

## **Guardianship & Administration in SACAT: Lessons from the Case Law**

### **Contents**

What is SACAT .....	3
Jurisdictional issues .....	3
Residency of party to proceedings.....	3
Effect of the death of the protected person on the proceedings. ....	3
Powers and obligations of Guardians and Administrators .....	4
Overarching principles for Guardians and Administrators to observe.....	4
Administrators.....	4
The powers of Administrators.....	4
Additional powers of Administrators .....	4
Specific obligations of Administrators.....	5
Specific responsibilities of an Administrator.....	5
Guardians .....	7
The powers of Guardians .....	7
Specific obligations of Guardians .....	8
Additional powers of Guardians.....	8
Before a decision maker can be appointed – Mental incapacity .....	10
Capacity generally.....	10
Presumption of capacity.....	12
The Act’s definition of incapacity.....	12
Two limb test for incapacity.....	13
The first limb: inability to manage affairs .....	13
The second limb: physical or mental impairment or illness.....	14
Medical evidence.....	14
Before a decision maker can be appointed – Clearing off or accounting for decision makers appointed via other means .....	15
Enduring Power of Attorneys.....	15
Advance Care Directives .....	16
Certain types of documents to be treated as Advance Care Directives.....	16
Renunciation of Appointment by Substitute Decision Makers .....	16
Revocation of Appointment by the Tribunal.....	17

Challenging the validity of the Advance Care Directive .....	19
Existing Guardian or Administrator .....	20
Manager appointed pursuant to the Aged and Infirm Persons' Property Act .....	20
Considerations of the Tribunal when appointing Guardians and Administrators .....	21
Section 5 principles .....	21
General Criteria for Appointment .....	21
Factors in favour of an Order being made .....	21
Factors in opposition to an Order being made .....	22
Appointment of the Office of the Public Advocate or the Public Trustee .....	24
Reviews appeals and revocations .....	25
Internal review .....	25
Staying of decision while Internal Review proceeds .....	26
Appeals.....	27
Revocations .....	27
Standing.....	28
Powers of the Tribunal relevant to Guardianship and Administration applications ...	29
Power to issue summons .....	29
Procedural fairness.....	30
Cost Orders .....	30
Obtaining directions from the Tribunal.....	32
The relevance of a protected person's Will with respect to their wishes .....	32

## **What is SACAT**

1. SACAT, a Tribunal (in this paper referred to as “the Tribunal”), exercises authority over various matters, including rental disputes, disciplinary proceedings, and certain disputes involving children.
2. This paper focuses exclusively on the Tribunal’s jurisdiction regarding Guardianship and Administration Orders.
3. Under the Guardianship and Administration Act 1993 (“the Act”), SACAT holds power to:
  - 3.1. revoke Advance Care Directives, in whole or in part; and
  - 3.2. make Guardianship and Administration Orders for people with a mental incapacity (a “protected person”).
4. A Guardianship Order appoints one or more Guardians. In practice, Guardians decide where the protected person lives and what health care they receive.
5. An Administration Order appoints one or more Administrators. In practice, Administrators manage the protected person’s legal and financial affairs.
6. The Tribunal may grant full orders, which authorise Guardians or Administrators to perform all possible duties, or limited orders, which restrict authority to specified functions.
7. In this paper, “decision maker” refers to a Guardian, an Administrator, or both. “Applicant” refers to an applicant for an Order.

## **Jurisdictional issues**

### **Residency of party to proceedings**

8. For the Tribunal to have jurisdiction, the protected person must reside in South Australia.<sup>1</sup>
9. Applicants may reside outside South Australia.<sup>2</sup>

### **Effect of the death of the protected person on the proceedings.**

10. When the protected person dies, the Tribunal should dismiss any ongoing proceedings in the exercise of the Tribunal’s power<sup>3</sup> to dismiss proceedings that are frivolous.<sup>4</sup>

---

<sup>1</sup> Re CQG [2018] SACAT 36.

<sup>2</sup> RHC v HTB & Ors [2024] SACAT 68, [29].

<sup>3</sup> South Australian Civil and Administrative Tribunal Act 2013, s 48(1)(a).

<sup>4</sup> RHC v HTB & Ors [2024] SACAT 68, [25].

## **Powers and obligations of Guardians and Administrators**

11. The Act prescribes principles for decision makers when acting for a protected person. The Act further defines the scope of their powers, their obligations, and the process for seeking additional authority.

### **Overarching principles for Guardians and Administrators to observe**

12. When making any decision in relation to a protected person, Guardians and Administrators need to abide by the following principles.
- 12.1. Consideration (and this will be the paramount consideration) must be given to what would, in the opinion of the decision maker, be the wishes of the protected person if he or she were not mentally incapacitated, but only so far as there is reasonably ascertainable evidence on which to base such an opinion.<sup>5</sup>
- 12.2. The present wishes of the person should, unless it is not possible or reasonably practicable to do so, be sought in respect of the matter and consideration must be given to those wishes.<sup>6</sup>
- 12.3. The decision made must be the one that is the least restrictive of the person's rights and personal autonomy as is consistent with his or her proper care and protection.<sup>7</sup>

## **Administrators**

### **The powers of Administrators**

13. The Act lists the powers of an Administrator.<sup>8</sup>

### **Additional powers of Administrators**

14. If an Administrator wishes to:
- 14.1. sell, lease (for more than two years), or otherwise dispose of real property;
- 14.2. purchase property; or
- 14.3. enter into a lease (other than for the protected person's accommodation)
- the Administrator must obtain Tribunal approval for the specific transaction.<sup>9</sup>

---

<sup>5</sup> Guardianship and Administration Act 1993, s 5(a).

<sup>6</sup> Guardianship and Administration Act 1993, s 5(b).

<sup>7</sup> Guardianship and Administration Act 1993, s 5(d).

<sup>8</sup> Guardianship and Administration Act 1993, s 39(2).

<sup>9</sup> Guardianship and Administration Act 1993 s 39(4).

### Specific obligations of Administrators

15. The Act requires Administrators, at intervals set by the Tribunal, to provide the Public Trustee—and, if requested, the Tribunal—with a statement of accounts. This statement must detail the protected person's assets, liabilities, income, expenditure, and any other particulars the Public Trustee requires.<sup>10</sup>
16. Attorneys do not face these obligations. If a client raises concerns about an attorney's management of a protected person's affairs, appointing that attorney as Administrator subjects the attorney's decisions to Tribunal oversight. This may allay the client's concerns, even if the same individual continues to act.

### Specific responsibilities of an Administrator

17. The Act imposes the duties and obligations of a trustee on Administrators regarding the protected person and their assets.<sup>11</sup> Relevantly, trustees must protect trust assets.<sup>12</sup>
18. Administrators must also consider relevant principles under section 5 of the Act:<sup>13</sup>
  - 18.1. the protected person's wishes, if not mentally incapacitated; and
  - 18.2. the protected person's current wishes
19. It is easy to see how the obligations of an Administrator to preserve the protected person's assets might conflict with their obligations to consider the protected person's wishes. The protected person may wish to:
  - 19.1. give generous gifts;
  - 19.2. gamble;
  - 19.3. lend money in circumstances where it is unlikely they will paidor may wish the Administrator to do so on their behalf.
20. Permitting these actions risks an Administrator acting consistently with the protected person's wishes but failing to protect the protected person's assets.
21. If the Administrator is in doubt about the correct course of action, the cautious approach is to seek advice and directions from the Tribunal.<sup>14</sup>
22. In *AMT v COT & GSZ*, the Tribunal spoke to the Administrator's conflicting duties. The Tribunal confirmed that Administrators and Guardians must ascertain the protected person's

---

<sup>10</sup> Guardianship and Administration Act 1993, s 44(1).

<sup>11</sup> Guardianship and Administration Act 1993, s 39(1)(b)

<sup>12</sup> *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [154].

<sup>13</sup> Guardianship and Administration Act 1993, s 5(a) and s 5(b).

