

South Australia

## Aged and Infirm Persons' Property Act 1940

An Act to make provision for the protection of the property of aged and infirm persons, to make provision for the perpetuation of testimony relating to testamentary documents, and for other purposes.

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### Legislative history

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## **The Parliament of South Australia enacts as follows:**

### **Part 1—Preliminary and general**

#### **1—Short title**

This Act may be cited as the *Aged and Infirm Persons' Property Act 1940*.

#### **3—Interpretation**

- (1) In this Act, unless the context or subject matter otherwise requires—

*court* means—

- (a) the Supreme Court; or
- (b) in relation to a matter in which a District Court has jurisdiction—the Supreme Court or a District Court;

*manager* means a person appointed to be manager of a protected estate under this Act; and where more than one person is so appointed, means either all the persons so appointed or each of those persons, as the context requires;

*proclaimed state* means a country, state or territory declared by proclamation to be a proclaimed state for the purposes of this Act;

*protected estate* means the real and personal estate of a protected person, or such part thereof as is the subject matter of a protection order;

*protected person* means a person who or whose estate or part thereof becomes the subject of a protection order.

- (2) The Governor may, by proclamation, declare any country, state or territory to be a proclaimed state and may, by subsequent proclamation vary or revoke any such declaration.

#### **4—Exercise of jurisdiction by court**

- (1) The Supreme Court has jurisdiction to hear and determine any application or other proceeding under this Act.
- (1a) Where an action for damages for personal injury is brought in a District Court, the Court has jurisdiction in that action to make a protection order under section 8A and, if the Court makes such an order, the same or any other District Court has jurisdiction to hear and determine any consequential or related proceeding under this Act.
- (2) Any proceedings under Part 2 may be heard in chambers, and any proceedings under Part 3 shall be heard in chambers.
- (3) The court shall have, and may exercise jurisdiction under Part 2 of this Act—
  - (a) if the person in respect of whom the protection order is sought, or has been made, is, or was at the time of the commencement of proceedings under that Part, domiciled or resident within the State; or
  - (b) if the property in respect of which the protection order is sought, or has been made, is situate within the State.
- (4) Subsection (3) of this section shall be construed as being in addition to, and not in derogation of, any principle of law upon which the jurisdiction of the court under Part 2 of this Act might otherwise be founded.

#### **6—Procedure where case not provided for**

- (1) If any circumstances arise for which no procedure is provided by this Act, or if there is any doubt as to what is the correct procedure, the court may direct what shall be done in any particular case, or that the procedure which has been adopted shall be deemed proper, or may make such order to meet the circumstances of the case as the court thinks fit: Provided that no such direction or order (even though not appealed against) shall operate so as to bar or prejudice the court from giving further or other directions at the hearing of any proceedings under this Act if, in the interest of justice, the court thinks fit so to do.
- (2) Subject to any direction by the court to the contrary, an application for a direction under subsection (1) may be made *ex parte*.

### **Part 2—Aged and infirm persons' property**

#### **7—Circumstances under which protection order may be made**

- (1) Where it is made to appear to the satisfaction of the court that any person is, by reason of age, disease, illness, or physical or mental infirmity—
  - (a) unable, wholly or partially, to manage his affairs; or
  - (b) subject to, or liable to be subjected to, undue influence in respect of his estate, or the disposition thereof, or of any part thereof; or
  - (c) otherwise in a position which in the opinion of the court renders it necessary in the interest of that person or of those dependent upon him that his property should be protected as provided by this Act,

the court may make a protection order in respect of the estate or part of the estate of that person.

- (2) Where it is made to appear to the satisfaction of the court that any person is, by reason of his taking or using in excess alcoholic liquors, or any intoxicating, stimulating, narcotic, or sedative drug, unable, wholly or partially, to manage his affairs, whether such inability is continuous or occasional, the court may make a protection order in respect of the estate or part of the estate of that person, anything in any other Act to the contrary notwithstanding.

## **8—Application for protection order**

- (1) Except in the case of an application made under subsection (1) of section 8A of this Act, every application for a protection order shall be made by originating summons, and may be made—
- (a) by the person whose property is sought to be protected; or
  - (b) by the husband or wife of such person; or
  - (c) by any near relation by blood or marriage of such person; or
  - (d) by the Public Trustee; or
  - (e) by any other person who adduces proof of circumstances which in the opinion of the court make it proper that such other person should make the application.
- (2) Where the application is made by any person other than the person whose property is sought to be protected, the originating summons shall be served upon such last-mentioned person, unless the court in any special case otherwise directs.

