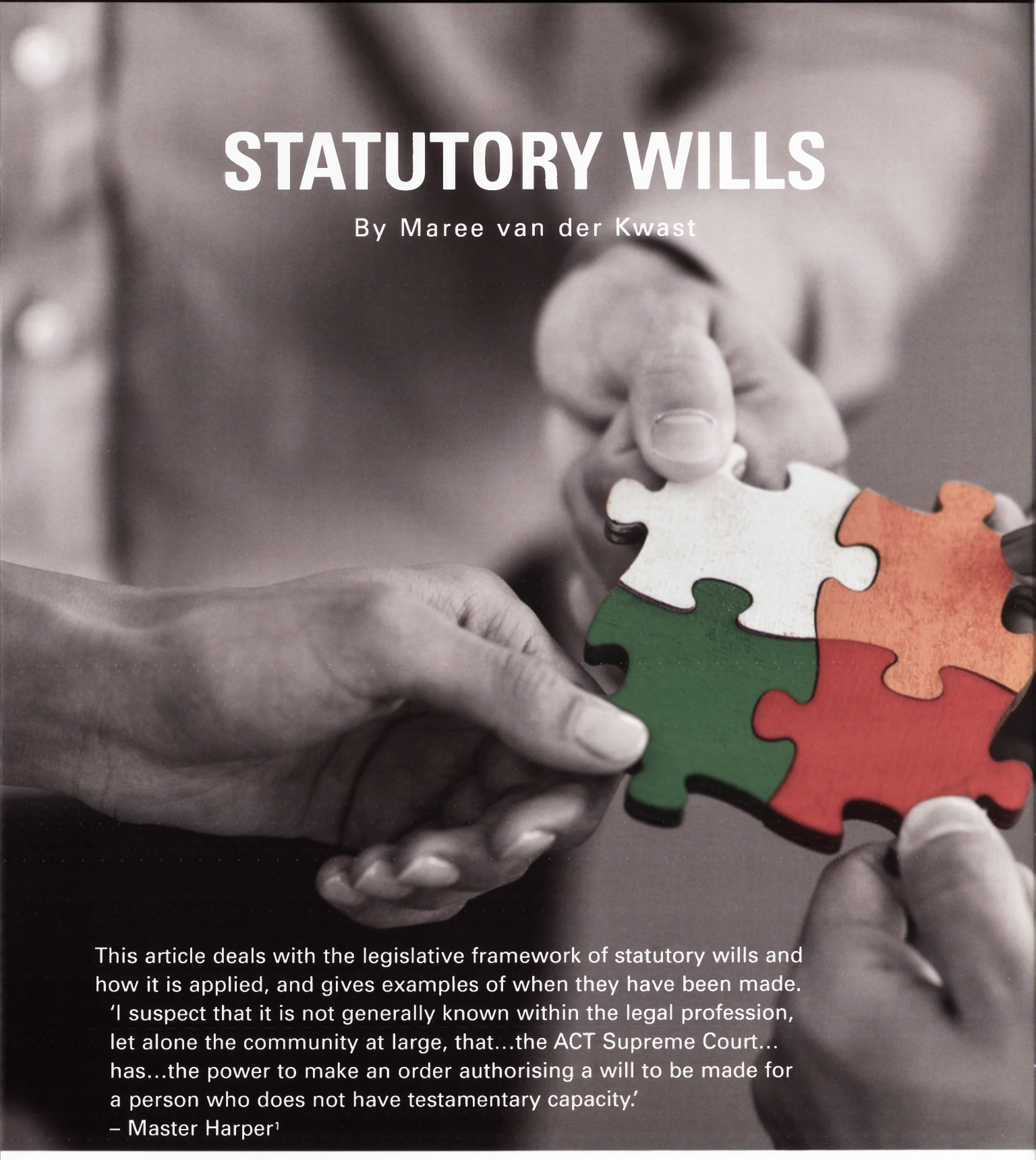
STATUTORY WILLS

By Maree van der Kwast



This article deals with the legislative framework of statutory wills and how it is applied, and gives examples of when they have been made.

'I suspect that it is not generally known within the legal profession, let alone the community at large, that...the ACT Supreme Court... has...the power to make an order authorising a will to be made for a person who does not have testamentary capacity.'