<sup>14</sup> Guardianship and Administration Act 1993, s 74(1).

current wishes before making any decision<sup>15</sup> (unless impracticable) but must ultimately act in the protected person's best interests. The Tribunal stated:

*"It is an essential part of the role of a Guardian and of an Administrator that from time to time they must make decisions in the best interests of the protected person even though those decisions may clearly be contrary to the wishes of that person."*<sup>16</sup>

Administrators, attorneys and gifts

23. Unless the Enduring Power of Attorney document states otherwise, an attorney cannot:
  - 23.1. make gifts of the donor's property;<sup>17</sup> and
  - 23.2. undertake acts that may be inconsistent with the donor's interest.<sup>18</sup>
24. A common scenario is a donor with limited capacity wishes their attorney to act in a manner the attorney believes breaches one or both of these duties.
25. Perhaps the donor historically allowed a family member to lease real property at discounted rent. Or the donor habitually made gifts. Now, with diminished capacity, the donor may wish (or the attorney may consider the donor would have wished) for either of these arrangements to continue.
26. If the donor were prudent, the Enduring Power of Attorney would have been drafted to allow the attorney to continue these arrangements. Absent specific authority in the document, an attorney cannot do so.
27. To permit such actions, the attorney might apply to the Court for advice and directions on their propriety. Alternatively, the attorney might seek Administrator appointment and simultaneously request Tribunal directions on the actions' propriety.
28. No judicial comment addresses which course offers greater success: an attorney receiving favourable directions or an Administrator. Anticipating judicial comment comparing a trustee's duties to beneficiaries (an Administrator's obligation) with an attorney's duties to a donor (an attorney's obligation) falls beyond this paper's scope.
29. However, the:
  - 29.1. obligation of an Administrator to consider the protected person's wishes; and

---

<sup>15</sup> AMT v COT & GSZ [2017] SACAT 2 [53].

<sup>16</sup> AMT v COT & GSZ [2017] SACAT 2, [73].

<sup>17</sup> G E Dal Pont, *Powers of Attorney* 2<sup>nd</sup> edition (LexisNexis Australia), [7.19].

<sup>18</sup> G E Dal Pont, *Powers of Attorney* 2<sup>nd</sup> edition (LexisNexis Australia), [6.53].

29.2. Administrator's specific power to apply the protected person's property for a spouse's maintenance, or children's or grandchildren's maintenance, education, or advancement<sup>19</sup> both being things not shared by an attorney, suggest a greater likelihood of an Administrator obtaining judicial approval.

## **Guardians**

### The powers of Guardians

30. Section 31 of the Act grants Guardians all powers they possess at law or in equity, subject to the Act and the Tribunal's Order.
31. The Act does not define a Guardian's powers at law or in equity. Case law on this point has eluded the author.
32. One can infer a Guardian's powers to some extent.
  - 32.1. Because the Tribunal must revoke the appointment of Substitute Decision Makers named in an Advance Care Directive, it can be inferred a Substitute Decision Maker's powers overlap with a Guardian's powers.
  - 32.2. The Advance Care Directives Act permits a Substitute Decision Maker to make decisions the protected person could have made in respect of:<sup>20</sup>
    - 32.2.1. health care (except for types excluded by regulation);
    - 32.2.2. residential and accommodation arrangements; and
    - 32.2.3. the person's personal affairs.
  - 32.3. Courts have not defined "personal affairs." The second reading speech for the Advance Care Directives Act refers to decisions about personal "matters," as being who should care for a pet.<sup>21</sup> "Personal affairs" likely refers to decisions outside an Administrator's defined scope and outside accommodation or health arrangements.
33. Guardians are distinct from carers. Guardians make significant decisions; carers provide day-to-day assistance and cannot make legally significant decisions.<sup>22</sup>

---

<sup>19</sup> Guardianship and Administration Act 1993, s 39(2)w.

<sup>20</sup> Advance Care Directives Act 2013, s 23(1).

<sup>21</sup> Advance Care Directives Bill, Second Reading, Tuesday, November 27, 2012, The Hon. G.E. GAGO (Minister for Agriculture, Food and Fisheries, Minister for Forests, Minister for Regional Development, Minister for Tourism, Minister for the Status of Women).

<sup>22</sup> Re LXN [2016] SACAT 23, [27].

### Specific obligations of Guardians

34. A Guardian must take reasonable steps to determine if the protected person has issued an Advance Care Directive and, as far as practicable, implement its provisions and avoid outcomes the protected person wished to prevent as expressed or implied in the directive.<sup>23</sup>

### Additional powers of Guardians

35. A Guardian without additional powers may only make non-binding decisions about accommodation and cannot authorise detention.<sup>24 25</sup>
36. The guiding principle is that any decision which is a restraint on a person's liberty ought to be a matter of public record rather than a private decision by the Guardian.<sup>26</sup>
37. To detain a protected person, or to otherwise constrain their liberty, the Guardian must obtain a "Special Powers Order".<sup>27 28</sup>
38. The Act establishes a hierarchy of orders regarding liberty constraints:<sup>29</sup>
- 38.1. A Guardianship Order without additional powers.
- 38.1.1. Grants powers to authorise some persons but not others to provide consensual health and day to day care, and to exclude third parties from a place in which a protected person resides by consent.
- 38.2. An Order pursuant to s 32(1)(a) of the Act (a placement order).
- 38.2.1. Clarifies to the protected person, and others, where the protected person is to live.<sup>30</sup>
- 38.2.2. Defines an area enabling a further order under section 32(1)(b) to authorise detention in that area.<sup>31</sup>
- 38.2.3. Allows for a Guardian, a member of the police force or a Substitute Decision Maker to enter premises and take the protected person to the defined area.<sup>32 33</sup>

---

<sup>23</sup> Guardianship and Administration Act 1993, s 31A(1).

<sup>24</sup> Re: EUY [2019] SACAT 51, [69].

<sup>25</sup> THE PUBLIC ADVOCATE v C, B [2019] SASCF 58, [56].

<sup>26</sup> THE PUBLIC ADVOCATE v C, B [2019] SASCF 58, [54].

<sup>27</sup> Guardianship and Administration Act 1993, s 32.

<sup>28</sup> Re LOR & Ors [2023] SACAT 59.

<sup>29</sup> THE PUBLIC ADVOCATE v C, B [2019] SASCF 58, [49].

<sup>30</sup> Re LOR & Ors [2023] SACAT 59, [105].

<sup>31</sup> Re LOR & Ors [2023] SACAT 59, [50]-[51].

<sup>32</sup> Guardianship and Administration Act 1993, s 32(4)(a).

<sup>33</sup> THE PUBLIC ADVOCATE v C, B [2019] SASCF 58, [18].

38.3. A medical treatment order.<sup>34</sup>

- 38.3.1. Allows for the persons from time to time involved in the care of the protected person to use such force as may be reasonably necessary for the purpose of ensuring the proper medical or dental treatment, day-to-day care and well-being of the person.

38.4. A detention order

- 38.4.1. Provides authority to detain the protected person in the area defined by section 32(1)(a).<sup>35</sup>
- 38.4.2. The person in charge of the area (or a third party given authority by such person)<sup>36</sup> may prevent the protected person from leaving the area or bring the protected person back to the area.<sup>37</sup>

*What is detention*

*Definition of detention*<sup>3839</sup>

39. Detention depends on objective evidence about the person's circumstances and the nature and extent of restrictions on liberty and movement.<sup>40</sup> It is not dependent on the protected person's knowledge of their detention.<sup>41 42</sup>

*Examples of detention*

40. Where a person is unable to leave a premises without permission or supervision.<sup>43</sup>
41. Where someone is prevented from being at liberty to go freely at all times to all places.<sup>44</sup>
42. Where the restraint imposed is one that is not shared by the public generally.<sup>45</sup>
43. Where the protected person resides in a locked ward that needed a key card or code to exit and it being clearly conveyed to the protected person that, if they leave, they were required to return.<sup>46</sup>

---

<sup>34</sup> Guardianship and Administration Act 1993, s 32(1)(c).

<sup>35</sup> Re LOR & Ors [2023] SACAT 59, [50]-[51].

<sup>36</sup> Guardianship and Administration Act 1993, s 32(1)(c).

<sup>37</sup> Guardianship and Administration Act 1993, s 32(4)(b).

<sup>38</sup> The Public Advocate v C, B [2019] SASCFC 58, [70].

<sup>39</sup> Re: EUY [2019] SACAT 51, [82].

<sup>40</sup> Re LOR & Ors [2023] SACAT 59, [77].

<sup>41</sup> Re: EUY [2019] SACAT 51, [90]-[91].

<sup>42</sup> Re QFO [2019] SACAT 43, [84].

<sup>43</sup> Re: EUY [2019] SACAT 51, [94].

<sup>44</sup> BC v THE PUBLIC ADVOCATE & ORS [2018] SASC 193, [20].

<sup>45</sup> BC v THE PUBLIC ADVOCATE & ORS [2018] SASC 193, [20].

<sup>46</sup> THE PUBLIC ADVOCATE v C, B [2019] SASCFC 58, [72].

