W A LEE EQUITY LECTURE 2010

COURT INTRUSION INTO TESTAMENTARY DISPOSITION: A BENEFICIAL JURISDICTION?*

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I INTRODUCTION

I was most honoured to be asked to deliver the 10th annual W A Lee Equity Lecture, and to have been asked to do so by Tony Lee himself. I was privileged to launch the series on 2 November 2000, when Tony delivered the inaugural lecture on the subject: 'Trustee Investing: Homes and Hedges'.

An array of comparably illustrious speakers followed over ensuing years: Mr Hubert Picarda QC, the Hon William Gummow AC, the Hon Justice Margaret White, the Hon Justice B H McPherson CBE, Professor Malcolm Cope, Professor Charles Rickett, the Hon Justice Ken Handley AO, the Hon Michael Kirby AC, and last year the Hon Justice Patrick Keane as he then was.

Keane J's perceptive paper found its way into the *Australian Law Journal*.[1] His Honour addressed the subject, 'The Conscience of Equity',[2] itself a commentary on the 2008 lecture delivered by Michael Kirby on the subject, 'Equity's Australian Isolationism', published in the 2008 *QUT Law and Justice Journal*.[3]

Almost all speakers have been faithful to the name of the lecture, by speaking on matters of equity. I will diverge this evening from the literal, in deference to the circumstance which I expect at least in part explains Tony's invitation that I deliver the lecture, and that is my being one of the students in his succession law class in 1969. My subject accordingly concerns not equity, but the administration of deceased estates, a topic I hope will hold some particular appeal for our sponsor the Queensland Community Foundation.

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* A paper presented at the 2010 W A Lee Lecture, Banco Court, Thursday, 18 November 2010.

† Chief Justice of Queensland.

1 (2010) 84 *Australian Law Journal* 92.

2 Ibid.

3 (2008) 8(2) *QUT Law and Justice Journal* 444.

At this significant stage in the history of the lecture, I pause briefly to acknowledge the signal contribution Tony Lee has made over almost five decades to legal education, scholarship and reform.

Many of my judicial colleagues, and I, fondly recall Tony Lee the lecturer, whose capacity to synthesise difficult propositions was remarkable. He was an inspirational lecturer, and his students' enduring respect bears testimony to that.

So do his major publications, *Principles of the Law of Trusts*, which reached its 3rd edition in 1996 before going loose-leaf,[4] and *Lee's Manual of Queensland Succession Law*, first published in 1975 and now in a 6th edition of which Mr Alun Preece is author.[5]

As law reformer, Tony was the driving force behind the development of Queensland's trustee and succession law, his work leading to the enactment of the *Trusts Act* in 1973[6] and the *Succession Act*[7] a decade later. His participation in the work of the Queensland Law Reform Commission is still greatly valued.

I conclude this brief tribute by repeating the anecdote I offered when launching the lecture series in the year 2000. My contemporary Justice John Byrne, having then only recently seen the movie 'The Dish', reminded me of 16 July 1969 – which you will immediately recall was the day of the momentous Apollo 11 moon landing. We eager students duly assembled that day for Mr Lee's succession lecture. He surprised us rather by immediately offering to cancel the lecture, so that we could disperse to watch the imminent moon landing. But ever fair and equitable, he proposed first that we should vote on the issue. If, as I rather suspect, Tony personally preferred to watch the historic event on television rather than give a lecture, voting was objectively a risky course to propose: could he be sure his devoted students would pass up an hour of his inspiring tuition? Well maybe in 1969 he was not quite the self-confident Tony Lee we see today. We in fact – churlish and ungrateful boys and girls – chose to pursue our secular interest and *did* vote unanimously to watch man on the moon!

II THE SCOPE OF THE LECTURE

The subject of my discourse this evening concerns the remedial jurisdiction of the court in relation to testamentary disposition, some of it fairly recently conferred, or refined.

