A Judge's Guide to the Galaxy - "Would It Save You a Lot of Time If I Just Gave Up and Went Mad Now?"

Justice Roslyn G Atkinson AO

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I Introduction

I would like to begin today by acknowledging the traditional custodians of the land on which we meet and their elders past, present and emerging. I am sure that this is but the latest of many occasions on which people have gathered in this place to discuss matters of law and to consider the position and role of elders within their society.

There is a balance to be struck in elder and succession law between protecting the vulnerable on one hand and promoting continued independence on the other. Ageing is a gradual process; just as capacity increases incrementally with the age of a child, it may decrease with the advance of old age and attendant health problems. Questions of capacity, vulnerability and independence do not arise in the abstract; rather, they affect the daily lives of individuals and their families, and are of particular relevance in the context of an ageing population such as Australia's.[1]

The issues that I have asked to discuss today relate to enduring powers of attorney; statutory wills; unconscionable conduct; undue influence; and suspicious circumstances. These topics are diverse and capacity is not necessarily relevant to each, but the quality and authenticity of decision-making processes are, and it is under that broader heading that capacity falls. For example, undue influence, unconscionable conduct, and suspicious circumstances may all be relevant to the question of whether a transfer of property, whether *inter vivos* or testamentary, reflects the true intention of the donor or vendor. Each may be found to affect the validity of the transaction due to some vulnerability or overpowering of the will, although mental capacity is fully intact. In contrast, a statutory will may only be made where the court finds, *inter alia*, that the person for whom the will is to be made lacks testamentary capacity.

[1] See Australian Bureau of Statistics, *Who Are Australia's Older People? Reflecting a Nation: Stories from the 2011 Census* <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features752012-2013>, as discussed in Lise Barry, *Elder Mediation* (2013) 24 *Australian Dispute Resolution Journal* 251, 251. See also the comments of the Tribunal in *Legal Services Commissioner v Comino* [2011] QCAT 387 at [7].

Understandably, these issues are often intertwined. I will do my best to extricate them today, examining first unconscionable conduct, undue influence and suspicious circumstances, then turning to capacity generally, and enduring documents and statutory wills in particular.

II Undue Influence, Unconscionable Conduct and Suspicious Circumstances

Turning first to undue influence, two of the most recent cases decided by the Supreme Court are *Baker v Affoo*[2] and *Anderson v Anderson*.[3]

In *Baker v Affoo*, a presumption of undue influence arose in relation to an *inter vivos* transfer of a property, being the major asset of the elderly Edward Blair, and the testamentary devise of the residue of his estate to his friend Bill Affoo and members of the Affoo family. Mr Affoo had previously been granted an enduring power of attorney.

Solicitors were involved in the transactions, however Justice Jackson noted that no one appeared to have contemplated section 87 of the *Powers of Attorney Act* 1998 (Qld). That provision creates a statutory presumption of undue influence in relation to transactions between a principal and their attorney, or a relation, business associate or close friend of the attorney.

Moreover, no one considered that the deceased should have obtained independent legal or financial advice prior to executing the relevant documents. The deceased was taken to medical appointments to determine his capacity to make certain decisions, however as Justice Jackson observed, capacity is a separate issue and one that did not fall for consideration in this case. Although Justice Jackson declined to infer that Mr Blair's will had been overborne, he concluded that the presumption of undue influence raised by s 87 had not been rebutted by the defendants. Mr Blair's lack of independent advice was central to this finding.

The importance of independent advice in relation to undue influence relates to the doctrine's focus on the imbalance in the relationship between the parties and the prospect that independent advice offers of levelling the playing field. Although the Affoos' solicitors could not have forced Mr Baker to obtain independent advice, the need for it ought to have been raised and, if Mr Baker chose not to seek it, that decision should have been recorded. It was clearly incumbent upon Mr Affoo's solicitors to advise him of the effect of s 87 as well.

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[2] [2013] QSC 8.
[3] [2014] QSC 46.

In different circumstances, the presumption of undue influence might have been rebutted with evidence.