## **8A—Protection order on court's own motion**

- (1) Where, in any action by a person for damages for personal injury sustained by him, it appears to the court that, by reason of that injury, that person suffers or is likely to suffer from some physical or mental infirmity by reason of which he is—
- (a) unable, wholly or partially, to manage his affairs; or
  - (b) subject to, or liable to be subjected to, undue influence in respect of his estate, or the disposition thereof, or of any part thereof; or
  - (c) otherwise in a position which in the opinion of the court renders it necessary in the interests of that person or of those dependent on him that his property should be protected as provided by this Act,

subject to subsection (2) of this section the court may, of its own motion or on the application of a prescribed person and before assessing the amount of the damages, make a protection order in respect of the estate or part of the estate of the person in respect of whom the damages are to be awarded.

- (2) The court shall, before making a protection order under this section—
- (a) where the application is made by a prescribed person, other than the person in respect of whom the damages are to be awarded, cause notice of its intention to consider the making of the order to be given personally to that person, unless the court in any special case otherwise directs; and
  - (b) receive such evidence and hear such argument relevant to the matter as to the court seems desirable or expedient.

- (3) A reference in subsection (1) of this section to an action includes a reference to an action which had been commenced before, and which had not been completed by, the day on which the *Aged and Infirm Persons' Property Act Amendment Act 1973* came into operation.
- (4) In this section a *prescribed person* means—
  - (a) the person in respect of whom the damages are to be awarded; or
  - (b) the husband or wife of that person; or
  - (c) any near relation by blood or marriage of that person; or
  - (d) the Public Trustee; or
  - (e) any other person who adduces proof of circumstances which in the opinion of the court make it proper that that person should make an application or be otherwise heard in the proceedings.

### **9—Examination of protected person**

Before making any protection order in respect of any person, the court may in any manner which it thinks fit examine personally such person with or without the attendance of any other persons interested.

### **9A—Investigation by Director-General of Community Welfare**

- (1) Before making a protection order in respect of any person, the court may order that an investigation into the affairs of such person shall be made by the Director-General of Community Welfare and may adjourn the proceedings until a copy of the report of the Director-General thereon is received by the court.
- (2) The Director-General shall, as soon as practicable, conduct the investigation and send a written report thereon to the Minister of Community Welfare and a copy thereof to the court.
- (3) Before making a protection order in respect of such person, the court may receive the copy of the report in evidence and may have regard to the matters contained in the report.
- (4) For the purposes of any investigation under this section, the Director-General of Community Welfare or any officer of the Department for Community Welfare may enter any building or premises where any person whose affairs are being investigated is present.
- (5) The owner and person in charge of the building or premises and every person having the care or control of the person whose affairs are being investigated shall, if so required by the Director-General or an officer of the Department for Community Welfare, give to the Director-General or officer all assistance in connection with the investigation which he is reasonably able to give or any papers, books or other documents relating to such person which he may have in his possession or under his control.  
Penalty: One hundred dollars.
- (6) Proceedings for a contravention of subsection (5) of this section shall be disposed of summarily.

## **10—Appointment of manager**

- (1) If the court thinks fit to make a protection order, the court shall, in and by the protection order, appoint the husband or wife or near relation by blood or marriage of the protected person, or some other person, or any body corporate incorporated in this State by or pursuant to any law of this State, either alone or with any other person or persons, or the Public Trustee alone, to be the manager to take possession of and to control and manage all or such part or parts of the estate of the protected person as the court may direct.
- (2) The court may in any case appoint the Public Trustee alone to be manager, but shall not appoint any person to be manager together with the Public Trustee.
- (3) The court may, if it thinks fit, require any manager other than the Public Trustee to give such security to the Public Trustee as to the court seems fit for the due performance of the duties of manager.
- (4) If by the protection order any person other than the Public Trustee is appointed to be manager, the court shall cause a copy of the protection order to be supplied to the Public Trustee.