I will first seek to identify current trends in relation to family provision applications: as to applications on behalf of persons suffering incapacity, as to aspects of the care of the aged which these days confront those ending their days in nursing homes, and as to levels of provision being awarded by the court to deserving applicants generally. When dealing with family provision applications for persons suffering incapacity, I will say a little about the important role of the Public Trustee of Queensland.

Then I will turn to areas which have benefited from recent legislative reform, particularly to the validity of purported wills irregularly executed, and the court's

4 H Ford and W Lee, *Principles of the Law of Trusts* (Lawbook Co, 3rd ed, 1996).
5 A A Preece, *Lee's Manual of Queensland Succession Law* (Lawbook Co, 6th ed, 2007).
6 *Trusts Act 1973* (Qld).
7 *Succession Act 1981* (Qld).

extensive powers of dispensation, which have now been in operation for about four years. In that context, I will say something about the performance of the Supreme Court's probate registry, its significance and practical operation.

Finally, I will speak about the court's fairly newly acquired, and rather radical, capacity to in effect make wills for persons without testamentary capacity, and for minors, providing opportunity for desirable judicial support for the position of the vulnerable.

The published title of the lecture (I confess my own words) appears to query whether the approach of the court on these matters is truly beneficial. I should at once dispel any such doubt: it is a remedial jurisdiction beneficially exercised, and if I have secured your attendance this evening under a false pretence, I apologise.

III FAMILY PROVISION

A *Incapacitated Adults*

I deal first with applications by adults with a disability, for provision or further provision from the deceased estate of a parent, usually the last surviving parent.

I have been greatly assisted in the preparation of my remarks on this subject by the Official Solicitor to the Public Trustee of Queensland, Mr Mark Crofton. The Public Trustee, and through him the Official Solicitor, are particularly well placed to discern relevant trends.

In the last financial year, the Public Trustee prepared wills for as many as 24 000 Queenslanders. Further, the Public Trustee currently acts as administrator for some 7400 adults with an incapacity, and in the last financial year, the Trustee litigated approximately 80 claims for provision on behalf of adults with an incapacity, most concluding with a compromise subject to the sanction of the Supreme Court. Accordingly, one may have confidence in the existence of trends identified by the Public Trust Office.

One distinct trend is the increasing frequency of applications for provision from deceased estates by adults suffering an incapacity. As mentioned, the Public Trustee brought approximately 80 applications last year. The forecast is that the number of persons with profound disabilities in Queensland will increase by 33% over the decade 2006 to 2016. Over that same period the number of Queenslanders aged over 50 years will increase by almost 84%.

If that forecast is fulfilled, we will see an increase in such applications, unless the testamentary culture changes. The present culture has tended to ignore a need for proper testamentary treatment of incapacitated adult family members. For many decades, adults with decision-making incapacity were typically institutionalised. In their 3rd edition of *Family Provision in Australia*, published in 2007, Dr de Groot and Mr Nickel point out that:

> until the late 1940's, the common view was that, if a person under an intellectual disability was confined in an institution run by the State, he or she had no special needs.

> ... applications (for further provision) were usually refused because it was said that any provision made by the court would benefit the State rather than the applicant.[8]

As is well known, recent decades have witnessed the movement of such persons from the institution into the general community: state run institutions have closed.

Yet testator parents have failed in their wills to make provision for such adult children plainly needing provision. Why is this so? The Official Solicitor advances these reasons:

- Often parents are of the view that the existing support arrangement (not taking into account their estate) are sufficient or adequate to provide support to their incapacitated adult child. The failure of this perspective lies with appreciating the needs of the adult (which quite often are limited only by the financial resources available) in the context of the size of the estate.

- There may be a legacy amongst those who make wills and perhaps even their advisers which holds that existing support given by the State is adequate or sufficient for the adult concerned.