In *Anderson v Anderson*, Mrs Anderson made an *inter vivos* gift of her home to one of her sons, Malcolm, without any protection, such as a life estate, for herself. On the same day as completing the transfer form, Mrs Anderson signed a new will that left her estate to both of her sons equally, but there was so little to the estate without the house that the effect of its distribution was essentially nugatory. An enduring power of attorney was also prepared on the same day, but was not signed. The solicitor who had prepared and witnessed the transfer and will as well was not certain that Mrs Anderson had capacity in relation to the enduring power of attorney, but its completion was nonetheless secured at a later date.

The plaintiff did not establish Mrs Anderson's lack of capacity on the evidence. However, Justice Dalton found the relationship between Mrs Anderson and Malcolm to satisfy the test set out in *Johnson v Buttress*.[4] A gift from parent to child does not fall within one of the automatic categories in which a relationship of undue influence is presumed, as a gift from a child to a parent will, but those categories are not closed. As Chief Justice Latham said (and Justice Dalton quoted):

> "*Wherever the relation between donor and donee is such that the latter is in a position to exercise dominion over the former by reason of the trust and confidence reposed in the latter, the presumption of undue influence is raised.*
>
> *Where such a relation of what may be called, from one point of view, dominion, and from another point of view, dependence, exists, the age and condition of the donor are irrelevant so far as raising the presumption of undue influence is concerned.*"[5]

As in *Baker v Affoo*, Mrs Anderson had not received independent legal advice. The solicitor who prepared and witnessed the documents was one with whom Mrs Anderson had no previous relationship and to whom she went with Malcolm. On only one occasion did the solicitor speak with her in the absence of Malcolm and on that occasion, she said very little. In reality, it was Malcolm who gave the instructions.

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[4] (1936) 56 CLR 113.
[5] Ibid at 119, as quoted in *Anderson v Anderson* [2014] QSC 46 at [54].

The plaintiff had sought to rely on s 87 of the *Powers of Attorney Act*, however as the gift of transfer was perfected prior to the completion of the enduring power of attorney, that argument was untenable. Nonetheless, Justice Dalton found that perfection of the transfer was just as infected by undue influence as the instructions to prepare the transfer form, so the transfer was set aside.

Justice Dalton also considered the plaintiff's alternative claim of unconscionable conduct, in a manner which demonstrates the substantial overlap between the two doctrines.[6] Indeed, as was stated by Justice Deane in *Commercial Bank of Australia Ltd v Amadio*,[7] "on occasion, both doctrines may apply in the one case".[8] In *Anderson*, the overt conduct of the defendant showed that he had "attempted enforcement or retention of a benefit produced by a dealing where the other party" – his mother – "is under a special disability".[9] In the circumstances, the plaintiff would have succeeded on either claim.

Although the doctrines of both unconscionable conduct and undue influence do overlap in practice, the substance of each is fairly clear, having been largely settled in the High Court over the last several decades. In sum, while undue influence looks to any actual or presumed impairment in the judgment of the weaker party in a particular relationship, unconscionable conduct examines whether one party has behaved in such a way as to make unfair use of the other's disadvantage.[10]

The issue of 'suspicious circumstances' relates specifically to the validity of wills and, in particular, testators' knowledge and approval of their contents. Justice Isaacs set out the relevant principles in *Nock v Austin*:[11] in sum, where 'suspicious circumstances' exist, the proponents of a will have to prove that the testator knew and approved of its contents, where in the absence of those circumstances, that would be assumed.[12] Suspicious circumstances include where an intermediary, a beneficiary or a close relative of a beneficiary drafts the will. In that case, the court may examine the size of the benefit received relative to the size

