54 does not envisage a transformative model. In the author's view, however, a strict settlement model will not usually be appropriate in G&A Act matters, whereas there may be merit in adopting a more therapeutic model that aims to improve communication between the parties involved in the incapable person's life and to enhance their appreciation of the issues involved.}}

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\section*{Mediation in guardianship and administration matters}

Mediation in guardianship and administration matters

A significant feature of guardianship and administration is that it is an exercise of original jurisdiction by the tribunal under the G&A Act. On many applications, the tribunal will make a determination that takes away the decision-making power of a person (who becomes a represented person) and confers that power on a guardian or administrator. These are not orders that can be made by consent, as the matter before the tribunal is not capable of being decided independently by the parties to the proceedings. The applicant will be a person other than the proposed represented person, and by the very nature of the application, the matter cannot be settled or withdrawn without an order of the tribunal. While there is scope for the tribunal to grant leave for an application to be withdrawn (eg if insufficient evidence of incapacity is obtained, or the absence of need for an order or the existence of a less restrictive alternative is obvious), the fate of an application is in the hands of the tribunal, not the applicant or the proposed represented person.

It is not uncommon for the orders determined by the tribunal to be in the best interest of the incapable person to be consistent with the views of the applicant, the proposed represented person, and other parties to the proceedings. A decision in this sense might be reached by consensus, but it is not an outcome that can be reached by consent between the parties. How much the tribunal member seeks to achieve or reinforce a consensus will depend very much on the particular matter and to some extent on the approach taken by the individual member.

In considering the proper role for mediation in proceedings under the G&A Act, the three following situations can be distinguished:

\begin{itemize}
  \item mediating the issue of whether a person is incapable;
  \item mediation with a person who is incapable, eg where there has been a determination already of this threshold issue, or there is an application for review of orders; and
  \item mediating with the parties to the proceedings, but not with the incapable person, eg about medical or care issues with facility staff and the family of the incapable person (although the incapable person might be present).
\end{itemize}

\section*{Mediating the issue of whether a person is incapable}

Mediating the issue of whether a person is incapable

On occasion the tribunal is required to determine the threshold question of incapacity in the face of conflicting evidence. Typically, the tribunal resolves the question by weighing the various reports, taking into account the timing of the assessment, the qualifications and experience of the person conducting the assessment, and the consistency of the expert evidence with other evidence tendered on the issue of capacity. To the author's knowledge mediation has not been used to mediate experts' reports in this jurisdiction, but in principle there is scope to do so. The main objectives of the tribunal, as stated in s 9(b) and (c) of the SAT Act, provide insight into why mediation between experts will be used infrequently in the jurisdiction. The tribunal is to act as speedily and with as little formality and technicality as is practicable, to minimise the costs to parties, and to make appropriate use of the...
knowledge and experience of tribunal members. All these considerations make mediation in this context unlikely.

Mediation with a person who is incapable

Mediation with a person who has a mental disability raises obvious issues about whether the process is suitable and whether it will be in their best interests. The value and appropriateness of a consensual and participatory process will be determined very much by the capacity of the incapable person to participate in the process, and the nature of the issues being negotiated. It has been argued that there are a number of perceived barriers to mediating with a person with a mental disability, but that, in some situations, these barriers can be overcome. [96] Arguments in support of a person with a mental disability participating effectively in mediation are based on the premise that legal incapacity for some purposes does not determine practical capacity for all purposes. While it is essential that a mediator satisfy herself or himself that the person has capacity to participate in the decision-making process, it is arguable that other process steps will assist. For example, while recognising that there are limits to mental health consumer participation in mediation, Flower argues that systemic changes to accommodate their special needs will afford them the therapeutic value of mediation. [97]

A critical aspect of mediating with a person with a mental disability (or, for that matter, any person whose capacity is affected during the process) [58], is the importance of the mediator being aware of the limits of the person’s ability to participate fairly and effectively in the process. [59] In the tribunal setting, a member mediator will be aware from medical and associated evidence of potential capacity issues. It is difficult to imagine a situation where the tribunal would refer a matter to mediation with a proposed represented person. Prior to a finding of incapacity, the tribunal has no jurisdiction to make orders in respect of the person. Once a finding of incapacity is made, and there is a need for decisions to be made, there is likely to be an appointment. The view would generally be taken that the person appointed as guardian or administrator is bound to take into account the expressed wishes of the represented person and they can do this without mediation prior to their appointment.

