



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No X

Protection of Money Awarded as Damages

REPORT

AUGUST 1976

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

As at the date of this report the Commissioners were -

Mr. D.K. Malcolm, Chairman

Mr. E.G. Freeman

Professor R.W. Harding

The Executive Officer of the Commission is Mr. C.W. Ogilvie, and the Commission's offices are on the 11th floor, R. & I. Bank Building, 593 Hay Street, Perth, Western Australia, 6000 (Telephone: 256022).

PREFACE

In a letter of 24 June 1976, the Attorney General, the Hon. I.G. Medcalf, Q.C., M.L.C., advised the Commission that the then Chief Justice of Western Australia had raised with him the question whether it might be desirable to enact legislation to protect a plaintiff who had recovered substantial damages in a court judgment but who lacked the capacity to handle his own affairs (although not an incapable person mentally).

The Attorney General drew attention to a provision in the *Aged and Infirm Persons' Property Act 1940* of South Australia which enables the court to make an order restraining such persons from dissipating the fruits of the judgment to the detriment of themselves and their families. The Attorney suggested that the Commission might best deal with the matter on an informal basis.

Having studied the matter the Commission accordingly reported to the Attorney General by letter dated 3 August 1976 outlining the existing law in Western Australia and the relevant provisions of the *Aged and Infirm Persons' Property Act* of South Australia and recommending that legislation along the lines of the South Australian provisions be enacted in this State. The text of the report is reproduced below.

WESTERN AUSTRALIA

Law Reform Commission

R. & I. Bank Building, 593 Hay Street, Perth, Western Australia, 6000

Telephone: 25 6022

The Hon. I.G. Medcalf, M.L.C.
Attorney General
11th Floor
Elder Building
111 St. George's Terrace
PERTH 6000

Dear Mr. Medcalf,

Protection of Money Awarded As Damages

1. Further to my letter of 30 June 1976, the Commission has now given its further consideration to this matter.

2. The Commission has studied the *South Australian Aged and Infirm Persons' Property Act* (a photocopy of which is enclosed). The Section to which the Chief Justice referred is Section 8a which was introduced by an amendment in 1973. Sub-Section (1) of this section provides:

"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;
 - (b) subject to, or liable to be subject 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."

The effect of a protection order is that the Court can then appoint a person, corporation or the Public Trustee to be the Manager of the protected person's estate.

3. Sub-Section (2) of Section 8a contains provision for notice to the person in respect of whom damages are to be awarded and for the Court to receive evidence and hear argument

relevant to the making of a protection order. Sub-section (4) enables the application to be made by:

- (a) the person in respect of whom the damages are to be awarded;
- (b) the husband or wife of that person;
- (c) any near relative by blood or marriage of that person;
- (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.

4. Before making a protection order the Court may examine the person concerned with or without the attendance of any other person interested (Section 9) and may also order an investigation of that person's affairs by the Director-General of Community Welfare (Section 10).

5. If the Court thinks fit to make a protection order, it may appoint the applicant or some other person, a corporation or the Public Trustee "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" (Section 10(1)). Thus the scope of the order could be limited to the fund represented by the damages award or it could extend to the whole of the estate of the person concerned. Provision is made for rescission or variation of a protection order (Section 11). The terms of appointment, powers, duties and liabilities of a manager appointed to protect an award of damages are assimilated to the general provisions of the *South Australian Act* covering the management of the estates of infirm or incapable persons.

6. In Western Australia, both the *Mental Health Act, 1962* and the *Public Trustee Act, 1935* contain provisions concerning the management of the estates of persons who are incapable of managing their own affairs. Under Section 64 of the *Mental Health Act*, it is provided that if, upon application by the Public Trustee, a corporate trustee or a natural person, the Court is satisfied that a person is incapable "by reason of any mental illness, defect or infirmity, however occasioned, of managing his affairs", the Court may make a declaration to that effect and may appoint the applicant or some other person to be the Manager of his estate.

7. Under Section 35 of the *Public Trustee Act* if it is proved to the satisfaction of the Public Trustee that a person is by reason of senility, disease, illness or, physical or mental infirmity incapable of managing his affairs, then the Public Trustee may sign a certificate that the person is an infirm person for the purposes of this Act. Once this is done it is mandatory under Section 36C for the Public Trustee to undertake the care and management of the estate of such infirm persons.