[6] Her Honour at [65] cited *Bridgewater v Leahy* (1998) 194 CLR 457, 477-9, with reference to *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 474, 478 (Deane J) in that regard.
[7] Above n 6.
[8] Ibid at 461.
[9] Ibid at 478, as cited in *Anderson v Anderson* [2014] QSC 46 at [65].
[10] See Sir Anthony Mason, 'The Impact of Equitable Doctrine on the Law of Contract' (1998) 27 *Anglo-American Law Review* 1 at 6-8, as quoted in *Bridgewater v Leahy* (1998) 194 CLR 457 at 478, and *Anderson v Anderson* [2014] QSC 46 at [65].
[11] (1918) 25 CLR 519.
[12] Ibid at 528.

of the estate, along with any other indicia of impropriety.[13] Similarly, where the testator was frail, ill, blind or illiterate at the time of execution, proof will be required that the will was read over to the testator, or that she or he otherwise knew of its contents.[14]

Earlier this year, a case of suspicious circumstances came before the Supreme Court in *Konui v Tasi*.[15] There, an application was made for a declaration that a will made in March 2012 was the valid last will of the deceased. The respondents asserted that another document, written on 12 November 2013, was in fact whole or part of the deceased's last will. While the 2012 will had been duly executed and witnessed, the 2013 document had not.

The deceased was 67 when he died on 14 November 2013. The applicant was the niece of the deceased. The two had a close relationship and she was named executor in both documents. The first respondent was the daughter of the deceased by Maori custom. The two had had a strained relationship during the 1990s, then reconciled, but kept in touch mainly by telephone, with contact becoming less frequent during the deceased's last year of life. The second respondent was the son of a former de facto partner of the deceased. He and the deceased maintained contact until the deceased died.

Under the 2012 will, nieces of the deceased were to receive specific gifts and shares of the residue of his estate, with one pecuniary gift to the first respondent as well. The 2013 document purported to alter the distribution, so that both gifts and residue would be divided between the first and second respondents, and the applicant, "with no interference from any members of the family…". The 2013 document showed the signature of the deceased in three places, however it was not witnessed and was significantly different to other signatures of the deceased before the court. The document was written under the hand of the second respondent's mother, who admitted to having inserted small details of her own, such as the second respondent's date of birth.

At the time the 2013 document was written, the deceased was in hospital in a parlous condition. The second respondent, his mother, his sister, and first respondent all visited the deceased on 12 November 2013. It was said in evidence that the deceased had expressed his own desire on that day that his final wishes be recorded in writing and that that is what the 2013 document reflected.

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[13] *Nock v Austin* (1918) 25 CLR 519 at 524-5 (Barton and Gavan Duffy JJ), 528 (Isaacs J); *Re Emanuel, Deceased* [1981] VR 113 at 118; *Wintle v Nye* [1959] 1 WLR 284 at 291; *Barry v Butlin* (1838) II Moore PC 480 at 485.
[14] *Barry v Butlin* (1838) II Moore PC 480 at 485-6; *In the Will of Walsh* (1892) 18 VLR 739.
[15] [2015] QSC 74.

The first and second respondents, and the second respondent's mother and sister were all consistent in saying that they had seen the deceased express his wishes and have them written down, as well as that he had been entirely lucid at the time. In contrast, the applicant said that he was in and out of consciousness, vague and confused. Although the applicant and the deceased had a discussion about the 2013 document on 13 November, he did not appear certain that it was what he wanted.

Questions of capacity and the informality of the purported will were also intermingled in this case. In considering 'suspicious circumstances', Justice Boddice quoted from the judgment of Justice Santow in *Smith v Hayler*,[16] saying:

> *"The circumstance that the person who prepared, or procured the execution of, the document receives a benefit under it is one which should generally arouse suspicion and call for vigilant examination of the evidence as to the deceased's appreciation of the contents of the will."* [17]

Justice Boddice concluded that the execution of the 2013 document was attended by suspicious circumstances, having been put to paper with additions by the mother of a substantial beneficiary at a point when the deceased had been very ill for some weeks and shortly before his death. It also expressed testamentary intentions very different from those in his previous will and was in similar form to one made while the deceased and the second respondent's mother were in a relationship. There was no evidence that the deceased had been made aware of its contents, so that it could not be concluded that he knew and approved of the 2013 document as his final will. As such, the 2012 will was declared valid and probate was granted to the applicant.