## **11—Variation or rescission of protection order**

- (1) The court may rescind any protection order.
- (2) The court may from time to time vary any protection order so as to provide that the protection order shall apply to any part of the estate of the protected person to which, at the time of the variation, the protection order does not apply or so as to provide that the protection order shall cease to apply to any part of the said estate.
- (3) Subject as hereinafter provided in this subsection, a protection order shall be determined by the death of the protected person. If for any special reason the court thinks it desirable so to do, the court may direct that the protection order shall remain in force for any period not exceeding two months after the death of the protected person but in any such case and notwithstanding the direction of the court, the protection order shall be determined if grant of probate of the will or administration of the estate of the protected person is granted by the court pursuant to the *Administration and Probate Act 1919*.

## **12—Exemption of part of estate**

- (1) The court may by the protection order or from time to time, except from the estate of the protected person to be taken possession of and controlled by the manager any part of the said estate.
- (2) The court may permit any such part to remain in the possession of the protected person, or of the wife or husband or child of the protected person. The court may from time to time direct that such possession shall be uncontrolled or that it be subject to such terms and conditions as are, from time to time, imposed by the court.

## **13—Powers of manager**

- (1) The manager shall have the following powers, unless the court in any particular case otherwise orders:
  1. To take possession of the protected estate, and to recover possession thereof from any person holding the same:

2. To repair and insure against any contingency any part of the estate:
  3. To demand, recover, and receive moneys and personal effects payable to or belonging to the protected person:
  4. To apply any moneys (whether arising from real or personal property, and whether income or capital) for the maintenance of the protected person, and the wife or husband and children of the protected person, and for the education of the children of the protected person, and in payment of the debts and liabilities of the protected person:
  5. To carry on any trade or business theretofore carried on by the protected person, and to carry on the business of any partnership in which the protected person may be a partner:
  6. To apply for and, if granted, to undertake administration for the use and benefit of the protected person during his incapacity where he would, but for his incapacity, be entitled to a grant of probate or administration.
- (2) The manager shall have such other powers and duties in respect of the protected estate as the court in and by the protection order, or from time to time, defines or directs, and the court shall have jurisdiction to confer any such powers upon the manager to be exercised generally in respect of the estate or any part thereof, or upon any special occasion, or in respect of any particular subject matter.

#### **14—Continuance of provision for dependent persons**

Where the protected person has, before the making of the protection order, made provision of any nature, whether regular or casual, for any person wholly or partially dependent on him, whether a relation or not, the court may in its discretion authorise the manager to continue the same or any less provision out of the protected estate.

#### **15—Application of unapplied portion of estate**

- (1) The manager shall apply such part of the corpus and income of the protected estate as is not required for the purposes specifically defined in this Act in such manner as is authorised by subsection (2) or as the court from time to time directs.
- (2) The manager may invest the unapplied corpus or income of the protected estate in such securities, other than the mortgage of land, as are authorised by law for investment of trust moneys.
- (3) The court may direct the investment of the unapplied corpus or income of the protected estate in such investments as the court from time to time deems proper in the interest of the protected person or of those dependent upon him, and the court shall not be limited in respect of any such direction to such securities as are authorised by law for investment of trust moneys or by any provision of subsection (2).

#### **16—Power to order sale etc**

The court may direct the sale, mortgage, lease, or other disposition of the whole or any part of the protected estate by the manager; and may confer upon the manager any powers in respect of or in relation to the protected estate which it may deem necessary or expedient for the realisation, investment, or better management thereof, or for the benefit or advancement in life of the children of the protected person; and, in particular, may confer any powers which the court may under any law or practice relating to trustees or to wards of court confer upon trustees or itself exercise.

### **16A—Where administration has disturbed entitlements of beneficiaries, the Court has power to intervene**

- (1) Where at the death of a protected person or former protected person who died leaving a will it appears that, in consequence of any dealing with the estate by an administrator, the share of any beneficiary in that estate under the will has been affected, the Court may, on application by an interested person, make such orders as it thinks just to ensure that no beneficiary gains a disproportionate advantage, or suffers a disproportionate disadvantage, of a kind not contemplated by the will, in consequence of the estate having been managed under this Act.
- (2) An order made by the Court under subsection (1) shall operate and take effect as if it had been made by a codicil to the will of the protected person or former protected person executed immediately before his death.
- (3) The Court shall, on making an order under subsection (1), direct that a certified copy of the order be made on the probate of the will and may, for that purpose, require the production of the probate.
- (4) An application under this section must be made within six months from the date of the grant in this State of probate of the will unless the Court, after hearing such of the persons affected as the Court thinks necessary, extends the time for making the application.
- (5) An extension of time granted under subsection (4) may be granted—
  - (a) on such conditions as the Court thinks fit; and
  - (b) whether or not the time for making an application under this section has expired.
- (6) An application for extension of time must be made before the final distribution of the estate.
- (7) A distribution of any part of the estate made before an application for extension of time shall not be disturbed by reason of the application or any order made upon the application.
- (8) This section does not apply in respect of the will of a deceased person who died before the commencement of this section.