- Not uncommonly the parents of an adult child with an incapacity present with the view that the family will provide additional support, including financial support should that be necessary. This expectation is rarely reflected in the will, or given any force in the will.[9]

Sitting in the Applications jurisdiction of the Supreme Court in September this year, I sanctioned the compromise of an application brought by the Public Trustee as litigation guardian of a 54 year old intellectually disabled daughter, one of four siblings surviving the death of her last surviving parent, their mother. Their mother left an estate worth approximately $550 000. The daughter had few assets, and had lived with and been supported by her mother all her life. Yet the mother left her nothing. After the mother's death, the daughter was living with and being cared for by a sister. I sanctioned a compromise which led to the equal division of the estate among the children.

Legal practitioners involved in drafting wills should take particular care to explain to a testator his or her obligation in relation to an incapacitated son or daughter, and to dispel suggestions that care arrangements which have prevailed to date will necessarily obviate any need for special provision in the will.

A second continuing and increasing trend identified by the Official Solicitor rests in the fear that in estates administered outside the Public Trust Office, applications for provision are not being made on behalf of a child with an incapacity where they should be made. Often the executor of the estate will uniquely have the requisite knowledge to advance such an application.

Interestingly the New Zealand Court of Appeal, in *Re Magson*, observed, of an estate administrator's duty in relation to provision for a child: 'Although an administrator is

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8 J de Groot and B Nickel, *Family Provision in Australia* (LexisNexis Butterworths, 3rd ed, 2007) 164.

9 Letter from Mark Crofton to the Hon Paul de Jersey AC, 10 September 2010.

not necessarily bound to apply on behalf of a minor ... in a clear case we think such a duty would arise.'[10]

In *Vasiljev v Public Trustee*, Hutley JA said an executor was bound 'to protect the interests of the infant to the full'.[11]

Analogously, a duty may be felt to arise in relation to an incapacitated adult.

But this situation is riven with potential conflict. That is because the executor will often be an adult sibling of the incapacitated brother or sister. The adult children with capacity will frequently benefit from the estate to the exclusion of their disabled brother or sister. Also, the incapacitated child's paraclete or representative – an informal decision-maker under s 9 of the *Guardianship and Administration Act 2000* (Qld) or an administrator appointed by the Queensland Civil and Administrative Tribunal,[12] will often be a brother or sister who otherwise benefits from the will.

Again, there is an obligation on legal practitioners involved in the administration of such deceased estates to take steps to ensure that these conflicts do not prevail with the consequence that applications for provision which should be made are not made.

I turn now to my second subject, an impact of aged care on the content of wills.

B *Novel Contemporary Conditions*

The ageing of the population, with improvements in available medical care, means increasing recourse to nursing homes. These days, entering a low care facility, one must furnish an 'accommodation bond', the amount of which is refunded subject to some deduction upon death or departure. Depending on assets, the amount of such a bond can be substantial, typically hundreds of thousands of dollars, and families confronted with the need to assemble these large amounts quickly can be daunted. The problem arose before me in a testamentary situation in the case of *Helmore*,[13] in which judgment was given on 26 November 2007.

A 90 year old husband died, survived by his widow and six children. He left an estate available for distribution worth approximately $340 000. By his will, he provided a legacy of $30 000 for the widow, and carefully disposed of the balance of the estate in favour of the children. On a family provision application, I considered the $30 000 allowed for the widow to be inadequate, and increased that sum to $120 000. But the wrinkle in the case concerned an accommodation bond.

The deceased made his will only 10 months before he died. At that time, he and his wife were living together in a house at Jacob's Well. Eight months later, the deceased moved into an RSL nursing home on a high care basis. His wife also moved in, on a low care basis. She was obliged to pay an accommodation bond to the tune of $185 000. It had not been paid by the time of the husband's death. By the time the case came before me,

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10 [1983] NZLR 592, 599 (Cooke J).
11 [1974] 2 NSWLR 497, 504.
12 *Guardianship and Administration Act 2000* (Qld) s 12.
13 (1888/2007) (Unreported, Supreme Court of Queensland, de Jersey CJ, 26 November 2007).

the widow was suffering considerable distress because of the uncertainty of her living situation.