As all of the three doctrines emphasise, the expression of a genuine and unaffected intention is necessary for the validity of many transactions. These doctrines arise commonly with respect to elder and succession law due to the physical, mental and material vulnerabilities often experienced by older people. However, the need for their operation may be avoided by ensuring that principals have full comprehension and control of their actions, including through the provision of good independent legal advice and, where necessary, financial advice.

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[16] [1999] NSWSC 1282.
[17] Ibid at [9], quoting *Pates v Craig* [1995] NSWSC 87 (Santow J).

III Capacity, Enduring Powers of Attorney and Statutory Wills

As the law stands in Queensland, capacity in a strict sense is required at the time of execution for enduring documents and wills to be valid. While every adult is presumed to have capacity for a matter in relation to an enduring document,[18] the onus of proof as to testamentary capacity lies on the proponent of any will.[19]

Much of what I will say in relation to capacity is echoed by the Queensland Handbook for Practitioners on Legal Capacity,[20] an excellent resource put together for the Queensland Law Society by law firm Allens Linklaters and Queensland Advocacy Incorporated, a community legal centre focussed on systemic advocacy to assist people with disability.[21] The Handbook, which will be the subject of another session today, covers the whole gamut of issues around capacity, from the very concept and its importance, through ethical duties, factors relevant to and affecting capacity, and practical matters around obtaining instructions, to what to do if you consider that your client does not have capacity. It also contains a number of useful schedules, among which are the Office of the Public Guardian's *Guidelines for Witnessing Enduring Documents*, which I will refer to later. The Handbook should be indispensable to all solicitors practising in succession and elder law, or who find themselves otherwise dealing with a question of capacity.

Ultimately, questions of capacity are for the court to determine. Nonetheless, it is often lawyers who are presented with the issue in the first instance. Solicitors are commonly required to give advice on, prepare, or witness wills and enduring documents. Very human feelings about ageing and death make succession law a complex area of practice, where emotions and interpersonal relationships often come to the fore. As we have seen with relation to the cases already discussed, this is where frayed family relationships tear, and the perceived hurt and injustices of the past often dominate decision-making in the present.

Questions of capacity are complicated by the fact that they are highly context-dependent: the more complex and multifaceted the decision, the greater the capacity required to make it

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[18] *Powers of Attorney Act* 1998 (Qld) s 1.

[19] See, e.g., *Buller v Fulton* (1942) 66 CLR 295; *Worth v Clasohm* (1952) 86 CLR 439; and *Boreham v Prince Henry Hospital* (1955) 29 ALJ 179.

[20] See <http://www.qls.com.au/Knowledge_centre/Ethics/Resources/Client_instructions_and_capacity/Queensland_Handbook_for_Practitioners_on_Legal_Capacity>

[21] See http://www.qai.org.au.

validly.[22] For this reason, different criteria must be addressed to determine whether an individual has capacity to undertake particular actions. It is important that the relevant criteria be identified to ensure that the correct enquiries can be made of the client.

Enduring Documents and Ordinary Wills

The *Powers of Attorney Act* sets out the requirements for making and revoking enduring powers of attorney and advance health directives.[23] While the Act also defines capacity generally,[24] sections 41 and 42 identify the specific matters that a principal must understand in order to make or revoke the enduring document.

The best statement of testamentary capacity remains that of Chief Justice Cockburn in *Banks v Goodfellow*.[25] In sum, the testator must understand that she or he is making a will; what the effects of that will be; the extent and general nature of the property of which she or he is disposing; and who may have a legitimate claim on her or his bounty.[26]

A tribunal determining capacity by these criteria must consider the evidence before it to ascertain what information it can rely upon and to what degree. Unfortunately, various decisions of the Supreme Court and QCAT indicate that often, members of both the legal and medical professions are unable to identify the point at which suspicions of a lack of capacity should be raised,[27] which adds complexity to the tribunal's decision.