### **17—Provision where two or more managers**

Where more than one manager is appointed all the managers must concur in every act, matter, and thing done in relation to the protected estate.

### **18—Manager to be deemed trustee**

A manager shall be deemed to be a trustee for all the purposes of the *Trustee Act 1936*.

## **19—Filing of statement**

- (1) The manager of every protected estate shall, at such times and in such manner as is directed by order of the court or prescribed by rule of court, prepare and file in the court a statement, verified by the affidavit of the manager, showing the property comprised in the protected estate, and the condition thereof, and the manner in which the property has been dealt with, administered, or applied, and such other particulars as may be prescribed, or as may be in any special case directed by the court to be included in the statement.
- (2) In any case in which the manager is not the Public Trustee the manager shall forthwith after filing every such statement deliver to the Public Trustee a duplicate thereof, and shall thereafter exhibit to the Public Trustee such accounts and vouchers in relation thereto as the Public Trustee may require.
- (3) If any manager fails or refuses to file any such statement as provided aforesaid, or to deliver to the Public Trustee a duplicate thereof as aforesaid, or to exhibit to the Public Trustee any such accounts or vouchers as aforesaid, he shall be guilty of an offence punishable summarily and liable to a penalty not exceeding one hundred dollars.
- (4) The Public Trustee shall cause every such statement delivered to him to be examined and reported upon either by himself or by any person he may appoint in that behalf, and shall cause the report to be filed in the court and a copy thereof to be transmitted to the manager by whom the statement has been delivered. No fee shall be payable on the filing of the report in the court.
- (5) For the purpose of examining any such statement, the Public Trustee may require the accounts of the manager to be audited by an auditor appointed by the Public Trustee.

## **20—Percentage of moneys collected payable to Public Trustee**

- (1) Where any person other than the Public Trustee is appointed manager in pursuance of this Act there shall be payable out of the protected estate by the manager to the Public Trustee, for the services rendered by the Public Trustee in respect of the estate, such remuneration as the court may from time to time direct.
- (2) If pursuant to subsection (5) of section 19, an auditor is appointed by the Public Trustee to audit the accounts of the manager, the manager shall pay to the Public Trustee out of the estate of the protected person the fees payable by the Public Trustee to the auditor appointed as aforesaid.

## **21—Exemption of manager from personal liability**

A manager acting in pursuance and exercise of any powers or duties conferred or imposed upon him by this Part or by the court shall not be personally liable in respect of any contract or engagement entered into with or any liability incurred to any person unless the manager has concealed from that person the fact that he was acting therein on behalf of the protected estate, but the protected estate shall be liable in respect of all such contracts, engagements, or liabilities, and the same may be enforced by proceedings against the manager in his representative capacity.

## **22—Proceedings**

- (1) Proceedings under this Part, whether commenced by originating summons, application under section 8A of this Act or on the court's own motion under that section shall remain open for application to be made therein from time to time to the court by the manager, or the protected person, or the Public Trustee, or by any relation of the protected person or by any person interested in the protected estate. After such notice or service as the court thinks fit to direct, any person may be made party to the proceedings generally or in any particular matter, and the court may grant and enforce against such party in matters relating to the protected person or the protected estate all judgments, orders, costs, and remedies, including injunction and mandamus, as the court might grant and enforce in any action against such party at the suit of the protected person or of the manager: Provided that if such party requires that an issue or issues of fact be stated and tried by the court, the court may direct that an issue or issues of fact be stated and tried, as between the manager in the names of the protected person and such party, by the court as upon the trial of an ordinary action or that the issue or issues of fact be stated and tried, as between the manager in the names of the protected person and such party, by the court in such other manner in accordance with the general practice of the court as is deemed appropriate by the court.
- (2) Upon any application to the court by the manager or the Public Trustee after the making of the protection order, it shall be necessary to serve with notice of the application only such persons or parties (if any) as the court on the application requires to have notice thereof.
- (3) The court may at any time discharge any party made party to the proceedings.