– Master Harper[1]

This statement is true for many jurisdictions besides the ACT. While some states have had a number of applications to their supreme courts for statutory wills to be made (notably NSW, South Australia and Victoria), in other states such applications are rare – for example, there has been only one in both Western Australia and the ACT.[2]

THE LEGISLATIVE FRAMEWORK

Statutory wills are dealt with by:

- Division 2 (ss18–26) *Succession Act* 2006 (NSW) (the NSW Act);
- Subdivision 3 (ss21–28) *Succession Act* 1981 (Qld) (the QLD Act);
- Section 40 *Wills Act* 1970 (WA) (the WA Act);

- Division 2 (ss19–26) of the *Wills Act* 2000 (NT) (the NT Act);
- Section 7 *Wills Act* 1936 (SA) (the SA Act);
- Division 2 (ss21–28) and Division 3 (ss29–41) *Wills Act* 2008 (Tas) (the Tas Act);
- Part 3A (ss16A–16I) *Wills Act* 1968 (ACT) (the ACT Act); and
- Division 2 (ss21–30) *Wills Act* 1997 (Vic) (the Vic Act).

The legislation is not uniform, and the differences can be significant. To deal with these differences in depth is beyond the scope of this article, which focuses on the general features they have in common.

1. Very generally, an application for a statutory will must be made only in relation to a person who:
   (a) lacks testamentary capacity.[3] This is not defined in any Act other than the SA Act,[4] but relies on the common law definition.[5] The best evidence is discussed in *Re Fenwick: Application of JR Fenwick: Re 'Charles'*;[6]
   (b) is alive;[7] and
   (c) except in WA,[8] may be a minor.[9]

A person who satisfies the above is known as the 'incapacitated person'.

2. The application must be made by a person[10] who is the 'appropriate person to make the application'.[11] This term is not defined in any of the Acts.
3. Except in WA,[12] an application seeking leave of the court must first be sought by the applicant.[13]
4. In all states except Victoria and SA, adequate steps must be taken to allow representation of all persons with a legitimate interest in the application, including persons who have reason to expect a gift or benefit from the estate of the person in relation to whom the order is sought.[14]
5. Except in Queensland and Tasmania, the court may make an order regarding the attendance or separate representation of the incapacitated person in any proceedings.[15]
6. Except in SA, the legislation contains a list of what information the court, subject to its discretion, must be given and (except in WA) may consider.[16] This includes:
   (a) a written statement of the general nature of the application and the reasons for making it;[17]
   (b) satisfactory evidence of the lack of testamentary capacity of the incapacitated person;[18]
   (c) a reasonable estimate of the size and character of the estate of the incapacitated person;[19]
   (d) a draft of the proposed will, alteration or revocation for which the applicant is seeking the court's approval;[20]
   (e) any evidence available to the applicant of the incapacitated person's wishes;[21]
   (f) any evidence available to the applicant of the likelihood of the incapacitated person acquiring or regaining testamentary capacity;[22]
   (g) any evidence available to the applicant of the terms of any will previously made by the incapacitated person;[23]
   (h) any evidence available to the applicant, or that can be discovered with reasonable diligence, of any persons who might be entitled to claim on the intestacy of the incapacitated person;[24]
   (i) any evidence available to the applicant of the likelihood of an application being made under the relevant 'family provision' legislation in respect of the property of the person;[25]
   (j) any evidence available to the applicant, or that can be discovered with reasonable diligence, of the circumstances of any person for whom provision might reasonably be expected to be made by will by the incapacitated person;[26]
   (k) any evidence available to the applicant of a gift for a charitable or other purpose that the incapacitated person might reasonably be expected to make by will;[27] and
   (l) any other relevant matters.[28] This has included:
      (i) the injustice caused by an unpublicised marriage;[29] and
      (ii) the attitude of the parties. However, the court will not simply make the will if all consent.[30]
7. Rules of evidence do not apply.[31]
8. The court must refuse leave to make an application for an order unless it is satisfied that:
   (a) the proposed will, alteration or revocation is, or is reasonably likely to be, one that would have been >>

made by the incapacitated person if he or she had testamentary capacity;[32] and

(b) it is or may be appropriate for the order to be made (except in WA).[33]

9. The will must be signed by the registrar and sealed with the seal of the court.[34]

THE APPROACH OF THE COURT

The legislation does not deal with the difficult question of how the court determines that a will should be made for a person who does not have the ability to decide what should be in their will.

The UK courts, when dealing with similar but not identical provisions, have developed a set of principles known as the 'substitute decision'.[35] In this approach, the court assumes that the incapacitated person:

- is having a brief lucid interval;
- has full knowledge of the past and a full realisation that as soon as the will is executed he or she will lapse into the actual mental state that previously existed with the prognosis as it actually is;
- is being advised by competent solicitors who will draw to his or her attention the matters that a testator should bear in mind; and
- is envisaged as taking a broad brush to the claim on his bounty rather than an accountant's pen.