A different issue is whether it will be in the best interest of a represented person for an issue or dispute that has arisen in relation to their affairs to be dealt with in mediation. This might take place before, during an adjournment, or after a tribunal hearing of an application. It may be a highly suitable and effective process to resolve a family conflict, eg over arrangements for communicating between family members on matters relating to the represented person, or about entitlements to family property. Unless the ability of the family members to reach agreement is central to the question whether there is a need for an appointment to be made or who should be appointed, there is no reason why the tribunal need mediate the matter. In these circumstances, if an appointment has been made, the tribunal might recommend and encourage family members to use mediation, but if the issue does not arise in the proceedings, there is no reason why it should conduct the mediation.

It is also a different issue whether a person with a mental disability should be present during a mediation between the parties. This requires a judgment on the mediator's part and will depend on the mental capacity of the incapable person. It will also depend on and whether it will be in their best interest to attend and whether their presence will benefit the process.

Mediating with parties to the proceedings

Mediation with the parties to an application raises a number of questions:
• What is the aim of the mediation?
• On what matters might the parties agree?
• What relevance will the parties’ agreement have to any orders made?
• Will the outcome of the mediation potentially mean that an order is not needed and an applicant given leave to withdraw their application?

It is important that these questions are answered before a referral is made, and before the model of mediation is chosen. If a facilitative model is adopted, the question arises as to how the best interests of the person the subject of the application will underlie any resolution.

The point has been made earlier that this is not a jurisdiction where orders can be made by consent. There are certain issues that arise on G&A applications that cannot be resolved by agreement between the parties. Examples include:
• the issue of whether a person is a person for whom an order can be made under the G&A Act;
• whether an appointment of a guardian or administrator is needed;
• who is to be appointed as guardian or administrator; and
• what functions will be conferred on a guardian or administrator.

This is not to suggest that significant issues cannot be resolved in mediation. Evidence of consensus or an agreement between some or all of the parties might be significant for the tribunal in determining what orders it should make. Examples include:
• agreement about how the parties will achieve effective and reliable communication in matters relating to the represented person, between, eg, medical and care professionals and involved family members;
• arrangements between family members or other persons for contact with or provision of services or other benefits to the represented person;
• an agreement to compromise or settle a claim by a party against the estate of the incapable person or their administrator; and

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• consensus on the question of who, among family members, eg, is best placed to take on the functions of an administrator or guardian.

In matters relating to an incapable person's estate, it will often be appropriate to use mediation to resolve family conflict or disputes over property after a person has been appointed as administrator. The administrator is bound to ensure that any agreement reached in mediation advances the represented person's best interests. In some instances, the appointment of an administrator will itself contribute to disputes being resolved by virtue of the fact that there is a person who can make a binding decision. In other instances, where interested parties are unhappy with the decision contemplated or made by an administrator, mediation could be usefully employed to reach some consensus on whether the decision is in the represented person’s best interests, and possibly forestall an application to the tribunal to review the administrator's appointment.

Four case examples

These case examples are used to illustrate the role that mediation can play in G&A Act matters, and when mediation will not be appropriate. [60]

Case example one

Rose has four half siblings. Before her mother became incapacitated by a stroke, she promised a quarter share of a valuable piece of land to Rose. Her mother also appointed two of her children other than Rose as donees of her estate under an EPA. Rose is in dispute with the donees’ siblings over her claimed entitlement, which they deny. Rose has applied to the tribunal for orders for intervention in respect of the EPA.