8. It should be noted that the power of the Court: to appoint a manager and the power of the Public Trustee to give a certificate and so assume management rests in each case on a finding or certification that the person is "incapable" of managing his affairs. Under Section 8a of the *South Australian Act*, the power of the Court to make a protection order may be exercised where the person is unable "wholly or partially" to manage his affairs, subject to undue influence or otherwise in a position which renders it in his interests or those dependant upon him that his property should be protected. In addition, the *South Australian Court* is able to act on its own motion.

9. The Commission agrees with the view that the present law should be amended so as to make provision for a protection order in the kind of case mentioned by the Honourable the Chief Justice. Legislation along the lines of the 1973 amendment in South Australia would appear to be appropriate. It does not seem necessary that there should be a formal reference of this subject to the Commission for the preparation of a working paper and report. The need for and nature of the desired reform both seem to be established.

10. The only difficulty seems to be in the selection of the most appropriate manner to introduce the reform. The *Mental Health Act* already contains adequate provisions regarding the powers, duties and liabilities of a manager appointed of the estate of an incapable person. The relevant provisions of the *Mental Health Act* are the West Australian equivalent of the *Aged and Infirm Persons Property Act, 1940* of South Australia. As a matter of drafting it would not be difficult to incorporate appropriate amendments in the *Mental Health Act* to give effect to the South Australian legislation. However, because of the association of the *Mental Health Act* with mental illness it might be thought that the use of the *Mental Health Act* as the source of jurisdiction to make a protection order could be misconstrued or clothe the proceedings with an unintended and, possibly, unwarranted stigma.

11. Suitable provisions could be included in the *Public Trustee Act*, but the Public Trustee is but one of the possible appointees as manager under a protection order.

12. The reform could be introduced by separate enactment. It might be considered that the reform could be most readily achieved by conferring jurisdiction on the Supreme Court and District Court by amendment to the *Supreme Court Act* and the *District Court Act* with appropriate cross-reference fixing the manager so appointed with the powers, duties and liabilities of a manager appointed under the *Mental Health Act* and incorporating such other of the machinery provisions that Act as may be necessary. There may well be appropriate cases where the Court would benefit from a report by the Director of Community Welfare concerning the affairs of the person concerned. A power to give directions regarding the provision of such report would rest more easily in the *Supreme Court Act* or *District Court Act* rather than in the *Mental Health Act*.

It is clear that there are a number of ways in which the reform could be achieved and the Commission holds no strong views on this aspect of the matter. However, it would be pleased to discuss the matter further with Parliamentary Counsel if requested.

Yours sincerely,

(Signed) David K. Malcolm

Chairman

3 August 1976

[Reprinted on the 3rd February, 1976 pursuant to the Acts Republication Act, 1967, as amended, and incorporating all amendments made prior to that date.]

AGED AND INFIRM PERSONS' PROPERTY ACT 1940 – 1975

being

Aged and Infirm Persons' Property Act 1940 No. 36 of 1940 (Assented to 28 November 1940)

as amended by

Aged and Infirm Persons' Property Act Amendment Act 1950 No. 22 of 1950 (Assented to 9 November 1950)

Aged and Infirm Persons' Property Act, 1965, No. 22 of 1965 (Assented to 25th November, 1965)¹

Aged and Infirm Persons' Property Act Amendment Act 1968 No. 42 of 1968 (Assented to 19 December 1968)

Aged and Infirm Persons' Property Act Amendment Act 1973 No. 16 of 1973 (Assented to 13 September 1973)

and

Aged and Infirm Persons' Property Act Amendment Act 1975 No. 9 of 1975 (Assented to 20 March 1975)

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.

BE IT ENACTED by the Governor of the State of South Australia, with the advice and consent of the Parliament thereof, as follows:

PART 1

PART I

PRELIMINARY AND GENERAL

Short title
Citation
amended by 9,
1975, s.1(3)

1. This Act may be cited as the "Aged and Infirm Persons' Property Act 1940-1975."

2. The provisions of this Act are arranged as follows:

Arrangement

PART I- Preliminary and general.

PART II- Aged and infirm persons' property.

PART III- Perpetuation of testimony relating to testamentary documents.