44. Where a locked door restricts the protected person's movement, and the person remains immobile or incapacitated. The person's inability to leave, even if they could not physically do so without the restriction, remains irrelevant. Their lack of awareness of the restriction, due to incapacity, also does not matter. The decisive factor is the actual restriction of movement.<sup>47 48</sup>

Obtaining special powers order

45. The Tribunal cannot act upon its own motion to confer authority to detain – it needs an application made by the Guardian.<sup>49</sup>
46. Before making an application:  
*“it is therefore incumbent on an applicant for special powers to adduce sufficient medical evidence, evidence about the circumstances of the person's accommodation, and evidence about the risks to the person's health and safety that might follow if the order is not made.”<sup>50</sup>*
47. The Tribunal may issue a detention order if:
- 47.1. the protected person resists the Guardian's decision regarding their residence;<sup>51</sup> or
  - 47.2. disagreements arise among those close to the protected person about their residence;<sup>52</sup>  
or
  - 47.3. there is otherwise a need for a detention order with such need being above that of a theoretical possibility and reasonably foreseeable to be needed.<sup>53</sup>

**Before a decision maker can be appointed – Mental incapacity**

48. Before appointing a decision maker,<sup>54</sup> the Tribunal must find, on the balance of probabilities,<sup>55</sup> that the protected person has a mental incapacity.

**Capacity generally**

49. South Australian law lacks a single, comprehensive legal definition of capacity.<sup>56 57</sup>

<sup>47</sup> Re: EUY [2019] SACAT 51, [90]-[91].

<sup>48</sup> Re QFO [2019] SACAT 43, [84].

<sup>49</sup> Re LOR & Ors [2023] SACAT 59, [113].

<sup>50</sup> Re QFO [2019] SACAT 43, [33].

<sup>51</sup> Re LOR & Ors [2023] SACAT 59, [50].

<sup>52</sup> Re LOR & Ors [2023] SACAT 59, [50].

<sup>53</sup> Re LOR & Ors [2023] SACAT 59, [103].

<sup>54</sup> Guardianship and Administration Act 1993 s 29(1) and s 35(1).

<sup>55</sup> Re CUD [2016] SACAT 21, [9].

<sup>56</sup> Review of the Mental Health Act 2009 (SA), South Australian Law Reform Institute, 3.1.3.

<sup>57</sup> Guthrie v Spence [2009] NSWCA 369, [174].

50. Common law determines a person's capacity to enter transactions or execute documents by reference to the nature of the specific transaction or document, as established in *Gibbons v Wright*.
  - 50.1. For transactions generally the test is described as whether the person is:  
*"capable of understanding the general nature of what he is doing by his participation"*<sup>58</sup>
  - 50.2. For legal instruments:  
*"(it) is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained"*<sup>59</sup>
51. Statutes and common law have modified the *Gibbons v Wright* test for particular transactions and instruments.
  - 51.1. The Mental Health Act 2009 sets the incapacity threshold for involuntary treatment orders.<sup>60</sup>
  - 51.2. The Aged and Infirm Persons' Property Act 1940 defines incapacity for orders under that Act.<sup>61</sup>
  - 51.3. The capacity required to execute an Advance Care Directive is broadly defined in the Advance Care Directives Act 2013,<sup>62</sup> with *Re KBM* clarifying a portion of the test, undefined as it is in the Advance Care Directives Act 2013 (i.e. what "competence" comprises) aligns with *Gibbons v Wright*.<sup>63</sup>
  - 51.4. The Advance Care Directives Act 2013 defines the threshold of capacity of a person ("impaired decision making") required for a Substitute Decision Maker to be empowered to make decisions for that person's health care, accommodation, and personal affairs.<sup>64 65</sup>
  - 51.5. The common law test for testamentary capacity differs from *Gibbons v Wright*.<sup>66</sup>

---

<sup>58</sup> *Gibbons v Wright* (1954) 91 CLR 423, 437–8. See also *Guthrie v Spence* [2009] NSWCA 369; 78 NSWLR 225.

<sup>59</sup> *Gibbons v Wright* (1954) 91 CLR 423, 437–8. See also *Guthrie v Spence* [2009] NSWCA 369; 78 NSWLR 225.

<sup>60</sup> Mental Health Act 2009, s 5A.

<sup>61</sup> Aged and Infirm Persons' Property Act 1940, s 7.

<sup>62</sup> Advance Care Directives Act 2013, s 11.

<sup>63</sup> *Re KBM* [2017] SACAT 14, [21].

<sup>64</sup> Advance Care Directives Act 2013, s 7.

<sup>65</sup> Advance Care Directives Act 2013, s 34.

<sup>66</sup> *Banks v Goodfellow* (1870) LR 5 QB 549.

- 51.6. The common law test for granting a Power of Attorney also differs.<sup>67</sup> Granting a Power of Attorney may require a higher level of capacity than making a Will.<sup>68</sup>

## **Presumption of capacity**

52. Common law presumes adults possess capacity. Courts sometimes refer to this as the presumption of sanity. The decision in *Dalle-Molle v Manos* explains:

*All persons who have reached the age of majority are presumed to have the capacity to enter into contracts or other transactions so that those who assert the contrary bear the onus of proof: Borthwick v Carruthers (1787) 1 TR 648, 99 ER 1300. The principle applies with equal force where it is alleged that a person lacks the required mental capacity: Re Cumming (1852) 1 De GM & G 537 at 557, 42 ER 660 at 668; Masterman-Lister v Brutton & Co [2003] 3 All ER 162 at [17]. The plaintiff, therefore, has no onus of proof to discharge. The burden is on those who assert incapacity.*<sup>69</sup>

53. Authorities diverge on whether this presumption applies to proceedings under the Act. In *Re FAV*,<sup>70</sup> the Tribunal held that no presumption of capacity exists. In *Re KBM*,<sup>71</sup> the Tribunal held that a presumption of capacity exists only when no evidence regarding capacity is before the Tribunal.

## **The Act's definition of incapacity**

54. The Act exclusively defines the test for capacity as the protected person's inability to look after their health, safety or welfare or to manage their affairs due to a physical or mental impairment or illness.<sup>72</sup>
55. The Tribunal must answer the question of mental incapacity in binary terms—yes or no.
56. At the time of the hearing,<sup>73</sup> if the Tribunal finds mental incapacity, the Tribunal may issue a Guardianship Order<sup>74</sup> or Administration Order.<sup>75</sup> If the Tribunal finds no mental incapacity, the Tribunal cannot issue such orders.

---

<sup>67</sup> *Szozda v Szozda* [2010] NSWSC 804, [34].

<sup>68</sup> *Szozda v Szozda* [2010] NSWSC 804, [35].

<sup>69</sup> *Dalle-Molle v Manos* [2004] SASC 102, [17].

<sup>70</sup> *Re FAV* [2020] SACAT 19, [40].

<sup>71</sup> *Re KBM* [2017] SACAT 14, [33].

<sup>72</sup> Guardianship and Administration Act 1993 s 3.

<sup>73</sup> *Re PIY* [2022] SACAT 35, [21].

<sup>74</sup> Guardianship and Administration Act 1993, s29(1).

<sup>75</sup> Guardianship and Administration Act 1993, s35(1).

57. While incapacity is a binary finding, the Tribunal considers the degree of incapacity to determine the appropriate form of order.<sup>76</sup> For example, the Tribunal may find a protected person mentally incapacitated under the Act, yet that person still makes valid decisions or transactions in specific contexts, such as everyday financial transactions under the *Gibbons v Wright* test or decisions about their health care, accommodation, and personal affairs under the *Advance Care Directives Act*.

## **Two limb test for incapacity**

58. The Tribunal applies a two-limb test.<sup>77</sup>

### The first limb: inability to manage affairs

59. Evidence is required,<sup>78</sup> but expert evidence is unnecessary.<sup>79</sup> The Tribunal will consider past and present experience as a predictor of future events.<sup>80</sup>
60. The Tribunal may consider:
- 60.1. Whether the person makes and implements decisions about personal and financial matters in a reasonable, rational, and orderly way, considering their present and future needs, as well as the needs of family and friends, without exposing themselves to undue risk of neglect, abuse, or exploitation.<sup>81</sup>
  - 60.2. Support systems available to the person.<sup>82</sup>
  - 60.3. The extent to which the person, in their circumstances, can be relied upon to make sound judgements about their welfare and interests.<sup>83</sup>
  - 60.4. Unwise or dangerous choices, including those influenced by cultural factors, do not conclusively establish incapacity.<sup>84</sup>
  - 60.5. The level of insight the protected person demonstrates regarding the assistance they require<sup>85</sup> and their general circumstances.<sup>86</sup>

---

<sup>76</sup> Re PIY [2022] SACAT 35, [28].