Comment

This matter is suited to mediation, but at this stage, not as part of proceedings before the tribunal. The issue of Rose’s entitlement to the land is not a matter over which the tribunal has jurisdiction under the G&A Act. It is a private dispute between Rose and her siblings and can be settled by agreement between them, or if not, needs to be decided by a civil court.

If it was demonstrated to the tribunal that the donees were not acting in accordance with their duties under the G&A Act or there were any other reasons why the enduring power of attorney under which they were appointed should be revoked, there may be scope for mediating the issue of who would best be able to carry out the functions of an administrator. It is likely, however, that evidence on this question would have already been presented at a hearing and if the grounds for removing the donees were made out, the tribunal could make an appointment without further delay.

Case example two

Lily, who suffers from dementia, has recently moved into an aged-care facility. Previously she was living in her own home. Lily has two sons, Ben and Ross. Ben and his teenage son have lived with Lily since Ben separated from his wife four years ago. Ben has helped care for his mother and in return she did not expect him to pay rent. Lily's son Ross is better off financially than Ben, and has not had a lot to do with his mother, or relied on her for any financial support since Ben moved in with her. Ross has applied to be appointed administrator for his mother, concerned that her house may need to be sold to pay her accommodation bond and for her future care. Ben is opposed to any orders, saying that Lily can make decisions for herself, and that her wish is for him and his son to stay in her house. He is certainly opposed to Ross taking over his mother's affairs.

Comment
Ben's belief that his mother is capable and that her wishes should be respected brings him into conflict with Ross, his brother and the applicant, and potentially, with his mother's own financial interests. If we assume that Lily's dementia means that she is no longer capable of making reasonable financial decisions, and that she has not conferred enduring power of attorney on anyone, she will need an administrator so that her financial needs can be met. While Lily's legal needs can be met in this way, an appointment of Ross may deepen the conflict between the siblings. Ben's view of his mother's capacity and his own financial needs make him an unsuitable appointment. It may be difficult in a hearing to establish whether Ben's concern about Ross being appointed has a good basis or is related to Ben's fears that he and his son will have to find accommodation elsewhere. While mediation between the brothers has the potential to improve communication between them and potentially improve their relationship, it is not clear how this will be of direct benefit to Lily (depending on how aware she is of family conflict). Mediation will provide an opportunity for Ross and Ben to make known their concerns for their mother, and for themselves. Depending on the model of mediation used, a mediator could assist Ben to understand the nature and likely outcomes of the proceedings. Arguably, this could include discussion of the evidence about Lily's dementia and its effect on her capacity. In the author's experience, most of this can also be achieved in a hearing if it is conducted in a way that gives all parties full information and an opportunity to be heard. The most likely benefit of referring the matter to mediation, is that the process is likely to assist Ben to realise that someone has to be appointed and unless he can show, on an objective basis, why Ross is unsuitable, the latter is likely to be appointed. Clearly the issue before the tribunal cannot be resolved at mediation and this is a strong indicator of unsuitability here. Mediation may have some benefit to the parties, but that has to be weighed against the time they need to invest to return for the mediation and then the adjourned hearing. In the author's view it is more in keeping with SAT principles that the hearing is conducted in a way that assists Lily's sons to understand the situation and to focus on her interests, rather than their own, but not to put off a decision (if there is sufficient evidence) while the matter is referred to mediation.

Case example three

Joseph has three children. He was widowed 10 years ago. For the past five years he has lived with Maxine, who was previously never married and who has no children. Joseph's children have had little to do with him since he moved in with Maxine, as they feel unwanted and excluded from their father's life. They have found it difficult to have private conversations with their father either at the house or on the telephone as Maxine always seems to be around. Recently, Joseph was diagnosed with terminal cancer. He spends most of his time at home, and in recent months his ability to make decisions for himself has rapidly declined. Maxine has been his primary carer except for a few stays in hospital. The children claim that Maxine is denying them contact with their father and are afraid that they will not be able to spend time with him before he dies. They want a guardian appointed to have him admitted to a facility where they can visit him. Maxine says she restricts all visitors to Joseph in the interest of his health.