3. In this Act, unless the context or subject matter otherwise requires-

Interpretation

"court" means the Supreme 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:

"Master" means the Master or Deputy Master of the Supreme Court:

"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

¹ Came into operation 27th January, 1966: *Gaz* 27th January, 1966. p. 145

becomes the subject of a protection order.

4. (1) The whole jurisdiction of the court under this Act may be exercised by any Judge, and the whole jurisdiction of the court under Part II may be exercised by the Master.

Exercise of jurisdiction by court
Cf. N.Z. 26, 1912. s.3

(2) Any proceedings under Part II may be heard in chambers, and any proceedings under Part III shall be heard in chambers.

(3) The court shall have, and may exercise jurisdiction under Part II of this Act—

Subsec.(3) inserted by 42, 1968, s.2

(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 II of this Act might otherwise be founded.

Subsec.(4) inserted by 42, 1968, s.2

(5) (1) The powers conferred by the *Supreme Court Act, 1935-1936*², to make rules shall be read as including power to make rules —

Rules of court.
Cf N.Z. 26, 1912. s.30

(a) for carrying into effect the several objects of Part II and Part III of this Act;

(b) relating to practice and procedures generally for the purposes of Part II and Part III of this Act, including rules as to costs and fees;

(c) prescribing the times for filing and manner of preparing statements to be filed by managers pursuant to Part II of this Act.

(2) The general practice of the court and the general rules of the court, with any necessary modifications and so far as the same are applicable and are not inconsistent with this Act or the rules under this Act, shall apply to all proceedings under this Act.

6. (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 procedures, the Master, having regard to the general practice of the court, may direct (and *ex parte* if he thinks fit) what shall be done in any particular case, or that the procedure which has been adopted shall be deemed proper, or may take such order to meet the circumstances of the case as he deems fit: Provided that no such direction or order

Procedure where case not provided for.

² Now *Supreme Court Act, 1935-1975*

(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) The powers given to the Master by this section may be exercised by any Judge.

PART II

Part II

AGED AND INFORM PERSON' PROPERTY

7. (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 –

Circumstances under which protection order may be made.
Cf N.Z. 26, 1912, ss. 4, 5

- (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.

Subsec. (2)
Amended by
42, 1968, s.3

8. (1) Except in the case of an application made under section (1) of section 8a of this Act, every application for a protection order shall be made by originating summons, and may be made –

Application for protection order.
Cf. N.Z. 26, 1912, s.6

- (a) by the person whose property is sought to be protected;
- (b) by the husband or wife of such person;
- (c) by any near relation by blood or marriage of such person;
- (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.

Subsec. (1)
amended by
16, 1973, s.2

(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. (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

Protection order on court's own motion.
S. 8a enacted by 16, 1973,

which he is –

s.3.

- (a) unable, wholly or partially, to manage his affairs.
 - (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;
- (b) the husband or wife of that person;
- (c) any near relation by blood or marriage of that person;
- (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. 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.

Examination of protected person

9a. (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.

Investigation by Director-General of Community Welfare.
S. 9a enacted by 22, 1965, s.4, Subsec. (1) amended by

(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.

amended by
16, 1973,
s.4(a), (b)
Subsec.(2)
amended by
16, 1973, s.4
(c), (d).

(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,

Subsec. (4)
amended by
16, 1973, s.4
(e), (f).

(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.

Subsec. (5)
amended by
16, 1973, s.4
(g), (h), (i)

Penalty: One hundred dollars³.

(6) Proceedings for a contravention of subsection (5) of this section shall be disposed of summarily.

10. (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.

Appointment
of manager.
Cf. N.Z. 26,
1912, ss. 7, 8,
9.
Subsec. (1)
amended by
16, 1973, s.5.

(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 Master shall cause a copy of the protection order to be supplied to the Public Trustee.

³ Pursuant to s.8 of the *Acts Republication Act, 1967*, as amended, references to amounts of money expressed in decimal currency have been substituted for references to amounts of money expressed in the old currency.

11. (1) The court may rescind any protection order

Variation or
rescission of
protection
order.
CF.N.Z. 26
1912, s. 7 (2).

(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, 1919-1937*⁴.

12. (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.