<sup>77</sup> Re KCG [2018] SACAT 17, [60].

<sup>78</sup> Re TQF [2019] SACAT 41, [41].

<sup>79</sup> Re TQF [2019] SACAT 41, [40].

<sup>80</sup> Re TQF [2019] SACAT 41, [41].

<sup>81</sup> Re TQF [2019] SACAT 41, [41].

<sup>82</sup> Re TQF [2019] SACAT 41, [41].

<sup>83</sup> Re TQF [2019] SACAT 41, [41].

<sup>84</sup> Re RTB [2023] SACAT 44, [35].

<sup>85</sup> Re WCU [2022] SACAT 68, [27].

<sup>86</sup> Re VVE [2020] SACAT 118, [46].

- 60.6. High levels of indebtedness, especially if the person cannot identify reasonable strategies for managing the situation and faces dire consequences, such as homelessness.<sup>87</sup>
- 60.7. Spending choices that clearly do not serve the person's best interests.<sup>88</sup>
- 60.8. Decisions to refuse medication for a serious illness, not based on informed decision-making, but on a lack of understanding of the illness and consequences.<sup>89</sup>
- 60.9. Acceptance of the need for assistance, followed by conduct that prevents the provision of that assistance.<sup>90</sup>

### The second limb: physical or mental impairment or illness

- 61. Expert evidence is required,<sup>91</sup> but a specific diagnosis is unnecessary.<sup>92</sup>

### **Medical evidence**

- 62. When the Tribunal receives multiple medical opinions, the Tribunal prefers the most recent opinion if all other factors remain equal.<sup>93</sup> If a medical report cannot be obtained, the Tribunal has the power to:
  - 62.1. require a person to submit to a medical report;<sup>94 95</sup> and
  - 62.2. issue a summons to compel a person's attendance before the Tribunal or to provide evidence to the Tribunal (see 138).
- 63. If no medical evidence can be obtained, the only course that occurs to the writer lies outside of SACAT's jurisdiction and requires:
  - 63.1. an application under the *Aged and Infirm Persons Property Act 1940* for the appointment of a Manager;
  - 63.2. joining the protected person to the proceedings as a Respondent; and
  - 63.3. as set out in *Atkins & Anor v Atkins & Ors*<sup>96</sup>, applying for an inquiry by a Master of the Court as to whether the Respondent is a person under a disability for the purpose of the application.

---

<sup>87</sup> HCT v Public Advocate & Anor [2024] SACAT.

<sup>88</sup> HCT v Public Advocate & Anor [2024] SACAT.

<sup>89</sup> HCT v Public Advocate & Anor [2024] SACAT.

<sup>90</sup> HCT v Public Advocate & Anor [2024] SACAT.

<sup>91</sup> Re TQF [2019] SACAT 41, [42].

<sup>92</sup> Re TQF [2019] SACAT 41, [47].

<sup>93</sup> Re FAV [2021] SACAT 64, [61].

<sup>94</sup> Re CUD [2016] SACAT 21, [20].

<sup>95</sup> Guardianship Act s 69.

<sup>96</sup> *Atkins & Anor v Atkins & Ors* [2011] SASC 85, [10].

64. If the Court makes the order for the inquiry, directions can be obtained about how the inquiry is to proceed, including directions regarding disclosure of documents and medical examinations.<sup>97</sup>

### **Before a decision maker can be appointed – Clearing off or accounting for decision makers appointed via other means**

65. The powers of an Administrator or Guardian may conflict with the powers of people otherwise appointed in relation to a protected person.
66. This section discusses the revocation of such people's appointment.

### **Enduring Power of Attorneys**

67. Before the Tribunal appoints an Administrator, the Tribunal does not need to (nor are they able to) revoke an existing Enduring Power of Attorney.
68. Only the Administrator, once appointed, holds the power to revoke an Enduring Power of Attorney.<sup>98</sup>
69. In *AMT v COT & GSZ*<sup>99</sup>, the Tribunal explained the relevant legislative framework.
- 69.1. Section 10(b) of the Powers of Attorney and Agency Act 1984 provides that an Administrator appointed under the Mental Health Act 1977 may revoke the power of attorney as the donor could have if competent and not incapacitated.
- 69.2. An Administrator appointed by the Tribunal is appointed pursuant to the Guardianship and Administration Act 1993 and not the Mental Health Act 1977.
- 69.3. Section 24 of the Acts Interpretation Act 1915 requires that a reference to an earlier Act or provision is taken to be substituted by a reference to a later Act if both Acts address the same subject matter.
- 69.4. References to an Administrator appointed under the Mental Health Act 1977 must therefore be read as references to an Administrator appointed under the Guardianship and Administration Act 1993 (SA). Therefore, an Administrator appointed under the Act may revoke an Enduring Power of Attorney as the donor could have if competent.

---

<sup>97</sup> *Atkins & Anor v Atkins & Ors* [2011] SASC 85, [10].

<sup>98</sup> *AMT v COT & GSZ* [2017] SACAT 2.

<sup>99</sup> *AMT v COT & GSZ* [2017] SACAT 2, [23].

## **Advance Care Directives**

70. Before the Tribunal appoints a Guardian, any existing Substitute Decision Makers must either renounce their appointment or have their appointment revoked.<sup>100</sup>

### Certain types of documents to be treated as Advance Care Directives

71. Historically, various documents allowed for a person to appoint decision makers for their health and welfare. If such document was executed before 1 July 2014 (being when the Advance Care Directives Act commenced) the last of such documents executed by the person<sup>101 102</sup> are to be treated as the person's Advance Care Directive. Such documents include:
- 71.1. An anticipatory grant or refusal of consent to medical treatment under section 7 of the Consent to Medical Treatment and Palliative Care Act 1995.<sup>103</sup>
  - 71.2. A medical power of attorney under section 8 of the Consent to Medical Treatment and Palliative Care Act 1995.<sup>104</sup>
  - 71.3. A direction or enduring power of attorney pursuant to Schedule 3 of the Consent to Medical Treatment and Palliative Care Act 1995.<sup>105</sup>
  - 71.4. An Enduring Power of Guardianship under section 25 of the Guardianship and Administration Act 1993.<sup>106</sup>

### Renunciation of Appointment by Substitute Decision Makers

72. Substitute Decision Makers may voluntarily renounce their appointment. However, the process depends on the circumstances:<sup>107</sup>
- 72.1. If the person who made the Advance Care Directive is not competent and one Substitute Decision Maker is appointed, such Substitute Decision Maker cannot renounce unless the Tribunal grants permission.

---

<sup>100</sup> Guardianship and Administration Act 1993, s 29(1).

<sup>101</sup> Advance Care Directives Act 2013, s 36(2) – only one of such previously executed documents can be held as an Advance Care Directive.

<sup>102</sup> Advance Care Directives Act 2013, s 17(1) – a person giving an Advance Care Directive revokes all previous Advance Care Directives.

<sup>103</sup> Advance Care Directives Act 2013, s 32.

<sup>104</sup> Advance Care Directives Act 2013, s 33.

<sup>105</sup> Advance Care Directives Act 2013, s 34.

<sup>106</sup> Advance Care Directives Act 2013, s 35.

<sup>107</sup> Advance Care Directives Act 2013, s 27.

- 72.2. If the person who made the Advance Care Directive is not competent and more than one Substitute Decision Maker is appointed, all Substitute Decision Makers bar one can renounce their appointment.
- 72.3. If the person who made the Advance Care Directive is competent, any and all Substitute Decision Makers can renounce their appointment.
73. A definition for competence in the context of the Advance Care Directives Act is given in Re KBM:
- ...can the person understand and appreciate the extent of the rights, duties and responsibilities generated by the ACD, the probable consequences of appointing a person and the significant risks, benefits and reasonable alternatives involved in making, revoking or changing an SDM under the ACD? A competent person would need to have sufficient mental capacity to consider and weigh up all of these matters and make reasonable judgements and be able to turn her mind to why a change of appointment was appropriate in the circumstances.*<sup>108</sup>

### Revocation of Appointment by the Tribunal

74. The Tribunal may revoke a Substitute Decision Maker's appointment while preserving the remaining provisions of the Advance Care Directive.<sup>109</sup> Grounds for revocation include:<sup>110 111</sup>
- 74.1. The Substitute Decision Maker does not qualify for appointment e.g., lacks competence, serves as a health practitioner responsible for care, acts as a paid carer, or belongs to a class of persons prescribed by regulation.<sup>112 113</sup>
- 74.2. The Substitute Decision Maker is unwilling to continue to act.<sup>114</sup>
- 74.3. The Substitute Decision Maker is in such default in exercising their powers under the Advance Care Directive that the Tribunal considers the person unfit to continue as a Substitute Decision Maker.<sup>115</sup>
- 74.4. The Substitute Decision Maker has been negligent in the exercise of their powers.<sup>116</sup>

<sup>108</sup> Re KBM [2017] SACAT 14, [21].