Comment

There are a number of issues here that have the potential to impact adversely on Joseph. There are likely to be opposing views on whether it will be better for him to remain at home at this time or to be in hospital. It is possible that the medical team treating Joseph have different views as to the best course to follow. The conflict over contact with Joseph is impacting on the way the children see the hospitalisation issue. It may be difficult in a hearing to uncover in any meaningful way what underlies the conflict here. The issue the tribunal has to consider is whether there is a need for the appointment of a guardian to decide matters relating to where Joseph should be receiving treatment, what treatment he should receive and what contact he has with family and others. If these questions can be resolved between the parties involved in Joseph's life, Maxine, his children and the medical team, there will be no need for an appointment. Mediation is highly suitable in this case. It is likely in this situation that someone from the hospital will have attempted already to mediate the issues. The benefit of a referral to mediation by the tribunal is that it provides a neutral mediator and the parties will be attempting to reach agreement in the knowledge that, if they cannot work out an arrangement, the tribunal will appoint a guardian.

Case example four

Alberto is a 64-year-old Croatian immigrant who speaks limited English. He has had schizophrenia since his youth and is epileptic. His children have found it difficult to deal with his illness, which has often resulted in aggressive behaviour towards them and their mother, Alberto's wife. Following a recent episode when Alberto threatened to evict their mother from their home, the children had
him admitted to the Perth Mental Health hospital. Now that things have settled down, the family want Alberto to return home. The hospital staff believe Alberto should be moved to a psychiatric hostel and have tried to persuade the family to agree. The hospital has applied for appointment of a guardian because they do not believe Alberto has the capacity to make decisions in his best interests. They believe the family is not able to make or carry out decisions that contradict Alberto’s expressed wishes.

Comment

The issues that arise here again relate to lifestyle issues: where Alberto is to live and what medical care or treatment he should receive. Given Alberto’s psychiatric illness, there is potential for provisions of the *Mental Health Act 1990* (NSW) to be used. Involuntary admission and treatment will obviate the legal need for a guardian to be appointed. Voluntary compliance with treatment, with the support of his family, however, may mean that Alberto need not be brought under the *Mental Health Act 1990* (NSW) provisions. It would be usual for the medical team involved with Alberto discuss and consult with the family on the issues here. Sometimes the communication breaks down. The cultural factors impacting on the family’s behaviour may be misunderstood. The relationship within the family may be misunderstood by the medical team. The motives and intention of the medical team may be misunderstood by the family. Mediation is highly suitable here to provide an opportunity for the parties to improve their understanding of each other’s perspective and find ways of communicating better over matters relating to Alberto. At the end of the day, an appointment of a guardian may still be necessary, eg to clarify that one of the children, rather than Alberto’s wife, can consent to medical care or treatment. Other functions may not need to be conferred on a guardian as a result of decisions made by the family in mediation, such as where Alberto is to live. The benefit of mediation in this scenario is that it may result in a more limited guardianship order than would otherwise be the case, in keeping with the least restrictive orders principle established by s 4(2)(e) of the *G&A Act*.