The widow's counsel submitted I should order that the amount of the bond be paid from the deceased's estate to the widow outright. But that would have meant that on her death, what was left of it would pass to her beneficiaries. Having determined that apart from the increase in the legacy to $120 000 her remaining needs were limited to securing the bond, I ordered that the will be varied to provide:

> Upon my wife ... executing and delivering to my executors an assignment of her entitlement to a refund of the accommodation bond payable under her residential care agreement ... I direct my executors to pay forthwith the balance accommodation bond payable under that agreement as if it were a liability borne by me.[14]

A legal practitioner advising the 90 year old husband in making that will should probably have canvassed with him mechanisms for the posting of such bond moneys should the need arise upon entry to such a facility by either of them.

I move now to the third matter, the level of further provision.

C *Family Provision Applications: Quantum of Awards*

In their text, Dr de Groot and Mr Nickel mention the view expressed by the editor of the *Australian Law Journal* in 1941, referring to testator's family maintenance legislation, that 'Dominion Equity judges had given the jurisdiction here a settled body of practice which made it possible to advise clients with accuracy as to claims under the legislation'.[15] The authors' own view is that the editor's sentiment represents 'the triumph of hope over experience'.[16] And they add that 'even with the wealth of decided cases (both reported and unreported) that are accessible today, outcomes cannot be predicted with precision.'[17]

Family provision applications are these days frequently compromised, subject to the sanction of the court. That may suggest either a sufficiently marked playing field, from which one may discern the likely result of any court adjudication, or, on the other hand, an unpredictability which militates in favour of compromise.

Whatever the true position, there is in fact a rather limited raft of current precedents, in consequence of the frequency of mediated resolutions. This would ordinarily mean that lawyers giving advice these days could not draw on a comprehensive bank of up-to-date prior jurisprudence when considering likely outcomes. But this is quintessentially an area where the outcome depends on the facts of the particular case, and the discretion of the court is very broad. Importantly, the underlying principles have remained constant over many decades, most recently affirmed by the High Court in *Vigolo v Bostin*.[18]

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14 *Helmore v Helmore* [2007] QSC 348 (26 November 2007), [18] (de Jersey CJ).
15 de Groot and Nickel, above n 8, 5-6.
16 Ibid.
17 Ibid.
18 (2005) 221 CLR 191.

A case illustrating the breadth of the discretion, drawn from my own work, is *Goold v Field*,[19] in which I gave a decision on 25 October 2005. The case also illustrates the poignancy, if not tragedy, which invariably attends these situations.

The 43 year old applicant was the only child of her deceased mother, a daughter. During the applicant's infancy, the mother demanded that her father leave and take the child with him. The applicant was eventually confined to an orphanage and foster homes until she reached the age of 15. She made repeated attempts to make contact with her mother which were always rebuffed. She implored her grandmother to act as an intermediary, but the grandmother declined, lest her daughter cut off all contact with her own parents.

The estate was worth approximately $450 000. With a minor exception, the deceased left all of it to her next door neighbour. That neighbour had thought the deceased always intended that he purchase the property from her estate upon her death, so would have been surprised at the provision made for him, which he did not seek to sustain.

The applicant lived a life of substantial deprivation. She occupied a barely habitable one bedroom former worker's cottage 'left over' after the construction of the Somerset Dam. She drove an unreliable 1964 model car. She had few assets. Her health was in a parlous state. Outstanding dental treatment alone would cost of the order of $40 000.

Counsel for the executor, urging circumspection, submitted that there being no competing claims, an award should not exceed 40% to 60% of the available estate, and he referred to previous judicial observations to that effect. As it turned out, I ordered that three quarters of the estate pass to the applicant.

Awards in favour of intellectually and otherwise disabled applicants have become more appropriately generous over the last decade. Likewise there is generally, I suggest, an increasing acceptance that where need is identified, it should be satisfied so far as the size of the estate and other competing demands allow. In short, the stipulation against the 'rewriting' of the will does not condemn the court to parsimony.