<sup>109</sup> Advance Care Directives Act 2013 s 51(5).

<sup>110</sup> AMT v COT & GSZ [2017] SACAT 2

<sup>111</sup> Advance Care Directives Act 2013, s 51(1)

<sup>112</sup> Advance Care Directives Act 2013, s 51(1)(a)

<sup>113</sup> Advance Care Directives Act 2013, s 21(2),

<sup>114</sup> Advance Care Directives Act 2013, s 51(1)(b)

<sup>115</sup> Advance Care Directives Act 2013, s 51(1)(ca).

<sup>116</sup> Advance Care Directives Act 2013, s 51(1)(c).

- 74.4.1. Negligence arises when the Substitute Decision Maker fails to exercise the required degree of care to protect the interests of the person who appointed them.<sup>117</sup>
- 74.4.2. The threshold for removal requires more than a trivial failure to act with sufficient care, but does not require a “very high degree” of negligence.<sup>118</sup>
- 74.4.3. Negligence may involve a single act or a pattern of conduct.<sup>119</sup>
- 74.4.4. Persistent failure to act with appropriate care, even if individual acts are minor, may justify removal.<sup>120</sup>
- 74.4.5. If a Substitute Decision Maker acts dishonestly and adversely affects the interests of the person who made the Advance Care Directive, the Tribunal may regard this as negligence for the purposes of s 51(1)(c) of the Act.<sup>121</sup>
- 74.5. The Circumstances for either the person who made the Advance Care Directive or the Substitute Decision Maker have changed, making it inappropriate for the Substitute Decision Maker to continue. Only the Office of the Public Advocate may bring such an application.<sup>122</sup> A change in personal circumstances becomes relevant if it materially affects the appropriateness of a particular person continuing as Substitute Decision Maker. The change may relate to the person who made the Advance Care Directive, the Substitute Decision Maker, or both. Examples include:<sup>123</sup>
  - 74.5.1. Death or illness of the Substitute Decision Maker.
  - 74.5.2. Estrangement between the Substitute Decision Maker and the donor.
  - 74.5.3. Change in the personal relationship between the Substitute Decision Maker and the donor.
  - 74.5.4. Inability to locate or contact the Substitute Decision Maker
  - 74.5.5. Changes in the donor’s medical or care needs.
  - 74.5.6. Impaired or reduced decision-making capacity of the Substitute Decision Maker, even if the impairment does not amount to a lack of competence for appointment.

---

<sup>117</sup> *AMT v COT & GSZ* [2017] SACAT 2, [94].

<sup>118</sup> *AMT v COT & GSZ* [2017] SACAT 2, [95].

<sup>119</sup> *AMT v COT & GSZ* [2017] SACAT 2, [96].

<sup>120</sup> *AMT v COT & GSZ* [2017] SACAT 2, [96].

<sup>121</sup> *AMT v COT & GSZ* [2017] SACAT 2, [98].

<sup>122</sup> Advance Care Directives Act 2013, s 51(1)(2)

<sup>123</sup> *AMT v COT & GSZ* [2017] SACAT 2, [101]-[106].

- 74.5.7. Actions by the Substitute Decision Maker that raise concerns about suitability, such as conflictual decision-making or inability to act objectively in the donor's best interests. These actions may amount to negligence, incompetence, or disregard for the role of a Substitute Decision Maker.

### Challenging the validity of the Advance Care Directive

75. The Tribunal may revoke the appointment of a Substitute Decision Maker by finding the Advance Care Directive document itself is invalid. Grounds for invalidity include:

#### *The person who made the Advance Care Directive lacked capacity*

76. To validly create an Advance Care Directive the person needs to:<sup>124</sup>
- 76.1. be a competent adult;
  - 76.2. understand what an Advance Care Directive is; and
  - 76.3. understand the consequences of giving an Advance Care Directive.
77. While a definition of a competent adult is not found in the Advance Care Directives Act, Re KBM defines the term as follows:
- Can the person understand and appreciate the extent of the rights, duties and responsibilities generated by the ACD, the probable consequences of appointing a person and the significant risks, benefits and reasonable alternatives involved in making, revoking or changing an SDM under the ACD? A competent person would need to have sufficient mental capacity to consider and weigh up all of these matters and make reasonable judgements and be able to turn her mind to why a change of appointment was appropriate in the circumstances.*<sup>125</sup>

#### *The Advance Care Directive was not completed in accordance with the Advance Care Directives Act*

78. The Advance Care Directives Act and its regulations set out the requirements for creating a valid Advance Care Directive.
79. The author's experience of the most common reasons for an invalid Advance Care Directive is:
- 79.1. the document having been witnessed by the person's health care practitioner;<sup>126</sup> and
  - 79.2. the person signing the document before the Substitute Decision Makers have done so.<sup>127</sup>
80. Section 11(5) of the Advance Care Directives Act 2013 provides that an Advance Care Directive executed with certain minor defects remains valid despite those defects.<sup>128</sup> However, this saving

<sup>124</sup> Advance Care Directives Act 2013, s 11.

<sup>125</sup> Re KBM [2017] SACAT 14, [21].

<sup>126</sup> Advance Care Directives Act 2013, s 15(2)(c).

<sup>127</sup> Advance Care Directives Regulations 2014, s 7(1)(a).

<sup>128</sup> Advance Care Directives Act 2013, s 5.

provision may not apply to an Advance Care Directive that lacks a date if no reliable evidence of the execution date exists.<sup>129</sup>

## **Existing Guardian or Administrator**

81. A Guardian or Administrator may have the Tribunal revoke their appointment if the Guardian or Administrator requests revocation.
82. The Tribunal may also revoke the appointment if satisfied that the Guardian or Administrator:<sup>130</sup>
  - 82.1. lacks willingness or ability to act in that capacity;
  - 82.2. does not qualify as a suitable person to act for the protected person;
  - 82.3. has acted incompetently, negligently, or contrary to the principles of the Act while serving in that capacity; or
  - 82.4. has committed an offence against the Act or an offence involving dishonesty.
83. For further discussion see - Considerations of the Tribunal when appointing Guardians and Administrator.

## **Manager appointed pursuant to the Aged and Infirm Persons' Property Act<sup>131</sup>**

84. The Court cannot issue a Protection Order under the Aged and Infirm Persons Property Act for any part of an estate already subject to an Administration Order. If the Administration Order covers the entire estate, the Court loses the power to make a Protection Order.
85. If the Court issued a Protection Order before the Administration Order, the Protection Order is rescinded once all appeal rights against the Administration Order have been exhausted. The rescission applies only to the portion of the Protection Order that overlaps with the Administration Order. If the Administration Order covers the whole estate, the entire Protection Order is rescinded.

---

<sup>129</sup> Re KBM [2017] SACAT 14, [57].

<sup>130</sup> Guardianship and Administration Act 1993, s 54(2).

<sup>131</sup> Aged and Infirm Persons' Property Act 1940, s 30.

## **Considerations of the Tribunal when appointing Guardians and Administrators**

### **Section 5 principles**

86. The Tribunal must apply the section 5 principles of Act when making any interim or final decision.<sup>132</sup>
- 86.1. The paramount consideration is the wishes the protected person would have if not mentally incapacitated.
- 86.2. The Tribunal must ascertain the protected person's current wishes, if possible, and consider them.
- 86.3. In relation to making or affirming a Guardianship or Administration Order consideration must be given to the adequacy of existing informal arrangements for the care of the person or the management of his or her financial affairs and to the desirability of not disturbing those arrangements
- 86.4. The decision must be the least restrictive of the person's rights and autonomy, consistent with their proper care and protection.

### **General Criteria for Appointment**

87. Case law provides practical examples to support the appointment of a particular person as Guardian or Administrator (see “Factors in favour of an Order being made”) and to oppose the appointment of another (see “Factors in opposition to an Order being made”).

#### **Factors in favour of an Order being made**

88. The person demonstrates the ability to act in the protected person’s best interests, even when this conflicts with the protected person’s current wishes.<sup>133 134 135 136</sup>
89. The person’s capacity to act impartially and objectively.<sup>137</sup>
90. The person’s willingness and ability to consider expert advice.<sup>138</sup>

---

<sup>132</sup> Guardianship and Administration Act 1993, s 5.

<sup>133</sup> Re NPP [2018] SACAT 48.