**Indicators of when mediation is of benefit in G&A Act matters**

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With these case examples in mind, and taking into account the factors discussed above, the following can be seen as indicating suitability for mediation of G&A Act matters:

• where there is conflict between parties to the proceedings that is affecting their ability to cooperate and this is adversely affecting the person the subject of the application;

• where agreement between parties may result in a less restrictive alternative (eg an informal process for deciding lifestyle matters can be put in place);

• where agreement between parties may result in a less restrictive order (eg a decision about where the represented party will live is made by consensus thereby obviating the need for a guardian to be appointed to make that decision even though a guardian may be needed for other purposes);

• where mediation has the potential to
  – improve communication between parties
  – improve relations between the parties; and
  – the represented party will benefit from this improvement, (eg, where the existing level of conflict and lack of cooperation between the parties is impacting adversely on the represented party); and

• where there is scope for consensus on conflicting expert evidence (eg medical opinions as to capacity).

It might be thought that the level of conflict between the parties is a significant factor. The general experience with mediation, however, is that a high-level conflict is not itself a contra-indicator. What is important is whether the level of conflict is affecting the parties’ willingness or ability to engage in the process. In G&A matters it is important when mediation is ordered that the parties to the application are made aware that regardless of what they agree to at mediation, ultimately it is the tribunal that will decide what orders are needed. For this and the many other reasons Mayer gives for party reluctance, eg where the conflict between the parties is too intense or not intense enough, the parties may prefer not to mediate. In reaching a decision whether to refer a matter to mediation, however, the guiding principle for the tribunal needs to be whether mediation will be in the best interests of the incapable person, even if it does not particularly suit the parties.

**Indicators of when mediation will not be of benefit in G&A Act matters**

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In addition to the general factors of unsuitability referred to above, it follows from the discussion of the case examples above that there are circumstances where mediation of G&A Act matters by the tribunal will not be suitable. These circumstances include where:

• the conflict between the parties relates to matters that are not amenable to G&A Act proceedings, eg debts or legal disputes between family members (although these matters may be suited to mediation elsewhere);
• the issues are not capable of resolution by agreement between the parties, including the questions of capacity, need for appointment and who to appoint (although mediation can be used for consensus building on these questions);
• the need for a decision-maker, if established, can only be met by an appointment of a guardian or administrator (while this can potentially rule out referring any application for appointment of guardian or an administrator to mediation, one could argue that this is only the case if on the evidence available to the tribunal there is no likely prospect of a less restrictive alternative or order resulting from mediation);
• the disclosure of information to the parties that will be necessary for effective mediation (but which would not be disclosed in a hearing) will result in unjustifiable loss of privacy for the person the subject of the application (although this might determine who is present at the mediation, rather than whether the matter is referred to mediation); and,
• delay would be adverse to the interests of the person the subject of the application.

As mentioned above, it is a significant feature of the SAT hearings in G&A matters that they are conducted without undue formality and parties are provided with an opportunity to participate in the hearing before the decision is made by the tribunal. In deciding whether to refer a matter to mediation therefore, an assessment is needed whether the therapeutic aspects of the mediation process are likely to outweigh the therapeutic aspects of the hearing process. In the author's view this is only likely to be the case, on balance, when there is scope for a better outcome in terms of orders (including no orders) as a result of mediation. It is the nature of the jurisdiction and the manner in which applications are dealt with by the tribunal which mean that mediation would often better be described as unnecessary, or of no additional benefit, than as unsuitable. This is likely to be the case in similar jurisdictions in Australia and overseas.

**Process issues**

Process issues

In any referral under s 54 of the SAT Act, a number of process issues need to be considered. It may be appropriate for some matters to be dealt with by directions made at the time of referring a matter to mediation. These process issues include:
• as a preliminary issue, the suitability of the matter for mediation;
• timing of mediation, including timing in relation to an adjourned hearing;
• who is to be present;

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• who is to be the mediator;
• where the mediation is to be held;
• what model of mediation will be appropriate (although this is a matter for the mediator, and it may change during the course of the mediation); and
• whether it is appropriate to move from mediation to a final determination of the issues where the mediator is a tribunal member.