This approach was considered, but rejected, by the NSW Supreme Court which, in *Re Fenwick*,[36] divided the possible cases into three categories:

1. 'lost capacity' cases
2. 'nil capacity' cases
3. 'pre-empted capacity' cases.

Lost capacity cases

According to the NSW Supreme Court in *Re Fenwick*,[37] 'lost capacity' cases are those in which a formerly competent person is rendered incapable of making a will and a will has not been made previously, or it has been lost, or the incapacitated person's family circumstances have changed, resulting in a distribution that the incapacitated person would never have intended.

The Court found that the proper approach is to determine the actual, or reasonably likely, subjective intention of the incapacitated person. Thus:

- in cases where the person expressed some testamentary intention in relation to the circumstances sufficient to warrant an application for a statutory codicil or new will, the court must:
  - be satisfied that the proposed will or codicil truly implements what the applicant claims the incapacitated person wishes to do;
  - consider whether the intention would have been carried into testamentary effect by the incapacitated person if he or she had testamentary capacity; and
  - consider whether the expressed intention is the product of the incapacitated person's free choice or if some undue pressure or influence been applied.
- In cases where an adult with established family or other personal relationships has made a valid will but, since losing testamentary capacity, has not expressed, or is incapable of expressing any testamentary intention to deal with changed circumstances:
  - the court must be satisfied as to what the incapacitated person is 'reasonably likely' to have done, in the light of what is known of his or her relationships, history, personality and the size of the estate.
- In cases where a person has never made a will:
  - the issue is whether the court can be satisfied that it is reasonably likely that the person would have made any will at all if testamentary capacity had not been lost. There is no presumption against incapacity.

Nil capacity cases

'Nil capacity' cases are those in which the incapacitated person has never been competent to make a will.

Such an incapacitated person poses some difficulties, as the 'record of her individual preferences and personality is a blank on which nothing has been written…'[38] The court therefore proceeds on the basis that the incapacitated person was a 'normal decent person, acting in accordance with contemporary standards of morality'.[39]

As there cannot be any meaningful search for subjective intention, the court must:

- make objective assessments of the likelihood that the person would have wanted a will; and
- consider whether it is likely that the incapacitated person would have made the will proposed. The considerations involved are entirely objective.

Pre-empted capacity cases

'Pre-empted capacity cases' are those in which a person, though still a minor and therefore lacking testamentary capacity, is old enough to form relationships and to express reasonable wishes about property before losing capacity.

In these cases, the court must determine whether the incapacitated person ever expressed some testamentary intention before becoming incapacitated.

If they did, the court:

- must be satisfied that the asserted intention is truly that of the incapacitated person; and
- assess whether it is reasonably likely that the incapacitated person would have expressed that intention if he or she had attained testamentary capacity, rather than the intention being the product of deluded attachment or hostility or immaturity. This question contains both subjective and objective elements.

If they did not, the court must ask whether:

- it is reasonably likely that the incapacitated person would have made any will at all rather than die intestate; and
- it is reasonably likely that the incapacitated person would have made the will which is now proposed.

The NSW approach was adopted in the ACT,[40] Queensland[41] and Victoria.[42] In SA, the court initially refused to decide whether it should follow the UK or NSW authority,[43] but most recent cases seem to be following the NSW approach.[44]

The issue does not appear to have been considered in other jurisdictions.

Such decisions do not mean that the court has untrammelled discretion. In *Boulton v Sanders & Ors*, the Victorian Court of Appeal noted that:

> 'The question is not whether the testator would have preferred the proposed Will to intestacy; nor whether the proposed Will is one of a number of possible proposed Wills, all of which might be equally likely to reflect the testator's likely intentions. If the proposed Will no more probably reflects 'likely intentions' than a number of other possible dispositions...the requirements...will not be satisfied.'[45]

CASE STUDIES

The types of situations in which statutory wills can be made are increasingly flexible. For example:

- the court is concerned with not only the gift, but also the terms on which it is made. Thus, in a South Australian case, the incapacitated person lost testamentary capacity as a result of an accident when he was five years old, but was entitled to significant compensation. There was concern that upon his death, in addition to his parents and sister, his brother – who suffered autism and did not have the capacity to manage his own affairs – would receive a share of his estate. The family members sought and obtained an order that a will be made that the brother's share be placed in a protective trust.[46]
- In *Monger v Taylor*[47] it was accepted that the incapacitated person never would have wanted her sister to inherit any part of her estate. Nevertheless, the court considered that, properly advised, she would have understood that her sister would have the right to make a claim against her estate pursuant to the equivalent of the *Inheritance Act* and would have made provision for her in her will on that basis.

