

## SUCCESSION LAW UPDATE SESSION

Presented 15 November 2013 Cairns

By The Honourable Justice Henry

### Statutory Wills for Persons without Capacity

The correct test:

- Lucid interval?

or

- Just apply the section?

Relevant provisions:

- S. 21 – The court may authorise a will to be made, altered or revoked for a person without testamentary capacity.
- S. 22 – Leave is required to apply for s. 21 order.
- S. 23 – Information which must be given to the court.
- S. 24 – Matters the court must be satisfied of before giving leave.

The key test after satisfaction of preliminary matters:

- S. 24(d) – “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.”

The lucid interval test:

- Pretending the testator had a brief lucid interval with full knowledge of the past and realisation he/she will lapse back to his/her incapable state and assuming the testator has competent legal advice is this the will, alteration or revocation the testator would make? In *Re D(J)* [1982] Ch 237
- Followed in *Re Keane* [2012] 1 Qd R 319 at [73]-[74].
- Criticised in *Re Fenwick; Application of J R Fenwick & Re Charles* (2009) 76 NSWLR 22 and *McKay v McKay & Ors* [2011] QSC 230.
- Rejected in *Sadler v Eggmolesse* [2013] QSC 40.

Just apply the section:

- *Re Fenwick; Application of J R Fenwick & Re Charles* (2009) NSWLR 22 at [148]:  
“[The] Court should start ‘with a clean slate’; it must interpret the words of the section in the light of the problems and difficulties which the legislation seeks to remedy, bearing in mind that legislation of this kind should receive a benevolent construction”.

The lucid interval test may still assist in applying the section:

*Re Matsis; Charalambous v Charalambous & Ors* [2012] QSC 349

*Doughan v Straguszi & Ors* [2013] QSC 295

### **Informal Wills**

- Testator’s intention is relevant under:
  - S. 10 – How a will must be executed; and
  - S. 18 – Court may dispense with execution requirements.
- S. 10(7) – “The signature of the testator must be made with the intention of executing the will.”
- *Re Gloria May Limpus Deceased* [2013] QSC 66: will instructions may, if s. 10 is complied with, be a will.
- S. 18 – “The document ... forms a will, ... of the deceased person if the court is satisfied that the person intended the document ... to form the person’s will.”
- *Re: Yu* BS10313/13 (delivered 6 November 2013): s.18 was satisfied where the deceased before taking his life typed his final farewells and his “Last Will” into his iPhone.
- *In the will of Ethel Florence Panigas (deceased); In the will of John William Panigas (deceased)* [2013] QSC 172: s. 18 was not satisfied where a will kit, while generally intended as the testator’s will, did not have content intended to comprise the testator’s will.

### **Prudent for Client to Sign Instruction Notes**

- It may be negligence not to:

*Maestrale v Aspite* [2012] NSWSC 1420

*Fischer v Howe* [2013] NSWSC 462

- It aids in the court's satisfaction of testamentary intention per s. 18.

### **Construction/Drafting of Wills: Survivors**

- Must those “who shall survive” the testator be living when the testator dies?
- Ordinarily the survivor must be living at the date the testator dies: *The Public Trustee of Queensland v Smith* [2009] 1 Qd R 26.
- But context may mean survivors of the testator includes persons yet to be born at the date the testator dies: *Morrison v Luckman* [2012] QSC 361.

### **Costs not always the Estate's to Bear**

- *Jones v Jones* [2012] QSC 342: applicant ordered to pay estate's costs limited to \$185,000.

### **Conclusion**

- Questions?