**Conclusion**

Conclusion

Research and experience tell us that mediation is a process that can be highly valuable in the resolution of conflict and disputes. There can be therapeutic benefits to participants not only in the outcomes, but also from participation in the process itself. At the same time there may be anti-therapeutic effects resulting from the delay in decision-making, and disillusionment if it is thought that the same outcomes could have resulted from a hearing. Without formal evaluation of mediation in this setting, we can only speculate on the experiences and perceptions of the parties and mediators to date.

Clearly, though, there are some circumstances where the outcome will be better if it is based on an agreement reached between the parties involved in the life of an incapable person. These circumstances will most commonly arise where the application concerns guardian issues. There is little scope for consensual and informal decision-making to obviate the need for the appointment of an administrator or to deal with concerns about the operation of an enduring power of attorney. In all cases, it is essential that parties to proceedings that are referred to mediation appreciate that this is not a consent jurisdiction and that mediation is not for the purpose of settling the application, but rather to see if some or all of the differences between the parties can be resolved in a way that best meets the needs of the incapable person.

**Footnotes**

* The author is a Senior Lecturer in Law at the Law School, The University of Western Australia and a former Senior Sessional Member of the State Administrative Tribunal of Western Australia. The views expressed in this article are
Evidence of the growing use of mediation is provided in numerous reports including the Australian Law Reform Commission review of the adversarial system of litigation: ADR – Its Role in Federal Dispute Resolution Issues Paper 25 (1998). As Astor and Chinkin have noted, it is becoming routine for new statutory schemes regulating areas of disputing to provide for ADR. Tribunals that were once themselves the ‘alternatives’ are now adopting ADR as part of their procedures. Astor H and Chinkin C, Dispute Resolution in Australia (2nd ed, Lexis Nexis Butterworths, 2002) p 14.

Different terms are used in the legislation: impaired decision-making ability in s 6 of the Guardianship and Management of Property Act 1991 (ACT); disability, defined in s 3 of the Guardianship Act 1987 (NSW); disability defined in s 3 of the Adult Guardianship Act 1988 (NT); impaired capacity in Sch 4 of the Guardianship and Administration Act 2000 (Qld); mental incapacity in s 3 of the Guardianship and Administration Act 1993 (SA); disability, defined in s 3(1) of the Guardianship and Administration Act 1995 (Tas); disability defined in s 1 of the Guardianship and Administration Act 1986 (Vic); mental disability, defined in s 3 of the Guardianship and Administration Act 1990 (WA).

While using this term, it is recognised that mental incapacity is a complex matter and not necessarily an absolute state. Although a finding of legal incapacity is a threshold issue for the jurisdiction of courts and other bodies that have a power of appointment, a finding for the purposes of the legislation is not determinative of a person’s capacity in other respects.

For an exploration of mediation’s potential to assist in the difficult process of life and death decision-making that takes place in hospital neonatal intensive are units, see Kovach KK, “Neonatal Life and Death Decisions: Can Mediation Help?” (2000) 28 Cap U L Rev 251. Parallels can be drawn between this area of decision-making and decision-making involving an incapable person. Kovach notes that most writing on decision-making in the neonatal intensive care context focuses on the outcome and the criteria used in making decisions, but rarely on the process of decision-making. She advances the view that mediation may be a useful process for making these difficult decisions. Further, she predicts that parties will be more satisfied with the process and subsequent disputes are less likely to arise.


Wexler, n 6.


Schneider, n 10 at 120; see also Schneider AK, “The Intersection of Therapeutic Jurisprudence, Preventative Law, and Alternative Dispute Resolution” (1999) 5 Psychology, Public Policy, and Law at 1084.

Stolle, n 8 at 465.


Guardianship and Management of Property Act 1991 (ACT); Guardianship Act 1987 (NSW); Adult Guardianship Act 1988 (NT); Aged and Infirm Persons’ Property Act 1979 (NT); Guardianship and Administration Act 2000 (Qld); Guardianship and Administration Act 1993 (SA); Guardianship and Administration Act 1995 (Tas); Guardianship and Administration Act 1986 (Vic); Guardianship and Administration Act 1990 (WA).