Exemption of
part of estate.
Cf. N.Z. 26,
1912, s. 15

(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. (1) The manager shall have the following powers, unless the court in any particular case otherwise orders:-

Power of
manager.
Cf. N.Z. 26
1912, ss. 10,
11

- I. To take possession of the protected estate, and to recover possession thereof from any person holding the same:
- II. To repair and insure against any contingency any part of the estate:
- III. To demand, recover, and receive moneys and personal effects payable to or belonging to the protected person:
- IV. 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:
- V. 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.

(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

⁴ Now *Administration and Probate Act 1919-1975*.

thereof, or upon any special occasion, or in respect of any particular subject matter.

14. 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 authorize the manager to continue the same or any less provision out of the protected estate.

Continuance of provision for dependent persons.
Cf. N.Z. 26, 1912, s.12

15. (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 authorized by subsection (2) or as the court from time to time directs.

Application of unapplied portion of estate.
Cf. N.Z. 26, 1912, s. 13.

(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 authorized 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 authorized by law for investment of trust moneys or by any provision of subsection (2).

16. 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 realization, 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.

Power to order sale, etc.
Cf. N.Z. 26, 1912, s. 14.

16a. In the exercise of any power to give any direction or make any order under this Act with respect to any protected estate, the court shall have power to make any order for the purpose of preserving, so far as possible in the administration of the protected estate, the quality, tenure and devolution of the property comprised therein,

Power of court.
Cf. U.K. 12 and 13. Geo. 5. c. 60 : 2(8). S. 16a enacted by 22, 1950, s.2.

16b. (1) The protected person, his heirs, executors, administrators, next of kin, devisees, legatees and assigns shall have the same interest in any moneys arising from any sale, mortgage, lease or other disposition directed by the court under this Act, which may not have been applied under the powers given by this Act, as he or they would have had in the property, the subject of the sale, mortgage, lease, or disposition if no sale, mortgage, lease or disposition had been made, and the surplus moneys shall be of the same nature as the property sold, mortgaged, leased or disposed of.

Interest in property.
Cf. U.K. 53, Vict. C. 5, s. 123.
S. 16b enacted by 22, 1950, s.2.

(2) In order to give effect to this section, the court may make such orders and direct such conveyances, deeds and things (which may and shall accordingly

be executed and done) as the court thinks fit.

(3) The proceeds of any such sale, mortgage, lease or other disposition shall be placed to a special credit for the purpose of identification.

17. 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,

Provision where two or more managers. Cf. N.Z. 16, 1912, s.16.

18. A manager shall be deemed to be a trustee for all the purposes of the *Trustee Act, 1936*⁵.

Manager deemed to be trustee. Cf. N.Z. 26, 1912, s.17.

19. (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.

Filing of statement. Cf. N.Z. 26, 1912, s.18.

(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 dollars⁶.

(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. (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.

Percentage of moneys collected payable to Public Trustee. Cf. N.Z. 26, 1912, s.19.

⁵ Now Trustee Act, 1936-1974.

⁶ Pursuant to s. 8 of the *Acts Republication Act, 1967*, as amended. references 10 amounts of money expressed in decimal currency have been substituted for references to amounts of money expressed in the old currency.

(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. 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.

Exemption of manager from personal liability.
Cf. N.Z. 26, 1912, s.20

22. (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.

Proceedings.
Cf. N.Z. 26, 1912, s.21.
Subsec. (1) amended by 16, 1973, s.6.

(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. (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.

Inquiry by 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. (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.

Application to court by Public Trustee.

(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 Master's office.

25. 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.

Exercise by manager of powers of protected person. S. 25 substituted by 9, 1975, s. 2.

26. 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.

Execution of assurances, etc. by manager. Cf. N.Z. 26, 1912, s. 24.

27. (1) A protected person shall be incapable, without the leave of the court, of making any transfer, lease, mortgage, or other disposition of such part of his estate as is the subject-matter of a protection order or of any subsequent order, or of entering into any contract, except or necessities; and every such transfer, lease, mortgage, or other disposition and every contract other than for necessities shall be void.

Restriction of powers of protected person. Cf. N.Z. 26, 1912, s. 24.

(2) Nothing in this section shall invalidate any transfer, lease, mortgage, disposition, or contract made or entered into by a protected person for valuable consideration if the other party thereto acted in good faith and without notice that a protection order had been made,

28. (1) A protection order may be registered under the provisions of the *Registration of Deeds Act, 1935*⁷, as an instrument affecting the title to any land wherein the protected person as any estate or interest, legal or equitable.