## **23—Inquiry by special magistrate**

- (1) The court may at any stage in any proceedings under this Part refer any matter arising out of those proceedings for inquiry by a special magistrate.
- (2) The special magistrate shall, for the purposes of the inquiry, have power to administer oaths, to take affirmations, and to examine parties and witnesses. Any person who by subpoena issued out of the court is summoned to attend before the special magistrate shall be bound to attend in pursuance of the subpoena and shall be liable to process of contempt in case of default in attendance, and all persons swearing or affirming before the special magistrate shall be liable to such penalties for any wilful and corrupt false swearing or affirming as if the matters sworn or affirmed had been sworn or affirmed before the court.
- (3) The special magistrate shall report the result of his inquiry to the court and the court may, upon the report, make such order as it deems fit.

## **24—Application to court by Public Trustee**

- (1) In any case in which the Public Trustee is the manager, the Public Trustee may, in respect of the exercise of any power of the manager, apply *ex parte* to the court for approval, advice, or direction upon a written statement setting out the facts.
- (2) Upon any such application, it shall not be necessary to serve notice of the application on any person or party, unless the court so directs.

- (3) If the court sees fit to approve, advise, or direct on any such *ex parte* statement, the approval, advice, or direction shall be sufficiently evidenced by the fiat thereon, and it shall not be necessary to draw up any formal order. The statement together with the fiat shall be filed in the court.

## **25—Exercise by manager of powers of protected person**

Where any right or power is or would be exercisable by a protected person if that person were *sui juris*, whether for his own benefit or in the character of a trustee, guardian or in any other fiduciary character, and it appears to the Court to be expedient that that right or power should be exercised the manager may in the name or on behalf of the protected person and with the sanction of the order of the Court made on his own application or on the application of any person interested exercise that right or power in such manner as the order directs.

## **26—Execution of assurances etc by manager**

The manager may, in the name and on behalf of the protected person, execute and do all such conveyances, transfers, leases, deeds, assurances, and things as may be necessary for effectuating any of the powers conferred upon him by this Act or by any order of the court.

## **27—Power of manager to avoid dispositions and contracts of protected persons**

- (1) Subject to this section—
  - (a) a disposition of property of a protected estate made by the protected person;  
or
  - (b) a contract entered into by a protected person,is voidable at the option of the manager.
- (2) A transaction may not be avoided by a manager if the other party to the transaction did not know and could not reasonably be expected to have known that the person with whom he dealt was unable, wholly or partially, to manage his affairs.
- (3) The Court may, by order, exempt a disposition of property or contract from the operation of this section if the Court is satisfied that to do so would be for the benefit of the protected person and that he has an adequate understanding of the nature of the transaction.
- (4) Nothing in this section affects the law relating to testamentary dispositions.

## **28—Registration of protection order**

- (1) A protection order may be registered under the provisions of the *Registration of Deeds Act 1935* as an instrument affecting the title to any land wherein the protected person has any estate or interest, legal or equitable.
- (2) A protection order shall be deemed to be an instrument purporting to affect land under the provisions of the *Real Property Act 1886* and, upon application to the Registrar-General in a manner and form approved by him, a memorandum of the order may be entered upon the register book with respect to any land whereof the protected person is the registered proprietor of any estate or interest under the provisions of that Act.

- (3) The manager, in the name and on behalf of the protected person, may lodge a caveat in respect of any land under the provisions of the *Real Property Act 1886* to or in which the manager claims that the protected person is entitled or beneficially interested.
- (4) The provisions of this section shall apply notwithstanding the provisions of the *Real Property Act 1886*.

## **29—Restriction of testamentary capacity of protected person**

- (1) The court may direct in any case that any testamentary provision by a protected person after the making of a protection order shall be made only after such precautions as the court thinks fit to direct, and any testamentary provision made otherwise than as the court shall so direct shall be ineffectual for all purposes.
  - (1a) The court may make such a direction at any time or from time to time and it may be made on the application of the manager.
- (2) The court may, by such means as it thinks fit, cause inquiries to be made as to the existence of any will or codicil made and executed by the protected person prior to the making of the protection order (whether the will or codicil was made before or after the passing of this Act), and may direct that any such will or codicil shall be deposited with the Registrar of Probates. If it appears to the court that the will or codicil was made when the person making the same was subject to any of the incapacities defined in section 7 of this Act, the court may inspect the will or codicil, and may cause inquiries to be made, in such manner as to the court seems fit, whether the will or codicil expresses the present desire and intention of the protected person, and, if satisfied to the contrary, may in any case where such course is possible, cause the present desire and intention of the protected person to be ascertained to its satisfaction, and may authorise the execution by the protected person of a new will disposing of his estate in accordance with such present desire and intention.
- (3) Except as provided in this section, nothing in this Part shall affect the law relating to testamentary dispositions.