There is less uniformity in the legislation in the various States and Territories regarding the availability of legal instruments by which a person with capacity appoints a substitute decision-maker in the event that the appointor loses capacity. These powers are often referred to as enduring powers of attorney (financial matters) and enduring powers of guardianship (lifestyle matters).

Typically, the legislation requires that a limited order rather than a plenary order be made if a limited order will meet the needs of the incapable person, eg Guardianship and Administration Act 1990 (WA), s 4(2)(d).

Express provision is made in the Guardianship and Administration Act 2000 (Qld), Pt 4A; Guardianship and Administration Act 1993 (SA), s 15A; Victorian Civil and Administrative Tribunal Act 1998 (Vic), s 88 (although there is no indication on the VCAT website that mediation is used in the guardianship and administration area, http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Mediation?OpenDocument&1=30-Mediation~&2=~&3=~ viewed 12 October, 2006; State Administrative Tribunal Act 2004 (WA), s 54.

Created by the State Administrative Tribunal Act 2004 (WA). (Until 31 January 2004 the functions of the tribunal were carried out by the former Guardianship and Administration Board, created under the G&A Act.)
People who have a cognitive impairment which results from a developmental disability, mental illness, dementia or brain injury are likely to have their capacity to make a legal decision questioned at some point in their lives. In Australia, approximately one in twelve people have an impairment that results in a need for assistance with communication and cognitive skills. Survey of Disability, Ageing & Carers (Australian Bureau of Statistics, 2003) cited in footnote 1, Attorney General's Department of NSW, Are The Rights of People Whose Capacity is in Question Being Adequately Promoted and Protected? A Discussion Paper (28 March 2006) p 3.

For example, the appointment of a guardian under child protection legislation.

Section 43 (Guardianship), ss 64, 65 (Administration) of the Guardianship and Administration Act 1990 (WA).

Section 97 of the Guardianship and Administration Act 1990 (WA).

Section 44(1) of the Guardianship and Administration Act 1990 (WA).

Section 44(2) of the Guardianship and Administration Act 1990 (WA).

Section 68(1) of the Guardianship and Administration Act 1990 (WA).

Section 68(3) of the Guardianship and Administration Act 1990 (WA).

Sections 44(5) and 68(5) of the Guardianship and Administration Act 1990 (WA).

Questions of capacity are important since a determination that a person does not have the requisite capacity may result in the denial of a fundamental human right: the right to autonomous decision-making: Attorney General's Department of NSW, n 19, p 3.

Section 64(1)(a) of the Guardianship and Administration Act 1990 (WA). The Act defines mental disability in s 3(1) to include an intellectual disability, a psychiatric condition, an acquired brain injury and dementia.

Section 43(1)(b) of the Guardianship and Administration Act 1990 (WA).

Sections 43(1)(c) and 64(b) of the Guardianship and Administration Act 1990 (WA).


For discussion, see eg Spencer D and Altabellli T, Dispute Resolution in Australia: Cases, Commentary and Materials (Lawbook Co, 2005) p 138.


The seminal text on transformative mediation is Baruch Bush RA and Folger J, Beyond Neutrality: Confronting the Crisis in Conflict Resolution (Jossey-Bass, 2004) p 86. Mayer presents these factors to build his argument that the field of dispute resolution, of which mediation is a key aspect, to date has not reached its potential and is not having the impact the field can and ought to have.

Mayer BS, Beyond Neutrality: Confronting the Crisis in Conflict Resolution (Jossey-Bass, 2004) p 86. Mayer attributes the failure of parties to use mediation to the following: [m]ediation demands a commitment of time, emotional energy, intellectual effort, and financial resources. It also requires a willingness to take risks and accept responsibility for searching for acceptable solutions. Most important of all, it requires that people own up to the fact that a conflict exists and they must face it. Often a conflict does not seem worth all the effort involved in mediation (p 87). These factors explain in part the trend towards mandatory mediation in a growing number of
statutory contexts.