Registration of protection order. Cf. N.Z. 26, 1912, s. 25

(2) A protection order shall be deemed to be an instrument purporting to

⁷ Now *Registration of Deeds Act, 1935-1973*.

affect land under the provisions of The *Real Property Act, 1886-1939*⁸, and a memorandum thereof may accordingly 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, 1886-1939*,⁹ 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, 1886-1939*¹⁰.

29. (1) The court may direct in any case that any testamentary disposition 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 disposition made otherwise than as the court shall so direct shall be ineffectual for all purposes.

Restriction of testamentary capacity of protected person. Cf. N.Z. 26, 1912, s.26.

(la) 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.

Subsec. 1(a) inserted by 22, 1950, s.3.

(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 authorize 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. (1) An order for the appointment of a manager may be made under this Part, although it may appear to the court that the person protected is a mental defective or that the estate is one which might be administered under the *Mental Health Act, 1935-1967*¹¹, but no such order for the appointment of a manager shall be made in respect of the estate of any person or if made shall be of any force or effect if-

Application to mental defectives. Cf. N.Z. 26, 1912, s.27. Subsec. (1) amended by 42, 1968, s. 4(a), (b), (c).

⁸ Now *Real Property Act, 1886-1975*.

⁹ Now *Real Property Act, 1886-1975*.

¹⁰ Now *Mental Health Act, 1935-1974*.

¹¹ Now *Real Property Act, 1886-1975*.

(a) such person is a patient within the meaning of the *Mental Health Act, 1935-1967*¹²; or.

Para. (a) amended by 42, 1968, s. 4 (b).

(b) a committee has been appointed pursuant to the said Act to manage the affairs of that person.

* * * * *

Para. (c) struck out by 42, 1968, s. 4(c)

(2) If any protection order is made under this Part in respect of the estate of any person and subsequent to the making of the protection order-

Subsec. (2) amended by 42, 1968, s. 4(d), (e), (f).

(a) the protected person becomes a patient within the meaning of the *Mental Health Act, 1935-1967*¹³; or

Para. (a) amended by 42, 1968, s.4(d).

(b) a committee is appointed pursuant to the said Act to manage the affairs of the protected person,

* * * * *

Para. (c) struck out by 42, 1968, s.4(e)

the protection order shall be deemed to be determined from the time the protected person became a patient, or a committee was appointed as aforesaid, as the case may be.

31. (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.

Expenses and remuneration of manager Cf. N.Z. 26, 1912, s. 28.

(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 in accordance with rules made pursuant to section 122 of the *Administration and Probate Act, 1919-1937*¹⁴, or as is otherwise allowed by the court, and such other charges as may be allowed by the court.

32. (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.

Change of managers. Cf. N.Z. 26, 1912, s. 29.

(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.

¹² Now *Mental Health Act, 1935-1974*.
¹³ Now *Mental Health Act, 1935-1974*.
¹⁴ Now *Administration and Probate Act, 1919-1975*.

PART III

Part III

PERPETUATION OF TESTIMONY RELATING TO TESTAMENTARY DOCUMENTS

33. (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.

Application for order to perpetuate testimony.

(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:-

- I. The due execution of any will or codicil made by the applicant:
- II. The testamentary capacity of the applicant:
- III. 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:
- IV. 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:
- V. Any matter which would be relevant in an application under the Testator's Family Maintenance Act, 1918¹⁵.

34. (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-

Attendance at examination.

- (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

¹⁵ The Testator's Family Maintenance Act, 1918, and its amendments have been repealed and superseded by the Inheritance (Family Provision) Act, 1972 (Now Inheritance (Family Provision) Act, 1972-1975).

court.

35. (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,

Conduct of examination.

(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. 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.

Discontinuance of proceedings.

37. 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.

Report

38. (1) The court may order that the examination of persons ordered to attend for examination may be before the Master or a special magistrate (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.

Power of examiner to conduct 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, 1929-1933*¹⁶.

(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. (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.

Deposit of deposition and will or codicil.

(2) Any person interested may by leave of the court inspect or bespeak a

¹⁶ Now *Evidence Act, 1929-1974*.

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. The court or a Judge may upon such terms (if any) as it or he deems 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.

Use of
depositions as
testimony.

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