## **30—Relationship between this Act and the *Guardianship and Administration Act 1993***

- (1) The court, on making or rescinding a protection order, must cause notice of the court's order to be forwarded to the Guardianship Board.
- (2) If an administration order is in force in respect of the whole of a person's estate, a protection order cannot be made in respect of the estate while that other order remains in force.
- (3) If an administration order is in force in respect of a part of a person's estate, a protection order can only be made in respect of the remainder of the estate while that other order remains in force.
- (4) If an administration order is made in respect of the whole or a part of a protected person's estate—
  - (a) the Guardianship Board must, on all rights of appeal against the order being exhausted, cause a notice of the order and of the date on which it took effect to be filed in the court; and

- (b) on the notice being so filed, the protection order will be taken to have been wholly rescinded or, if the administration order relates only to a part of the person's estate, rescinded to that extent, as from the day on which the administration order took effect.
- (5) The court must notify the former manager of the protected estate of a rescission of or affecting the protection order pursuant to subsection (3).
- (6) The former manager of the protected estate has the same obligations in relation to the filing of accounts, statements and affidavits as if the protection order had been rescinded by the court.
- (7) In this section—

*administration order* means an administration order under the *Guardianship and Administration Act 1993*.

### **31—Expenses and remuneration of manager**

- (1) All expenses properly incurred by the manager in respect of the maintenance of the protected person, or the administration of the protected estate, shall be charged against and payable out of that estate; and in addition, there shall be payable in respect of all moneys forming part of the protected estate, and coming under the control of the manager, such remuneration by commission or otherwise to the manager, and such other charges, as are allowed by the court in any manner thought fit by the court.
- (2) If the Public Trustee is the manager, there shall be payable in respect of all moneys forming part of the protected estate and coming under the control of the Public Trustee, a commission and fees determined in accordance with regulations made pursuant to section 112 of the *Administration and Probate Act 1919* or as is otherwise allowed by the court, and such other charges as may be allowed by the court.

### **32—Change of managers**

- (1) The court may at any time, on the application of the manager, or on the application of the protected person or of any other person, on proof that there is good cause for so doing, make an order appointing any other person or persons as the manager of the estate in addition to or in lieu of the manager or appointing the Public Trustee as the manager of the estate in lieu of the manager.
- (2) The court may at any time, on the application of the protected person, or of the manager, or of any other person, rescind the order appointing the manager, on proof that the protected person is of sufficient ability to manage his own affairs.

### **32A—Provision for Public Trustee to manage estates of persons in other parts of the world**

If an authority invested by the laws of any proclaimed state with the custody or administration of the estate of a person who is incapable of managing his affairs by reason of age, disease, illness or physical or mental infirmity—

- (a) certifies in writing under his hand to the Public Trustee that the person has property in this State; and
- (b) by instrument in writing under his hand authorises the Public Trustee to manage the property of that person within this State,

the Public Trustee shall have and may exercise in respect of that property all the powers that he could exercise if he were the manager of the estate of that person.

### **32B—Provision for Public Trustee to request authority in other parts of the world to administer estate of protected persons**

- (1) Where it appears to a manager that the protected person has property in a proclaimed state he may, by instrument in writing directed to the authority of that proclaimed state who is or may be invested by its laws with the management of the estates of persons, however described under those laws, who are incapable of managing their affairs by reason of age, disease, illness or physical or mental infirmity—
  - (a) certify that he has the management of the estate of the protected person; and
  - (b) authorise the authority to manage the property of the protected person that is in the proclaimed state.
- (2) A manager may revoke or vary an authority given by him under subsection (1).