CONCLUSION

Obviously there is no substitute for carefully examining the relevant legislation in the jurisdiction. However, this article should serve to alert practitioners to the types of situations in which it is possible for a court to make a statutory will, and they should not assume that, just because a person lacks testamentary capacity, suitable arrangements cannot be made for their estate following their death. ■

Notes: **1** *Re DH: Application by JE and SM* [2011] ACTSC 69 at [1]. **2** *Stasinowsky by her Attorneys Shack and Jones v Shack* [2013] WASC 439; *Re DH*. **3** Section 16A(1) & (2) ACT Act; s18(1) & (2) NSW Act; s19(1) & (2) NT Act; s21(1) & (2)(a) Qld Act; ss7(1) & (3)(a) SA Act; s22(1) Tas Act; s21(1) Vic Act; s40(1) WA Act. **4** See s7(12) SA Act. **5** *Banks v Goodfellow* (1870) LR 5 QB 549. **6** [2009] NSWSC 530 at [126ff]. **7** Section 16A(3) ACT Act; s40(2) WA Act; s18(3) NSW Act; s19(3) NT Act; s21(3) Vic Act; s22(3) Tas Act; s21(2)(b) Qld Act; the SA Act does not expressly provide, but it is implicit: *In the Estate of Grace Geraldine Brown (Deceased)* [2010] SASC 90. **8** Section 40(2) WA Act. **9** Section 4 ACT Act; s18(4) NSW Act; s19(4) NT Act; s21(3) Vic Act; s22(4) Tas Act; s7(5) SA Act; cf wording in s21(7) Qld Act. **10** Most jurisdictions provide that 'any person' may make an application. The Qld, NT and ACT Acts refer to 'a person'. **11** Section 21(d) NT Act; s22(d) NSW Act; s16E(d) ACT Act; s24(a) Qld Act; s24(a) Tas Act; s42(1)(c) WA Act. **12** However, note the ability of the court to refuse applications in certain circumstances: s42(1)(c) WA Act. **13** Section 23(1) Tas Act; s22(1) Qld Act; s21(2) Vic Act; s16B(1) ACT Act; s19(1) NSW Act; s20(1) NT Act; cf 'permission of the Court' in s7(1) SA Act. **14** Section 24(c) Tas Act; s42(d) WA Act; s16E(e) ACT Act; s21(e) NT Act; s22(e) NSW Act; cf 'proper interest' in s24(b) Qld Act. **15** Section 25 NSW Act; s16H ACT Act; cf differences in s29(a) & (b) Vic Act; s7(7) SA Act; s43(1)(a) WA Act; s22(c) NT Act. **16** Sections 19, 20 & 21 NSW Act; ss23, 25 & 26 Tas Act; ss23 & 25 Qld Act; s20 NT Act; ss16B, 16C & 16D ACT Act; s7(4) SA Act; s28 Vic Act; s41 WA Act. **17** Sections 16B(2)(a) & 16D(a) ACT Act; ss19(2)(a) & 21(a) NSW Act; ss20(2)(a) & 23(1)(a) NT Act; ss23(a) & 25(a) Qld Act; ss23(2)(a)& 26 Tas Act; ss22(a) & 28(a) Vic Act; s41(1)(a) WA Act. **18** Sections 16B(2)(b) & 16D(a) ACT Act; ss19(2)(b) & 21(a) NSW Act; ss23(b) & 25(a) Qld Act; ss23(2)(b) & 26 Tas Act; cf the different approach in s21(a) NT Act; s26 Vic Act. Note that it is not expressly stated in the WA Act, but implied by s40(1) WA Act. **19** Sections 16B(2)(c) & 16D(a) ACT Act; ss19(2)(c) & 21(c) NSW Act; ss20(2)(b) & 23(1)(a) NT Act; ss23(d) & 25(a) Qld Act; ss23(2)(c) & 26 Tas Act; ss22(a) and 28(b) Vic Act; cf the differences in s41(1)(b) WA Act. **20** Sections 16B(2)(d) & 16D(a) ACT Act; ss19(2)(d) & 21(a) NSW Act; ss20(2)(c) & 23(1)(a) NT