I move now to my second subject, the regularisation of irregularly executed wills, in the course of which I will say something of the operation of the Supreme Court's Probate Registry.

IV THE VALIDITY OF PURPORTED WILLS IRREGULARLY MADE

The requirements for the due execution of a will were substantially simplified by amendment of the *Succession Act* operative from April 2006. A major improvement was the removal of the long-standing requirement that a signature be applied at the 'foot or end' of the will, a requirement which had produced a welter of case law, with its apogee, or perhaps more appropriately nadir, on one view reached in *Smee v Bryer*.[20] I can make my point by reading the headnote for the case as reported in the English Reports:

> A holograph will, in which an executor was appointed, and the residue disposed of, being written on three sides of a sheet of paper, ended on the third side, leaving eight-tenths of

[19] [2005] QSC 310 (25 October 2005).
[20] (1848) 163 ER 1155.

> an inch of that page blank; the signature of the testatrix was not placed there; the upper part of the fourth page was in blank (for which a reason was assigned), and more than half-way down that page, opposite to the attestation clause (for which clause there was not space on the third page), her signature was placed. It was held that the will was not signed 'at the foot or end thereof,' that it ought to have been signed at the bottom of the third page.[21]

It was that absurdly narrow approach which is said to have led the frustrated Sir Edward Sugden, first Baron St Leonards, to promote as Lord Chancellor what became known as the liberalising 'Lord St Leonards' Act'. The even more liberal position we have now reached in Australia exhibits a level of common sense of which the early English jurisprudence was utterly devoid.

That Lord St Leonards, many of us may recall from Tony Lee's lectures, was the otherwise fastidious testator who managed to lose his own will, the complicated contents of which were proved after his death by the oral testimony of his daughter who knew it 'by heart'.[22] When I say His Lordship lost his will, I was thinking that it was possible it had been stolen from its repository.

In any event, the subject on which I briefly touch in this address is the commonsensical dispensing power introduced by s 18 in 2006, replacing the previous stipulation for at least 'substantial compliance' with the formal requirements. Under the new current provision, the court may declare a document or part of a document constituted the deceased person's will simply if satisfied that 'the person intended (it) to form the person's will'.[23]

The 2006 amendments brought Queensland into line with the legislative position in the other states and territories. The beneficially broad scope of the provision may be gathered from the variety of documents admitted to probate.

These have included:

- an unwitnessed hand-written note on the reverse page of a diary;[24]
- an unsigned will prepared for the testator but inadvertently signed by his wife;[25]
- suicide notes;[26]
- unsigned photographs;[27]
- computer files;[28] and even
- audio tapes.[29]

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21 *Smee v Bryer* (1848) 163 ER 1155, 1155.
22 *Sugden v Lord St Leonards* (1876) 1 PD 154.
23 *Succession Act 1981* (Qld) s 18.
24 See *In the Estate of Stephen Windus Deceased* [2007] QSC 391 (15 March 2007).
25 See *In the Estate of Blakely* (1983) 32 SASR 473.
26 See for example, *Public Trustee v Alexander* [2008] NSWSC 1272 (20 November 2008); and *Ryan v Kazacos* (2001) 183 ALR 506.
27 In *Re Estate of Torr* (2005) 91 SASR 17 unsigned photographs of personal property were admitted to probate as a codicil to the will of the testator.
28 See *Re Trethewey* (2002) 4 VR 406.
29 *Treacey v Edwards* (2000) 49 NSWLR 739.

While as yet there are no authorities, it seems that video tapes and recordings, such as made on a mobile phone or perhaps even posted on YouTube, could also be considered a 'document' and admitted to probate.[30]

May I refer to an even more radical example?

A will written on the wall of the testator's house in pencil and in Ukrainian was admitted to probate by Legoe J of the South Australian Supreme Court in the *Estate of Slavinskyj*.[31] This decision would no doubt have created something of a problem for the probate registry: not every day must a will written on a plasterboard wall be filed. That difficulty was there overcome by the filing of an affidavit and photograph of the wall.