<sup>134</sup> Re FZL [2017] SACAT 3.

<sup>135</sup> AMT v COT & GSZ [2017] SACAT 2, [73].

<sup>136</sup> Re NPP [2018] SACAT 48, [33].

<sup>137</sup> Re: N, A [2010] SADC 13, [35].

<sup>138</sup> AMT v COT & GSZ [2017] SACAT 2.

91. The person's knowledge of the protected person's current<sup>139</sup> or pre-incapacity<sup>140</sup> wishes.
92. The person's depth of knowledge of the protected person generally.<sup>141</sup>
93. The person's ability to follow the guiding principles in section 5 of the Act.<sup>142</sup>
94. The person's ability to make decisions in the protected person's best interests, even where those decisions conflict with their own beliefs.<sup>143</sup>
95. Whether a joint appointment allows for one decision maker's strengths to compensate for the other's weaknesses.<sup>144</sup>
96. The Tribunal may appoint an Administrator to prevent informal management of the protected person's financial affairs, especially if such management impedes an appointed Guardian.<sup>145</sup>

### Factors in opposition to an Order being made

97. Whether a conflict of interest exists.<sup>146</sup> This factor does not automatically disqualify an applicant. The Tribunal assesses whether appropriate undertakings can cure the conflict. For example, a decision-maker living in the protected person's property without paying rent may resolve the conflict by agreeing to pay rent in the amount determined by an independent expert.<sup>147</sup>
98. The extent to which the appointment would damage relationships between the proposed Administrator and family members of the protected person.<sup>148</sup>
99. A loving relationship, such as that between a parent and adult child, may render the parent less suitable if it impedes the objective decision-making required under section 5 of the Act. As the Tribunal has observed:

*"It is often difficult for parents to make the tough, objective decisions for their adult children that are required to be made by a Guardian recognising the principles set out in s 5 of the (Guardian and Administration) Act."*<sup>149</sup>

<sup>139</sup> Re MYW (No 2) [2019] SACAT 20.

<sup>140</sup> Re MYW [2019] SACAT 19, [104].

<sup>141</sup> Re MYW (No 2) [2019] SACAT 20, [47].

<sup>142</sup> Re NPP [2018] SACAT 48, [32].

<sup>143</sup> Re FZL [2017] SACAT 3, [9].

<sup>144</sup> Re MYW (No 2) [2019] SACAT 20, [61].

<sup>145</sup> FC v Public Advocate & Anor [2025] SASC 110, [19].

<sup>146</sup> Re FZL [2017] SACAT 3.

<sup>147</sup> Re FZL [2017] SACAT 3, [15].

<sup>148</sup> AMT v COT & GSZ [2017] SACAT 2, [78].

<sup>149</sup> Re RBY [2021] SACAT 39, [42].

100. Where the protected person has complex needs, such as managing a National Disability Insurance Scheme (NDIS) plan, the Tribunal may prefer an appointee with the skills and capacity to address those needs.<sup>150</sup>
101. The Tribunal views rigidity in thinking as a negative factor when assessing suitability.<sup>151</sup>
102. Expressions of frustration by a potential Administrator about managing the protected person's estate become relevant only if evidence shows inappropriate financial decisions resulted from that frustration.<sup>152</sup>

### Conflict

103. The likelihood that appointing a particular Guardian or Administrator will cause conflict between decision-makers, or between the protected person and others, may weigh against making an Order.<sup>153 154 155</sup>
104. The Tribunal may infer conflict from adversarial submissions or evidence of strained relationships.<sup>156</sup>
105. Not all conflict likely to result from an appointment is relevant. Conflict becomes relevant if the protected person has expressed a wish to maintain relationships with particular people and an appointment would jeopardise this goal.<sup>157</sup>
106. Conflict is also relevant if it causes detriment<sup>158 159</sup> to the protected person. Detriment may arise if:
  - 106.1. Conflict jeopardises the support the protected person receives from family or friends.<sup>160</sup>
  - 106.2. Conflict impedes the appointee's ability to make impartial decisions.<sup>161</sup>
  - 106.3. Conflict prevents the effective exercise of a Guardian's or Administrator's powers by restricting communication about the protected person's medical, wellbeing, or financial needs.<sup>162</sup>

---

<sup>150</sup> Re RBY [2021] SACAT 39, [48].

<sup>151</sup> Re KCG [2018] SACAT 17, [82].

<sup>152</sup> Re PCM [2021] SACAT 82, [46].

<sup>153</sup> Re NPP [2018] SACAT 48.

<sup>154</sup> Re FAV [2020] SACAT 19.

<sup>155</sup> Re MYW (No 2) [2019] SACAT 20.

<sup>156</sup> Re NPP [2018] SACAT 48, [33].

<sup>157</sup> Re NPP [2018] SACAT 48, [40].

<sup>158</sup> Re QOA [2015] SACAT 1.

<sup>159</sup> Re N, A, [2010] SADC 13, [35].

<sup>160</sup> Re NPP [2018] SACAT 48, [41].

<sup>161</sup> Re NPP [2018] SACAT 48, [42].

<sup>162</sup> Re NPP [2018] SACAT 48, [70].

- 106.4. Decision-makers cannot agree or communicate effectively about the protected person's needs and best interests.<sup>163</sup>

## **Appointment of the Office of the Public Advocate or the Public Trustee**

107. The Office of the Public Advocate and the Public Trustee can be appointed (respectively) Guardian or Administrator.
108. The Act authorises the Tribunal to appoint the Public Advocate as Guardian only when no other suitable and willing person exists.<sup>164</sup>
109. Although the Act does not impose a similar restriction on appointing the Public Trustee, the Tribunal should adopt the same approach.<sup>165</sup>
110. Conventionally, the Tribunal does not assess the suitability of the Public Trustee or the Office of the Public Advocate as decision-makers for a protected person. The Office of the Public Advocate—and, by extension, the Public Trustee—qualifies as suitable when no other suitable person is available.<sup>166 167</sup>
111. Re XHQ provides a slightly contrary view:  
*That is not to say that the Public Trustee will + be an appropriate Administrator for a particular estate or that the Public Trustee will always act competently in the role of Administrator. Clearly there may be individual matters where the Public Trustee is found to have acted negligently or incompetently. There may be cases where the appointment or continued appointment of the Public Trustee is for some reason inappropriate<sup>168</sup> ... In my view, it is appropriate for the Tribunal to satisfy itself that there is no apparent reason why the Public Trustee should not be appointed.*<sup>169</sup>
112. This reasoning offers limited assistance when seeking to revoke the appointment of the Public Trustee or the Public Advocate, as their appointment occurs only when no other suitable or willing person exists. Re XHQ raises an interesting question: if the Public Trustee or Public Advocate also prove unsuitable, what orders remain available to the Tribunal?

---

<sup>163</sup> Re VBL [2021] SACAT X, [31].

<sup>164</sup> Guardianship and Administration Act 1993, s 29(4).

<sup>165</sup> Re TGP [2020] SACAT 91, [17].

<sup>166</sup> Re XHQ [2018] SACAT 11, [85].

<sup>167</sup> Re MYW [2019] SACAT 19, [70].

<sup>168</sup> Re XHQ [2018] SACAT 11, [88].

<sup>169</sup> Re XHQ [2018] SACAT 11, [87].

113. Where both the Public Advocate and the Public Trustee are unsuitable, an argument may arise that neither the Public Trustee nor a particular applicant alone qualifies as Administrator. In such circumstances, a joint appointment may be acceptable to the Tribunal.<sup>170</sup> The applicant may limit the Public Trustee's potential negligence or incompetence (perhaps by bringing a more hands on approach), while the Public Trustee may offset the deficiencies that rendered the applicant unsuitable (perhaps by bringing to bear their considerable experience, expertise and resources).
114. Alternatively, on the basis that the Tribunal may generally assume that licensed trustee companies possess the competence and suitability required for appointment as Administrators,<sup>171</sup> there may be scope to argue for the appointment of a trustee company.

## **Reviews appeals and revocations**

115. After the Tribunal issues a decision, an applicant may seek an internal review. If dissatisfied with the outcome of the internal review, the applicant may appeal the decision. An applicant may also (separately) seek a revocation of the Tribunal's order.
116. An application for internal review or revocation is heard by the Tribunal. An appeal is heard by the Supreme Court. Typically, an internal review or appeal is brought on the basis that the applicant considers the original decision deficient. In contrast, an application for revocation is usually based on the premise that the original decision was correct, but circumstances have since changed, making the order now inappropriate.