The only survey to date of lawyers' approaches to capacity assessment indicated that lawyers tend not to focus on their clients' motivations for making particular decisions, although this is a key factor in the process-oriented assessment of capacity.[28] A 2008 paper by Willmott and White identified several other causes for concern as to how solicitors witness enduring documents.[29] From their research, the authors concluded that a significant proportion of solicitors practising in this area are not taking sufficient care, or are simply not aware of

[22] *Gibbons v Wright* (1954) 91 CLR 423.
[23] See ss 41, 42.
[24] See sch 3, definition of 'capacity'.
[25] (1870) 5 QB 549 at 565.
[26] See also *Timbury v Coffee* (1941) 66 CLR 277, particularly the judgment of Dixon J at 283 citing *In the Will of Wilson* (1897) VLR 197 at 199 (Hood J).
[27] See, e.g., *H* [2015] QCAT 615 at [47], [52]; *In the Will of Ruth Barlow, Deceased* [2014] QSC 7 at [42], [49]-[52]; *Anderson v Anderson* [2013] QSC 8 at [17], [24], [27], [50]-[51]; *Legal Services Commissioner v De Brenni* [2011] QCAT 340 at [4], [6], [9]; and *Legal Services Commissioner v Ford* [2008] LPT 12 at 21-2.
[28] See E Helmes, VE Lewis and A Allan, 'Australian Lawyers' Views on Competency Issues in Older Adults' (2004) 22 *Behavioral Sciences and the Law* 823 at 825, as cited in Barry, above n 1, at 255.
[29] See Lindy Willmott and Ben White, *Solicitors and Enduring Documents: Current Practice and Best Practice* (2008) 16 *Journal of Law and Medicine* 466 at 467.

when to question and how to ascertain whether a client has capacity. This is concerning, given the vulnerability of individuals who lack capacity or are otherwise subject to improper influence.

Several cases decided by the Legal Practice Tribunal and, later, QCAT, confirm that there are some deficits in how solicitors often approach enduring documents and wills. The most recent is *Legal Services Commissioner v Given*.[30] There, Mr Given was charged with having failed to maintain reasonable standards of competence and diligence in the preparation and execution of an enduring power of attorney and two wills for his client, Robert Bywater, where questions as to Mr Bywater's capacity arose. At the time, Mr Bywater was 76 years old and had only recently moved to live with his sister after separating from his wife. The new enduring power of attorney was made in favour of his sister, instead of his wife, who had been named in a previous document.

Expert evidence identified the main deficiencies in Mr Given's conduct as his omissions to speak with Mr Bywater alone and to keep a proper record of their conversations. The tribunal was not required to determine whether the client did in fact have capacity. However, what was in issue was whether there were sufficient indicia to suggest Mr Given should have been alive to the question of capacity. The Tribunal referred the statement of President Kirby (as he then was) of the New South Wales Court of Appeal that,

> "*In judging the question of testamentary capacity the courts do not overlook the fact that many wills are made by people of advanced years. In such people, slowness, illness, feebleness and eccentricity will sometimes be apparent – more so than in most persons of younger age. But these are not ordinarily sufficient, if proved, to disentitle the testator of the right to dispose of his or her property by will.*"

The Tribunal noted that, whilst not determinative of the issue, such characteristics as those mentioned by President Kirby ought to enliven a practitioner to the question of capacity, although the Tribunal also considered it undesirable to set specific rules about what a legal practitioner should take into account.

[30] [2015] QCAT 225.

The Tribunal also referred to three of its previous decisions – *Legal Services Commissioner v De Brenni*,[31] *Legal Services Commissioner v Comino*[32] and *Legal Services Commissioner v Ford*[33] – each of which resulted in a finding of unsatisfactory professional conduct. All of them involved a failure to make appropriate enquiries and to take adequate notes of questioning and conversations, which itself constitutes conduct below the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner. It was held in *Ford* and reiterated in each of the other decisions that the legal practitioners ought to have adhered to the Office of the Adult Guardian's *Capacity Guidelines for Witnesses of Enduring Powers of Attorney*, to which I will later refer.