Act; ss23(e) & 25(a) Qld Act; ss3(2)(d) & 26 Tas Act; ss22(a) & 28(c) Vic Act; s41(1)(c) WA Act. **21** Sections 16B(2)(e) & 16D(a) ACT Act; ss19(2)(c) & 21(e) NSW Act; ss20(2)(d) & 23(1)(a) NT Act; ss23(f) & 25(a) Qld Act; s7(4)(a) SA Act; ss23(2)(e) & 26 Tas Act; ss22(a) & 28(d) Vic Act; s41(1)(d) WA Act. **22** Sections 16B(2)(f) & 16D(a) ACT Act; ss19(2)(f) & 21(a) NSW Act; ss20(2)(e) & 23(1)(a) NT Act; ss23(c) & 25(a) Qld Act; s7(4)(b) SA Act; ss23(2)(f) & 26 Tas Act; ss22(a) & 28(e) Vic Act; ss41(1)(e) & 46 WA Act. **23** Sections 16B(2)(g) & 16D(a) ACT Act; ss19(2)(g) & 21(a) NSW Act; ss20(2)(f) & 23(1)(a) NT Act; ss23(g) & 25(a) Qld Act; s7(4)(c) SA Act; ss23(2)(g) & 26 Tas Act; ss22(a) & 28(f) Vic Act; s41(1)(f) WA Act. **24** Section 7(4)(d)(ii) SA Act; s23(2)(h) Tas Act; s19(2)(h) NSW Act; s16B(2)(h) ACT Act; s28(i) Vic Act; s20(2)(g) NT Act; s23(k) Qld Act; s41(1)(g) WA Act. **25** Sections 16B(2)(i) & 16D(a) ACT Act; ss19(2)(i) & 21(a) NSW Act; ss20(2)(h) & 23(1)(a) NT Act; ss23(h) and 25(a) Qld Act; s7(4)(d)(ii) SA Act; ss23(2)(i) & 26 Tas Act; ss22(a) & 28(g) Vic Act; s41(1)(h) WA Act. **26** Sections 16B(2)(j) & 16D(a) ACT Act; ss19(2)(j) & 21(a) NSW Act; ss20(2)(j) & 23(1)(a) NT Act; ss23(j) & 25(a) Qld Act; s7(4)(d)(iii) SA Act; ss23(2)(j) & 26 Tas Act; ss22(a) & 28(h) Vic Act; s41(1)(i) WA Act. **27** Sections 16B(2)(k) & 16D(a) ACT Act; 19(2)(k) & 21(a) NSW Act; ss20(2)(k) & 23(1)(a) NT Act; s23(i) & 25(a) Qld Act; s7(4)(d)(iv) SA Act; ss23(2)(k) & 26 Tas Act; ss22(a) & 28(j) Vic Act; s41(1)(j) WA Act. **28** Sections 16B(2)(l) & 16D(a) ACT Act; ss19(2)(l) & 21(a) NSW Act; ss20(2)(m) & 23(1)(a) NT Act; ss23(j) & 25(a) Qld Act; ss23(2)(l) & 26 Tas Act; ss22(a) & 28(k) Vic Act; s41(1)(k) WA Act. **29** *Re Davey* [1981] 1 WLR 164. **30** *Monger v Taylor* [2000] VSC 304. **31** Section 25(c) Qld Act; s7(6) SA Act; s22(c) Vic Act; s23(c) NT Act; s16D(c) ACT Act; s21(c) NSW Act; s26(c) Tas Act; s43(2) WA Act. **32** Note the slight differences in wordings: cf s22(b) NSW Act; s24(e) Tas Act; s22(b) NSW Act; s16E(b) ACT Act; s24(d) Qld; s21(b) NT Act; cf s7(3)(b) SA Act; s26(b) Vic Act; s42(1)(b) WA Act. **33** Section 22(c) NSW Act; s16E(c) ACT Act; s21(c) NT Act; s24(d) Tas Act; s24(e) Qld Act. **34** Section 7(9) SA Act; s40(4) WA Act; s26(1) Qld Act; s16F(1) ACT Act; s27 Tas Act; c.f. requirements in s24 NT Act; s23 NSW Act. **35** *Re D(J)* (1982) (1) Ch 237. **36** [2009] NSWSC 530. **37** *Ibid.* **38** *Re C(A patient)* (1991) 3 All ER 866 at [87] as cited in *In the matter of RAK* [2009] SASC 288. **39** *Ibid.* **40** *Re DH*. **41** *Sadler v Eggmolesse* [2013] QSC 40. **42** *Saunders v Pedemont* [2012] VSC 574. **43** *In the matter of RAK* [2009] SASC 288. **44** *In the Matter of Shaun Arthur Pickles* [2013] SASC 175. **45** (2004) 9 VR 495 at [515]–[516]. **46** *In the matter of RAK* [2009] SASC 288. **47** *Monger v Taylor* [2000] VSC 304.

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