The contemporary liberal interpretation of what amounts to a 'document' for the judicial dispensing power is not confined to Australian decisions. In Canada as long ago as 1948, letters of administration were granted in relation to holograph writing scratched on a tractor fender.[32]

Later in this address I speak of the sensitivities which potentially arise in the administration of deceased estates. One very practical consideration, especially sensitive because it falls so proximately upon the death, concerns securing a grant of probate, and for that purpose, a certificate of death. Financial institutions will ordinarily require a grant of probate before allowing access to the deceased's accounts. Any undue delay will on occasion not only inconvenience, but often cause serious emotional distress at a time of great vulnerability.

In that context, I say a little now about the work of the Probate Registry in the Supreme Court.

In the 2009-10 financial year, the Registry processed 6779 grants of probate and 760 grants of letters of administration. That reflected a 26% increase in grants of probate and a 36% increase in grants of letters of administration since the year 2006. Much of the increase has resulted from applications made at the behest of organisations holding a bond, such as nursing homes, as a pre-requisite for the release of the bond moneys. The Registry has sought to meet this increased demand by streamlining administrative processes, to facilitate faster response times. Currently, the Registry aims to enter and store all relevant application data in the probate case management system within two working days of a filing for probate, and issue the grant within the ensuing 10 working days. The Registry is currently achieving those time goals. Interestingly, 24% of deaths recorded in Queensland in the last two financial years have resulted in succession law applications being made to the court.

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30 Ibid, where despite clearly not satisfying the requirement of 'writing' for the purposes of the normal formalities, an audio tape was considered a 'document' for the purposes of the dispensing power. Emphasis was placed on s 21 of the *Interpretation Act 1987* (NSW) which defines a 'document' as 'anything from which sounds, images or writing can be reproduced with or without the aid of anything else'. Thus, whether a video recording is considered a 'document' will depend largely upon the interpretation statutes in each jurisdiction. It is, however, worth noting that in Queensland s 36 of the *Acts Interpretation Act 1954* contains a similar definition of 'document' to that in s 21 of the *Interpretation Act 1987* (NSW).

31 (1988) 53 SASR 221.

32 See *Estate of Harris* [1948] Can Bar Rev 1242.

One of the major potential problems besetting the quick turn-around of probate applications is delay when the cause of death is unknown and falls to be determined by autopsy. Where this occurs, the Registry of Births, Deaths and Marriages issues a certificate without nominating a cause of death, and the Probate Registry must requisition any probate application pending the resolution of that issue. Currently, 1 in 6 probate applications must be requisitioned by the Registry for that reason.

Given the large and increasing number of probate applications received each year by the Registry, it is creditable that probate applications are being handled in that quick and efficient manner.

I move now to my final subject, the court's capacity to make wills for persons without testamentary capacity.

V COURT MADE WILLS

Provisions empowering the court to authorise the making, alteration or revocation of a will for a person without testamentary capacity, including minors, were introduced into the *Succession Act* in the year 2006.

Among other matters set out in a carefully crafted raft of provisions, the court must be satisfied that 'the proposed will, alteration or revocation is or may be a will, alteration or revocation that the person would make if the person were to have testamentary capacity'.[33] Other provisions are designed to ensure that a court called upon to make that apparently difficult judgment proceeds from a comprehensively informed platform.

The reference to a will which is 'or may be' a will the person would make, assuming testamentary capacity, allows the court an interesting degree of latitude. Some cases may be clear enough to allow the court to reach a conviction that the proposed will <u>is</u> the one the incapacitated person would have made. Otherwise, the court would need to be satisfied that the proposed testamentary disposition is within the range of disposition that the person would (<u>not could</u>) have made. Our Queensland legislation is arguably less demanding that the Victorian *Wills Act 1997*, which requires the court to be satisfied that the proposed will 'reflects what the intentions of the person would be likely to be ... or might reasonably be expected to be'.[34] That may assume a greater degree of certainty than required under the Queensland legislation. As observed in the Victorian Court of Appeal in *Boulton v Sanders*, the Victorian provision, with its 'insistence on an accurate reflection of the likely intentions of the testator', 'precludes the authorisation of a proposed will which no more probably reflects likely intentions than any number of other possible wills, although it may accord with an assumed desire to avoid intestacy'.[35]