### **Internal review**

117. Within one month of an interim or final decision, any applicant, the person to whom the proceedings relate, any individual who provided evidence, submissions, or material to the Tribunal, or any person with a proper interest may seek an internal review of the Tribunal's decision.
118. The Tribunal may grant an extension of time. When considering an extension, the Tribunal examines:<sup>172</sup>
- 118.1. The length of the delay.
  - 118.2. The reason for the delay.

---

<sup>170</sup> Re MYW (No 2) [2019] SACAT 20, [61].

<sup>171</sup> Re XHQ [2018] SACAT 11, [85].

<sup>172</sup> Re NPP [2018] SACAT 48, [20].

- 118.3. The prospects of success of the application.
- 118.4. The extent of any prejudice suffered by the respondent to the application.
- 118.5. The complexity of the proceedings.<sup>173</sup>
- 119. A different Tribunal member conducts the internal review, considering the evidence before the original member to determine if the correct or preferable decision was made.<sup>174</sup> The Tribunal may change the original decision even if no error occurred.<sup>175</sup>
- 120. The Tribunal can allow fresh evidence on an internal review. The key consideration is whether the material was reasonably available had diligent enquiries been made before the first hearing.<sup>176</sup> However, the overriding principle is that the Tribunal must reach the correct or preferable decision. This obligation should not be frustrated by strict adherence to appellate court principles regarding fresh evidence.<sup>177</sup>
- 121. The Tribunal must grant permission for an internal review, with its discretion guided by the interests of justice. A reasonably arguable review and substantial subject matter warrant consideration. Inadequate reasons for the initial decision also justify permission.<sup>178 179 180</sup>

### Staying of decision while Internal Review proceeds

- 122. Filing an internal review does not affect the decision under review; the decision remains in force until the Tribunal concludes the internal review application. The SACAT Act does not clearly state whether the Tribunal may order restoration of the parties to their pre-decision status pending the outcome of the internal review (a “stay order”).<sup>181 182</sup>
- 123. If empowered to make a stay order, the Tribunal would consider, in addition to the principles under section 5 of the Act:
  - 123.1. Whether the review application genuinely raises an arguable case, rather than merely seeking to delay or nullify the decision without demonstrating any error.<sup>183</sup>

<sup>173</sup> RHC v HTB & Ors [2024] SACAT 68, [34].

<sup>174</sup> Re NPP [2018] SACAT 48.

<sup>175</sup> Re RBY [2021] SACAT 39, [12].

<sup>176</sup> Re PIY [2022] SACAT 35, [25].

<sup>177</sup> Re AKS [2016] SACAT 19, [27].

<sup>178</sup> Re WCU [2022] SACAT 68, [32].

<sup>179</sup> Re AKS [2016] SACAT 19, [14].

<sup>180</sup> Re SCD [2022] SACAT 71, [4].

<sup>181</sup> Re LMP [2020] SACAT 2, [9].

<sup>182</sup> Deane Jarvis, *Annotated SACAT Legislation 2023* (LexisNexis Australia), 69.

<sup>183</sup> Re LMP [2020] SACAT 2, [16].

- 123.2. Where the balance of convenience lies, including the practicality of varying the appointment.<sup>184</sup>
- 123.3. The likely timeframe before a hearing can occur.<sup>185</sup>
- 123.4. Whether the stay order serves the proper care of the protected person, rather than the interests of the applicants or any other party.<sup>186</sup>
- 123.5. Any prejudice or adverse outcome the protected person may suffer if a stay is not granted.<sup>187</sup>
- 123.6. The irreversibility of any decisions that might be made during the stay period.<sup>188</sup>

## Appeals

- 124. After an internal review rejection, an applicant can appeal to the Supreme Court.<sup>189</sup>
- 125. An Appeal is  
*“by way of a rehearing. It is effectively a trial over again on the evidence relied upon in the Tribunal together with such additional evidence as may be received on appeal. The court must independently review the evidence and carefully consider the findings made at first instance. Significantly, where the matter involves a question of judicial discretion, the Court is not entitled to substitute its own decision unless an error is identified in the exercise of that discretion.”*<sup>190</sup>
- 126. If the decision maker acted on the wrong principle, mistook the facts, took into account irrelevant matters, or failed to take into account relevant matters, an error will be established. However, the question of the weight assigned to relevant considerations is not an appealable error.<sup>191</sup>

## Revocations

- 127. A party may apply to revoke a Guardianship or Administration Order.<sup>192 193</sup>

---

<sup>184</sup> Re LMP [2020] SACAT 2.

<sup>185</sup> Re LMP [2020] SACAT 2, [35].

<sup>186</sup> Re LMP [2020] SACAT 2, [28].

<sup>187</sup> Re LMP [2020] SACAT 2, [30].

<sup>188</sup> Re LMP [2020] SACAT 2, [35].

<sup>189</sup> LUCA v ECKERT [2024] SASCA 60

<sup>190</sup> Deane Jarvis, *Annotated SACAT Legislation 2023* (LexisNexis Australia), 149 citing Maroulis v Psychology Board of South Australia [2020] SASC 51, [3].

<sup>191</sup> FC v PUBLIC ADVOCATE & ANOR [2025] SASC 110, [46].

<sup>192</sup> Guardianship and Administration Act 1993, s 30.

<sup>193</sup> Guardianship and Administration Act 1993, s 36.

128. This process differs from an internal review because the Tribunal admits new evidence as of right, and the matter is heard afresh.<sup>194</sup>
129. Revocation or variation under section 36 are typically brought where there has been a change in circumstances that renders the original order, though correct when made, no longer appropriate.<sup>195</sup>

### Standing

130. The legislation<sup>196</sup> establishes a hierarchy of interests. The person who is the subject of the application, the Public Advocate, a Guardian, or an Administrator may apply to revoke an order without qualification.
131. A person responsible for the protected person, or any other person with a proper interest in the protected person's welfare, may also apply to revoke the order. Such an applicant must demonstrate a reasonably arguable<sup>197</sup> case that a change in circumstances has occurred affecting either the protected person or the appointed Guardian or Administrator.
132. The Tribunal must be satisfied, as a matter of substance, that the application is made because of a change in the protected person's circumstances. Whether the applicant ultimately proves the change is a separate question.<sup>198</sup> The threshold requires the applicant to present a reasonably arguable case that the relevant circumstances have changed.<sup>199</sup>

### Change in circumstances

133. "Circumstances" refers to events and factors relevant to whether a decision maker is required or remains the appropriate person to act in that capacity.<sup>200</sup>
134. The term encompasses any circumstance related to the protected person's health, safety, and welfare, and extends to any factor that would have been relevant when considering the original appointment.<sup>201</sup>

---

<sup>194</sup> TGN v MCN & ANOR [2023] SASCA 62, [33].

<sup>195</sup> Re KCG [2018] SACAT 17, [19].

<sup>196</sup> Guardianship and Administration Act 1993, s 33.

<sup>197</sup> Re NPS [2022] SACAT 123.

<sup>198</sup> TGN v MCN & ANOR [2023] SASCA 62, [42].

<sup>199</sup> Re NPS [2022] SACAT 123, [38].

<sup>200</sup> Re NPS [2022] SACAT 123.

<sup>201</sup> TGN v MCN & ANOR [2023] SASCA 62, [34].

Effect of Office of Public Advocate's decision making on a change in circumstances

135. A change in circumstances may include the impact of decisions made by the Office of the Public Advocate on the protected person.<sup>202</sup>
136. After an order is made, circumstances may change, rendering it inappropriate for the Office of the Public Advocate to continue as Guardian. For example, the protected person's health may decline as a result of the appointment, even if this does not arise from negligence by the Office of the Public Advocate.<sup>203</sup>
137. The Tribunal is empowered to consider whether the Office of the Public Advocate remains a suitable Guardian and whether it has acted in the protected person's best interests. If poor decision-making or inadequate care by the Office of the Public Advocate has detrimentally affected the protected person, that will amount to a change in circumstances.<sup>204</sup>

## **Powers of the Tribunal relevant to Guardianship and Administration applications**<sup>205</sup>

### **Power to issue summons**

138. The Tribunal may issue a summons to compel a person's attendance or to require the production of evidence.<sup>206 207</sup> The Registrar may refuse to issue a summons if the evidence sought is not relevant to the proceedings.<sup>208</sup>
139. Mr Jarvis provides a useful discussion of the Tribunal's powers to issue summons.<sup>209</sup>  
*In Atkins v Adelaide Rentals Proprietary Ltd [2021] SACAT 61 DP Johns said, at [49], that the issue of a summons is "not done as a matter of routine", but only where the Tribunal considers there is information (or a witness) that is relevant to the matter being dealt with, and that information would not otherwise be provided to the Tribunal (or the witness would not otherwise give evidence).*
140. Mr Jarvis further addresses the test of relevance.