## **Part 3—Perpetuation of testimony relating to testamentary documents**

### **33—Application for order to perpetuate testimony**

- (1) Upon the application of any person (other than a protected person) who has made and executed any will or codicil, the court may order that any testimony which may be material in relation thereto be perpetuated and for that purpose may make any order requiring the applicant or any other person to attend for examination upon oath before the court at any time and place. The court may give any directions as to the manner in which the examination is to be conducted, the evidence to be adduced therein, the parties who may attend on the examination and as to any other matters thought fit by the court.
- (2) Every such application shall be made by originating summons and may be made *ex parte*.
- (3) The court may direct that notice of the application or of any order made on such application be given to any person who may be interested in the disposition of the applicant's estate.
- (4) The testimony to be taken upon any such examination shall, subject to the direction of the court, be relevant to the following matters, namely:
  1. The due execution of any will or codicil made by the applicant:
  2. The testamentary capacity of the applicant:
  3. Whether the applicant was subject to or liable to be subjected to undue influence in respect of his estate or the disposition thereof or any part thereof:
  4. Any other matter which would be relevant on any application or in any action relating to the grant or recall of probate or administration of the will or codicil:
  5. Any matter which would be relevant in an application under the *Testator's Family Maintenance Act 1918*.

### 34—Attendance at examination

- (1) Any person claiming to be interested in the proceedings may by leave of the court and upon such terms (if any) as the court may direct and at his own expense—
  - (a) attend the whole or any part of the proceedings in person or by a solicitor:
  - (b) upon paying the costs occasioned thereby give or call such evidence as the court thinks fit.
- (2) Any person claiming to be interested may by leave of the court, be admitted to the place where the examination is being held during the examination, but shall not be entitled to take notes of the examination except by leave of the court.

### 35—Conduct of examination

- (1) The court may put such questions to the applicant or any other person relating to any matters which the court considers relevant whether arising out of the cause of the examination or otherwise.
- (2) The court shall have power to disallow such portions of the evidence tendered or any questions put in cross examination to any person during the examination which the court considers go beyond the legitimate requirements of the examination.
- (3) Any questions which may be objected to and the purport of any evidence and any questions which may be disallowed by the court shall be noted in the depositions together with a short statement of the reasons for disallowing any such evidence or questions.

### 36—Discontinuance of proceedings

The applicant may discontinue the proceedings at any stage upon paying the court fees then due. Upon any such discontinuance the court may order the applicant to pay to any person attending the proceedings by leave such costs as it thinks just.

### 37—Report

After the termination of the examination, the court shall make a report touching the examination and the conduct and credibility of any witness or other person thereon.

### 38—Power of examiner to conduct examination

- (1) The court may order that the examination of persons ordered to attend for examination may be before an officer of the court or other person appointed by the court to conduct the examination (hereinafter referred to as *the examiner*) and may give any directions as to the manner in which the examination is to be conducted and as to the testimony to be taken upon the examination.
- (2) Subject to any directions of the court, the examiner—
  - (a) shall have the powers and duties of the court under sections 34 and 35 of this Act:
  - (b) shall have the powers of a judge and the court under sections 22, 23, and 24 of the *Evidence Act 1929*.
- (3) After the termination of the examination, the examiner shall make a report to the court touching the examination and the conduct and credibility of any witness or other person thereon.

### **39—Deposit of depositions and will or codicil**

- (1) The depositions when taken upon any examination shall be authenticated by the court or examiner and forthwith after the termination of the examination transmitted together with the report of the court or examiner and the will or codicil or a copy thereof certified by the court or examiner to be a true copy to the Registrar of Probates and deposited in the Probate Registry.
- (2) Any person interested may by leave of the court inspect or bespeak a copy or extract of the depositions (so taken) or report but no person other than the person who made the will or codicil shall be entitled to inspect the will or codicil or bespeak a copy or extract thereof except by the special leave of the court.
- (3) No original will or codicil so deposited shall be withdrawn except by leave of the court.

### **40—Use of depositions as testimony**

The court may upon such terms (if any) as it thinks just order that the depositions and report be received in evidence in any proceedings or on any application relating to or concerning the will or codicil in respect of which the depositions and report were taken or made notwithstanding any objection to the depositions on the ground that a party interested in the proceedings or application was not present when the depositions were taken.

## Legislative history

### Notes

- Amendments of this version that are uncommenced are not incorporated into the text.
- Please note—References in the legislation to other legislation or instruments or to titles of bodies or offices are not automatically updated as part of the program for the revision and publication of legislation and therefore may be obsolete.
- Earlier versions of this Act (historical versions) are listed at the end of the legislative history.
- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au).

