BOOK REVIEW

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Statutory Will Applications: A Practical Guide by Richard Williams and Sam McCullough, (LexisNexis Butterworths Australia 2014) $135.00 ISBN: 9780409337020 pp322 + xxvii

It is a pleasure to write this review. *Statutory Will Applications: A Practical Guide* is an excellent book. Justice Tom Gray of the Supreme Court of South Australia provided an enthusiastic Foreword which the work fully deserves.

'Statutory wills' are wills made or authorised by the court for persons who do not have testamentary capacity. This power is based in legislation, and a body of case law has built up around the topic. Because the legislation is not uniform and there are areas of considerable uncertainty, practitioners, academics and students need a reliable guide. They will find it here.

Practitioners who work with statutory wills will find this book essential. The principles, the rules and the practice of each jurisdiction are right there. Academics teaching the topic will appreciate the way the book covers the principles in their social and historical context. Every reader will notice how readable the book is.

Statutory Will Applications is very well arranged, both generally and in detail, and so this review follows the order of topics in the book.

Chapter 1 **Introduction** sets out the origins and history of the English jurisdiction which has existed in various forms for a long time. Modern English legislation was the origin of the Australian statutory wills legislation. After a hesitant start in a few jurisdictions, each Australian jurisdiction has, during the period 1996 to 2010, developed its own legislation based on its own law reform work. It follows that the Australian law is not uniform, though it has a strong common core which originates not only in the English development, but also in the common drive to make legislative provision for a perceived need. The authors' historical discussion of the English law provides a context in which it is possible to see and understand the Australian law.

The pattern of the Australian legislation, the law reform materials that led up to it and the developing case law are clearly set out.

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Chapter 2 **The Statutory Framework** provides a very good description of, and comparison between, the statutes of the various jurisdictions. Considerable detail is provided, but this does not cloud the clear exposition of principle.

In chapter 3 **When a Statutory Will May be Required** the authors categorise the situations in which a statutory will may be required and this enables them to turn what would otherwise be an uncharted sea of cases into logical and easily accessible material. The cases are set out clearly and in considerable detail, with quotations and discussion. The authors are not afraid to criticise the law when it seems to them appropriate to do so, and this reviewer found their criticisms and comments apt and persuasive.

The material in chapter 4 **Acting for the Applicant** is comprehensive and very well arranged so that a practitioner in any particular jurisdiction can do everything necessary in the right order and thoroughly.

Paragraph 4.5 deals with 'identifying the persons who should be named and served'. In the course of the discussion the authors refer to *Re Davey* [1980] 3 All ER 342; [1981] 1 WLR 164. This decision is mentioned in paragraph 1.23 as being 'a striking case': *Re D(J)* [1982] Ch 237 at 253 per Megarry VC (quoted by the authors at p 26). *Re Davey* is indeed a striking case, and the authors might perhaps have given a little more information about it, and a comment. A woman of 93 who did not have testamentary capacity married clandestinely an employee of an old people's home (in which she was a resident) 6 days before the old lady's death, thus disinheriting her family. The Master acting under the jurisdiction given by ss 102-103A of the Mental Health Act 1959 made a will for her in favour of her family (the people who had benefited under her former, perfectly reasonable, will, that had been revoked by the marriage). The will made by the Master was upheld on appeal, in spite of the fact that notice of the making of the will had not been given to the husband, as required by the Act. The Court said that failure to give notice was in order, because the husband would have opposed the will, so causing delay, and the old lady would have died before the will could be made for her. This justification for not requiring notice is indeed striking, because one would have thought that the core reason for giving notice is precisely to give a party affected the opportunity to oppose.

Paragraph 4.8 deals with 'lack of testamentary capacity'. The paragraph is a short one. The authors say not much more than that the test in *Banks v Goodfellow* (1870) LR 5 QB 549 applies (at p 86), and to support this they cite a few Australian cases. It is true that the tests in *Banks v Goodfellow* are good law in Australia, but there has been a wealth of refinement and explanation

over nearly a century and a half, and this jurisprudence should perhaps have been referred to. There is a paragraph (4.14) on 'evidence of lack of capacity' which surveys cases on the topic. The cases surveyed are statutory will cases, which might give the impression that statutory wills cases and other capacity cases are evolving differently along different lines. It is to be hoped that this is not the case. References to a wider range of sources on testamentary capacity might have been worthwhile.

In paragraph 4.9, the authors go as far as they can towards setting out the 'core test' which must be met for an application to succeed. (In very broad terms, the core test is concerned with whether the testator, if he or she had capacity, would/might make the will proposed.) It is impossible to formulate the core test in a form which is generally valid, because the statutory formulation of the core test varies from jurisdiction to jurisdiction, and in any case the statutory formulations themselves are not clear cut. The discussion of the 'core test' is excellent. The discussion shows to what extent the core test has a clear form, and to what extent it depends on the case law of the particular jurisdiction in the light of the case law in other jurisdictions. The difficulties and uncertainties are well set out. The practitioner acting for the applicant is given insights, understanding and guidance on how to ensure that the application does not go ahead unless the core test is satisfied.

Chapter 5 deals comprehensively with the topic **Acting for Other Interested Persons**.

Chapter 6 deals with the relationship between statutory wills and family provision.

Chapter 7 deals with costs.

Chapter 8 consists of summaries, with more or less extensive quotations, of about 50 statutory wills cases. This chapter is the largest in the book, and takes up some 100 pages.

Chapter 9 consists of extracts from legislation and procedural rules.

Chapter 10, **Precedents**, contains a well ordered and comprehensive checklist for taking initial instructions and suggests the matters which should be raised in correspondence with the applicant client, the medical practitioner or other interested persons.

Chapter 11, **Case Studies**, illustrates how the law can be applied to complex factual situations.

Summing up, *Statutory Will Applications: a Practical Guide* is an excellent

book. It does what it sets out to do with single minded enthusiasm. It is easy to read and it will be a pleasure to use.