51 Section 55 of the State Administrative Tribunal Act 2004 (WA).

52 State Administrative Tribunal Act 2004 (WA), A similar provision exists in Guardianship and Administration Act 1993 (SA), s 15A(5). Contrast s 88(6) of the Victorian Civil and Administrative Tribunal Act 1998 (Vic) s 6 which provides: 

"If a member of the Tribunal is a mediator in a proceeding, he or she cannot constitute the Tribunal for the purpose of hearing the proceeding. A change from a facilitative mediation process to a determinative process raises obvious issues about how confidential matters are to be dealt with by the tribunal member during the mediation. The essential requirement is that parties are aware from the outset that what is disclosed during the mediation will be known to the third party who may ultimately decide that matter."

53 There are strengths and weaknesses in this med-arb model. On the one hand, it allows a matter to be dealt with expeditiously, in keeping with the principles of the SAT Act. On the other hand, it might stifle communication in the mediation knowing that the mediator may become the judge of the matter. In the G&A Act area there is also a danger that referring a matter to mediation that can only be finally determined at a subsequent hearing will prolong the process and be perceived as unnecessary by the parties. It is a judgment call by the member referring a matter to mediation as to whether this danger is outweighed by the potential benefits of mediation for the incapable person.

54 As we will see above, there will often be matters before the tribunal in G&A matters that are not amenable to settlement between the parties.

55 The purpose of dispute resolution is set out in broader terms in s 145B of the Guardianship and Administration Act 2000 (Qld) as being to (a) to identify and reduce the issues in dispute between the active parties to a proceeding; and (b) to promote settlement of the issues in dispute. While the reduction of issues is not an expressly stated purpose under the SAT Act, it is a common outcome. In either case, a settlement model of mediation is likely to be adopted.

56 Flower SL, “Resolving Voluntary Mental Health Treatment Disputes in the Community Setting: Benefits of and Barriers to Effective Mediation” (1999) 14 Ohio St J on Disp Resol at 881.

57 Flower, n 56. Flower advocates (at 899 and infra) the following three ways to overcome these barriers: (1) establishing specific mediator qualifications, who should mediate, recommending the practice to mental health professionals or to those educated in topics of mental health; (2) using appropriate settings to hold mediations involving mental health consumers, whether or not to limit the use of caucuses, and the need to create visual or audio aids to assist the consumer in an understanding of the process and the agreement; and (3) determining whether consumer’s counsel should attend the mediation.

58 A well-accepted example being where there is a violent or otherwise abusive relationship between the parties to the mediation.

59 A matter of potential concern to the author is where family members, possibly assisted by lawyers, attempt to resolve financial issues involving a person whose capacity is in question. There may be a lack of awareness of the extent or effect of the disability and the inability of that person to participate in the process. There are legal and ethical traps for the lawyer who purports to represent the interests of the incapable person in these circumstances, and any resultant agreement may be challenged at a later date. It is exactly this potential problem that preventative law, referred to earlier in this article, seeks to avoid. In this case, a proper assessment of capacity is called for and it may be appropriate that an application be made for the appointment of an administrator before any agreements are made between family members.

60 These examples are based loosely on the facts in matters the author has heard or mediated in the tribunal. In all other respects these examples are fictional.

61 See Kovach, n 4, which demonstrates how mediation can be used for decision-making involving the medical staff and families, which can overcome some of the difficulties posed by differences between what she refers to as the medical model for resolving disputes, and the law and justice model that a family might seek to apply.

62 This appointment would be necessary to displace the statutory hierarchy in s 119(3) of the Guardianship and Administration Act 1990 (WA) as to who can give consent to medical treatment. A guardian is higher in the statutory hierarchy than a spouse.

63 See above.