### Principal Act and amendments

New entries appear in bold.

Year	No	Title	Assent	Commencement
1940	36	<i>Aged and Infirm Persons' Property Act 1940</i>	28.11.1940	28.11.1940
1950	22	<i>Aged and Infirm Persons' Property Act Amendment Act 1950</i>	9.11.1950	9.11.1950
1965	22	<i>Aged and Infirm Persons' Property Act Amendment Act 1965</i>	25.11.1965	27.1.1966 ( <i>Gazette 27.1.1966 p145</i> )
1968	42	<i>Aged and Infirm Persons' Property Act Amendment Act 1968</i>	19.12.1968	19.12.1968
1973	16	<i>Aged and Infirm Persons' Property Act Amendment Act 1973</i>	13.9.1973	13.9.1973
1975	9	<i>Aged and Infirm Persons' Property Act Amendment Act 1975</i>	20.3.1975	20.3.1975
1984	41	<i>Aged and Infirm Persons' Property Act Amendment Act 1984</i>	24.5.1984	24.5.1984
1984	73	<i>Aged and Infirm Persons' Property Act Amendment Act (No. 2) 1984</i>	15.11.1984	1.1.1985 ( <i>Gazette 13.12.1984 p1811</i> )
1990	15	<i>Aged and Infirm Persons' Property Act Amendment Act 1990</i>	12.4.1990	1.2.1992 ( <i>Gazette 16.1.1992 p126</i> )
1993	59	<i>Mental Health Act 1993</i>	27.5.1993	6.3.1995 ( <i>Gazette 2.3.1995 p734</i> )
2006	17	<i>Statutes Amendment (New Rules of Civil Procedure) Act 2006</i>	6.7.2006	Pt 6 (ss 31—38)—4.9.2006 ( <i>Gazette 17.8.2006 p2831</i> )

### Provisions amended since 3 February 1976

- Legislative history prior to 3 February 1976 appears in marginal notes and footnotes included in the consolidation of this Act contained in Volume 1 of The General Public Acts of South Australia 1837-1975 at page 242.

New entries appear in bold.

Entries that relate to provisions that have been deleted appear in italics.

Provision	How varied	Commencement
Pt 1		
s 2	<i>omitted under Legislation Revision and Publication Act 2002</i>	
s 3		
s 3(1)	s 3 redesignated as s 3(1) by 73/1984 s 3(b)	1.1.1985
court	substituted by 15/1990 s 3(a)	1.2.1992
<i>master</i>	<i>deleted by 15/1990 s 3(b)</i>	<i>1.2.1992</i>
proclaimed state	inserted by 73/1984 s 3(a)	1.1.1985
s 3(2)	inserted by 73/1984 s 3(b)	1.1.1985
s 4		
s 4(1)	substituted by 15/1990 s 4	1.2.1992
s 4(1a)	inserted by 15/1990 s 4	1.2.1992
s 5	<i>deleted by 15/1990 s 5</i>	<i>1.2.1992</i>
s 6		
s 6(1)	amended by 15/1990 s 6(a), (b)	1.2.1992
s 6(2)	substituted by 15/1990 s 6(c)	1.2.1992
Pt 2		
s 10		
s 10(4)	amended by 15/1990 s 7	1.2.1992
s 13		
s 13(1)	amended by 41/1984 s 2	24.5.1984
s 16A	substituted by 73/1984 s 4	1.1.1985
<i>s 16B</i>	<i>deleted by 73/1984 s 4</i>	<i>1.1.1985</i>
s 24		
s 24(3)	amended by 15/1990 s 8	1.2.1992
s 27	substituted by 73/1984 s 5	1.1.1985
s 28		
s 28(2)	amended by 73/1984 s 6	1.1.1985
s 29		
s 29(1)	amended by 73/1984 s 7	1.1.1985
s 30		
	substituted by 15/1990 s 9	1.2.1992
	substituted by 59/1993 Sch cl 3	6.3.1995
s 31		
s 31(2)	amended by 73/1984 s 8	1.1.1985
ss 32A and 32B	inserted by 73/1984 s 9	1.1.1985
Pt 3		
s 38		
s 38(1)	amended by 15/1990 s 10	1.2.1992
s 40	amended by 15/1990 s 11	1.2.1992

## Historical versions

Reprint No 1—1.7.1991

Reprint No 2—1.2.1992