There is I think much to commend the practical approach propounded by Sir Robert Megarry VC in *In re D*,[36] in relation to the corresponding English legislation. His Lordship proposed a five-stage consideration: first, assume the patient is having a brief lucid interval when the will is being made; second, assume the patient then has a full

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33 *Succession Act 1981* (Qld) s 24(d).
34 *Wills Act 1997* (Vic) s 26.
35 (2004) 9 VR 495, 515 (Dodds-Streeton AJA).
36 [1982] 1 Ch 237, 243-4.

knowledge of the past, and a full realisation that as soon as the will is made, he or she will relapse into the incapacitated state; third, consider the position of the actual, not a hypothetical, patient; fourth, assume that during the lucid interval the patient is being advised by a competent solicitor; and fifth, envisage the patient 'taking a broad brush to the claims on his bounty, rather than an accountant's pen'.[37]

I will refer to two decisions in the Trial Division of the Supreme Court to illustrate the beneficial operation of these comparatively new Queensland provisions. In all, there are six instances of court-ordered wills of which I am aware.[38]

The first in time is *Winstanley*,[39] a decision of Justice Daubney given on 18 January 2008. Herbert was a 76 year old intellectually impaired man who lived with his also intellectually impaired sister Nita in a house at Clontarf. The house was registered in Herbert's name. Herbert's brother Cecil also lived there. Cecil was their long-term, full-time carer. Herbert was one of 10 children. Another brother Kevin brought proceedings in the District Court claiming an interest in the Clontarf house. Those proceedings were dismissed by consent. But in the course of them, Herbert made a will which he lodged with the Public Trustee, in which he left the Clontarf house to Cecil, in the expectation Cecil would continue to live there and care for Nita. Concern over whether Herbert had testamentary capacity when he made the will led to the application before his Honour, and the learned judge authorised the making of the will.

The second decision, *Deecke*,[40] was given by Justice Mullins on 1 April 2009. The mother and full-time carer of a seriously incapacitated 31 year old woman sought approval for a will under which the daughter would leave all of her estate to her mother, save for a small charitable bequest. The estate was worth more than $1 million, the consequence of a payout under a medical negligence claim. The daughter was the victim of a major brain injury and needed total full-time care. Her father, who was the mother's former husband, while opposing some of the factual basis for the application, did not appear at the hearing. He had remarried and was living in China. His particular interest rested in the circumstance that if the will were not authorised, the daughter would die intestate, so that he and his former wife would share the estate equally. Justice Mullins authorised the will because of her conclusion that it was a will the daughter would make, if possessed of testamentary capacity.

Each of those cases illustrates the beneficial operation of this recent legislation, in circumstances where previously nothing could have been done to address the testamentary plight of those incapacitated and highly vulnerable people.

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37 *In re D* [1982] 1 Ch 237, 243-4.

38 *Payne v Smyth as Litigation Guardian for Welk* [2010] QSC 45 (22 February 2010); *Deecke v Deecke* [2009] QSC 65 (1 April 2009); *Weick* (7033/2009) (Unreported, Supreme Court of Queensland, Applegarth J, 27 August 2009); *Joachim* (12325/2008) (Unreported, Supreme Court of Queensland, Dutney J, 22 December 2008); *Winstanley* (11203/2007) (Unreported, Supreme Court of Queensland, Daubney J, 18 January 2008); and *Bock* (8794/2010) (Unreported, Supreme Court of Queensland, de Jersey CJ, 23 September 2010).

39 (11203/2007) (Unreported, Supreme Court of Queensland, Daubney J, 18 January 2008).

40 [2009] QSC 65 (1 April 2009).