---

<sup>202</sup> TGN v MCN & ANOR [2023] SASCA 62, [23].

<sup>203</sup> TGN v MCN & ANOR [2023] SASCA 62, [25].

<sup>204</sup> TGN v MCN & ANOR [2023] SASCA 62, [26].

<sup>205</sup> The assistance of Mr Deane Jarvis via his textbook, *Annotated SACAT Legislation 2023* was instrumental, and relied upon heavily, in the production of this section of the paper.

<sup>206</sup> South Australian Civil and Administrative Tribunal Act 2013, s 40.

<sup>207</sup> South Australian Civil and Administrative Tribunal Rules 2014, r 80.

<sup>208</sup> Deane Jarvis, *Annotated SACAT Legislation 2023* (LexisNexis Australia), 149.

<sup>209</sup> Deane Jarvis, *Annotated SACAT Legislation 2023* (LexisNexis Australia), 149

*The test of relevance in the context of an application to inspect summonsed documents was explained in Comcare v Maganga (2008) 101 ALD 68; 47 AAR 487; [2008] FCA 285; BC200801482 at [37]–[38] by Bennett J as follows (omitting citations):*

*[37] A party seeking to inspect documents does not need to establish, on the basis of probabilities, that the documents will establish anything. Rather, the test of relevance is whether the documents relate to the proceedings such that there is a real possibility that they may assist in the resolution of issues in the proceedings.*

*[38] Further, the test of relevance for the purpose of inspection is not confined to whether the documents in question will or may establish an inconsistent statement by a witness giving evidence in the proceedings or whether the documents themselves will prove a fact in issue. The Court may allow documents to be inspected if they are apparently relevant or are on the subject matter of the litigation or if they might be used for a legitimate forensic purpose in cross-examination.*

141. The Tribunal may exercise its powers to compel an attorney to produce a statement of the protected person's accounts or a summary of all transactions if evidence suggests misuse or misappropriation of funds.<sup>210</sup>

## Procedural fairness

142. If the Tribunal departs from the principles of procedural fairness, a full review hearing on the merits can cure the defect.<sup>211</sup>
143. The Tribunal must afford procedural fairness to any person whose interests, rights, or legitimate expectations are affected by the proceedings. This obligation extends to potential Guardians, Administrators, and individuals with a close relationship to the protected person.<sup>212</sup>
144. However, procedural fairness does not require the Tribunal to provide all relevant documents to an applicant or interested person before a hearing.<sup>213</sup> The Tribunal must balance the need for disclosure with the privacy interests of the protected person.<sup>214</sup>

## Cost Orders

145. Proceedings under the Guardianship and Administration Act are inquisitorial and protective of the protected person. The Tribunal discourages costs orders on the basis they might deter

<sup>210</sup> Re PCM [2021] SACAT 82, [35].

<sup>211</sup> Re RBY [2021] SACAT 39, [27].

<sup>212</sup> Re MYW [2019] SACAT 19, [15].

<sup>213</sup> Re RBY [2021] SACAT 39, [16].

<sup>214</sup> Re XHQ [2018] SACAT 11, [70].

applicants from bringing properly motivated applications. As a result, costs orders in this jurisdiction are rare, whether for or against the applicant or the subject person.<sup>215</sup> Nevertheless, The South Australian Civil and Administrative Tribunal Act 2013 empowers the Tribunal to make cost orders.<sup>216 217</sup>

146. This paper provides only a brief discussion of costs orders. For detailed analysis, reference should be made to Deane Jarvis, *Annotated SACAT Legislation 2023* (LexisNexis Australia).
147. Section 57(2) of the South Australian Civil and Administrative Tribunal Act 2013 sets out the considerations the Tribunal must take into account when making costs orders.<sup>218</sup>
  - 147.1. One consideration under section 57(2) refers to “any provision made by the rules.” Relevant rules include rules 4a, 4b, 27, and 101b.<sup>219</sup>
148. In internal review applications, the considerations under section 57(2) are subject to an additional threshold: the Tribunal may make a costs order against a party only if that party’s conduct in the proceedings was frivolous, vexatious, or calculated to cause delay.<sup>220</sup>
149. Section 57(3) of the South Australian Civil and Administrative Tribunal Act 2013 provides that if the Tribunal dismisses or strikes out proceedings in prescribed circumstances,<sup>221 222</sup> it must make an order as to costs unless satisfied that there is good reason not to do so in the particular case.
150. The Supreme Court can make costs orders for any aspect of the proceedings.<sup>223</sup>
151. The following circumstances may justify a costs order.<sup>224</sup>
  - 151.1. The unusual circumstances and/or unusual complexity of the matter.
  - 151.2. An applicant party bringing frivolous, vexatious or misconceived proceedings with little or no merit, to the disadvantage of the subject person, another party or an interested person.
  - 151.3. A party or interested person conducting their argument in a way that unnecessarily disadvantages another party or person, (including the subject person), or conducting the

---

<sup>215</sup> Re HWS [2018] SACAT 39, [42].

<sup>216</sup> South Australian Civil and Administrative Tribunal Act 2013, s 57, 58 and 91.

<sup>217</sup> Deane Jarvis, *Annotated SACAT Legislation 2023* (LexisNexis Australia), 139.

<sup>218</sup> South Australian Civil and Administrative Tribunal Act 2013, s 57(2).

<sup>219</sup> Deane Jarvis, *Annotated SACAT Legislation 2023* (LexisNexis Australia), 143.

<sup>220</sup> Guardianship and Administration Act 1993, s 64(g).

<sup>221</sup> Deane Jarvis, *Annotated SACAT Legislation 2023* (LexisNexis Australia), 139.

<sup>222</sup> South Australian Civil and Administrative Tribunal Act 2013, s 47(4), s 48(2) and s 49(2).

<sup>223</sup> TGN v MCN & ANOR (No 2) [2023] SASCA 81.

<sup>224</sup> Re HWS [2018] SACAT 39, [44].

proceedings in an unnecessarily legally or factually complex, confusing or protracted manner.

- 151.4. A party/person not co-operating with the Tribunal (either by a failure to comply with pre-hearing directions or with directions provided during the course of a hearing).
- 151.5. A party/person failing to conduct the case with a focus on a just, quick and cheap outcome in a manner proportionate to the matter or issues in dispute with a consequent detriment to the other parties/interested persons.
- 151.6. Any other relevant matter regarding the nature of the application or the conduct of the parties.

## **Obtaining directions from the Tribunal**

152. A decision maker can apply to the Tribunal for advice or direction on the exercise of their powers.<sup>225</sup>
153. The Tribunal cannot control specific decisions made in relation to a protected person, except as expressly contemplated under the Guardianship and Administration Act, such as in matters involving detention or prescribed medical treatment.
154. The Tribunal cannot order or direct a Guardian to permit the protected person to engage in specific activities. For example, as held in *Re KKV*, the Tribunal cannot direct a Guardian to allow the protected person to go to lunch with a particular individual.<sup>226</sup>

## **The relevance of a protected person's Will with respect to their wishes**

155. *Re HFF*<sup>227</sup> at [18] the Tribunal offers tentative authority that a protected person's Will may reflect the person's wishes, at the time of execution, regarding posthumous arrangements. However, these wishes do not permit the Administrator to act in a way that overrides the need to protect the protected person's interests during their lifetime.
156. In *Re ZJZ*,<sup>228</sup> the Tribunal considered an application for advice and directions from the Administrator. At the outset, the Tribunal determined that ZJZ, if not mentally incapacitated, would have wished for a Will in a specified form. Because ZJZ's circumstances allowed the

---

<sup>225</sup> Guardianship and Administration Act 1993, s 74.

<sup>226</sup> *Re KKV* [2017] SACAT 48, [26].

<sup>227</sup> *Re HFF* [2020] SACAT 20, [18].

<sup>228</sup> *Re ZJZ* [2015] SACAT 2

Administrator to pursue this wish without jeopardising his financial security, the Tribunal held that the Administrator could properly use ZJZ's funds to bring an application for a statutory Will in the specified form.

Harrison Charles May

Treloar & Treloar

24 November 2025

This paper is intended to provide general information only. It is not, and should not be relied on as, legal advice. The application of the principles discussed will vary depending on the facts of each matter.

Readers should obtain specific legal advice before taking any action based on the material contained in this paper. While every effort has been made to ensure accuracy, Treloar & Treloar Barristers & Solicitors do not accept any responsibility for any errors or omissions or for any loss arising from reliance on this paper.