VI CONCLUSION

I now seek to draw these themes together.

The legislative amendments giving the court an extensive power to dispense with the need for compliance with formal requirements in the making of wills, and giving the court the important power to authorise the making of wills for incapacitated persons, grew out of the Uniform Succession Laws Project. That was a mammoth 14 year exercise initiated by the Standing Committee of Attorneys-General in 1991, designed to achieve national consistency through uniform succession legislation. Significantly, the National Committee which directed the project was co-ordinated by the Queensland Law Reform Commission. The amendments to which I have referred this evening were two of a range including many others. They reflect, I suggest, a measured though appropriately progressive legislative response in a particularly sensitive area of human life.

Family provision, or testator's family maintenance as it was known, is a very sensitive area, described by one commentator as having begun 'as a modest intrusion upon testamentary freedom', but 'subject to great pressure for expansion'.[41] I suggest the extension which has occurred has been justified, though as that commentator notes, it would likely have drawn the ire of the late Justice Hutley, in light of his preface to the 3rd edition of his co-authored *Cases and Materials on Succession*, published after the passage in New South Wales of the *Family Provision Act* in 1982, where he said:

> The most radical complications [in the law of succession by the extension of claims against the estate] have been introduced in New South Wales. George Orwell's Big Brother could not have done better than the reformers who entitled the Act which gave claims against the estate to mistresses and lovers, 'The Family Provision Act 1982'. The Act might have been more properly entitled 'The Act to Promote the Wasting of Estates by Litigation and Lawyers Provision Act 1982'.[42]

I have always regarded *Tony Lee's Manual of Queensland Succession Law* as compelling for its clarity and cogency. While acknowledging his own daunting legal learning, that quality of the text may also be a function of the subject matter. Of all aspects of the law, succession law should be a model of clarity. Fortunately the current legislation reasonably conforms to that ideal. The state could have gone down the revenue path and produced legislation of Byzantine complexity. A cynic might say it has not troubled to do so because the destination of the money is not consolidated revenue. But to its credit, the legislature has been prepared to vest large discretions in the courts, and the courts may safely be expected to exercise those discretions in the beneficial interests of the deserving beneficiaries of deceased estates – as is occurring.

In referring to the raw sensitivity of this area, I have in mind a spectrum of concerns: the dismay and disappointment of surviving family members at perceived poor treatment, sometimes vindictiveness, on the part of a deceased testator; the potential fracturing of relationships among siblings through claims which can lead to protracted and expensive

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41 R F Croucher, 'Towards Uniform Succession in Australia' (2009) 83 *Australian Law Journal* 728, 739.

42 F Hutley, R Woodman and O Wood, *Cases and Materials on Succession* (Lawbook Co, 3rd ed, 1984) v.

litigation; at the anterior will-making stage, the range of motivation of the errant testator, from fecklessness to unkindness to venom; the disquieting uncertainty, for those left behind, whether an apparent expression of testamentary disposition will be rejected as just too informal; then there may be the careless or even, regrettably, callous disregard of some testators towards vulnerable and disadvantaged family members; and even at a very practical level, the potential for major disruption and personal deterioration through delays and uncertainties in the issue of death certificates and grants of probate.

The legislative scheme seeks to work through that potential minefield in a sensitive way, with a view to securing good social outcomes, and I believe it does so effectively, addressing reasonable contemporary expectations, one of which is, of course, relative freedom of testamentary disposition, but subject to proper provision for one's needy survivors; another being avoiding undue formalism in determining what is or is not a 'will'.

The legislation works because of the carefulness applied in its implementation by the courts. But that should be seen as building on what has gone before, by way of administrative governmental response to a death, and the advice tendered to surviving family members and other interested parties both privately and through the public agency.

I have referred this evening to the important role of the private legal profession in tendering good advice to prospective testators, and in the administration of deceased estates. This is the occasion to acknowledge, as well, the great utility of the work routinely accomplished with vitality by the Public Trustee of Queensland and within the Probate Registry of the Supreme Court.