In *Given*, the Tribunal found that the particular circumstances ought to have caused a reasonable practitioner to be conscious of capacity, but they were not determinative of capacity. Mr Given was held to have made adequate enquiries as to capacity through open-ended questioning and medical opinions were not required to verify his conclusion, although they would apparently have supported it. Nonetheless, Mr Given was found guilty of unsatisfactory professional conduct, publicly reprimanded and ordered to pay a fine of $1,500 due to his failures to interview the client in accordance with the guidelines and to take adequate notes.

The guidelines referred to previously are, in their current form, the Queensland Office of the Public Guardian's *Guidelines for Witnessing Enduring Documents*.[34] These guidelines provide a framework within which to consider a principal's capacity. They are not intended specifically for solicitors but are generally applicable to all individuals asked to witness an enduring document and, according to QCAT's decisions, should be followed by solicitors.

The guidelines suggest that the initial meeting with the principal be with the principal alone. Indicia of a possible lack of capacity identified include anxiety about making decisions, often losing things or getting lost, and experiencing changes in behaviour or personality. Where the intended witness knows or reasonably considers the principal to have a diagnosed condition that may affect her or his decision-making capacity, it is advised that extra care be taken in witnessing the document, or a medical opinion verifying capacity be sought.

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[31] [2011] QCAT 340.
[32] [2011] QCAT 387.
[33] [2008] LPT 12.
[34] See Queensland Law Society, *Guidelines for Witnessing Enduring Documents* (2015) <http://www.qls.com.au/Knowledge_centre/Ethics/Resources/Client_instructions_and_capacity/Guidelines_for_Witnessing_Enduring_Documents_Aug_2013>.

If a medical report is obtained, it should not be the sole determinant of capacity. Even from a medical perspective, deciding questions of legal capacity is an inexact science with room for different opinions. Capacity can also fluctuate according to contextual factors.[35] As such, intended witnesses should always have the principal read the enduring document, then give any particular explanations, and finally ask relevant questions to satisfy themselves of the principal's understanding of the document's nature and effect.

These questions should be phrased in an open-ended manner and recorded, along with the principal's answers. Taking thorough notes of all aspects of an interview with a principal for an enduring document will not only assist the proper assessment of the principal's capacity, but will also mean the witness is capable of dealing with any challenges to that assessment.

Although the guidelines themselves caution that they ought not to be substituted for a proper or more rigorous assessment of a person's capacity where justified, they represent a sure starting point regarding any enduring document.

Statutory Wills

In contrast to enduring documents, a finding of a *lack* of capacity is necessary to make a statutory will. Section 21 in its current form was introduced into the *Succession Act* 1981 (Qld) in 2006 to permit the court to authorise the making, amendment or revocation of a will for a person without testamentary capacity. As the factors relevant to testamentary capacity have already been mentioned, I will turn to more recent developments in the law on statutory wills.

GAU v GAV[36] was an interesting decision handed down by the Court of Appeal late last year. There it was held that the court could authorise the execution of a codicil giving effect to the apparent intentions of the incapacitated testator although this would disentitle an existing beneficiary. The circumstances were that GM had left property to her son GK, with a gift over to his wife GAV under certain conditions. Some years after the making of that will, when GM had lost capacity, GK separated from GAV. There was evidence to show that GM wished her property to remain within the family, permitting the inference that, had she retained capacity, she would have altered her will so as to disentitle her son's estranged wife

[35] See, e.g., *WAJ* [2015] QCAT 353 at [8]-[12], [22]; *H* [2015] QCAT 615 at [10]-[25]; *Anderson v Anderson* [2013] QSC 8 at [3]-[5], [22].

[36] [2014] QCA 308. In relation to this case, see generally John McKenna QC, 'Around the Nation: Queensland – Statutory Wills and Public Policy' (2015) 89 *Australian Law Journal* 227 at 227.

and ensure that it passed only to GK and his children. The other considerations in favour of the execution of the codicil, the Court of Appeal held, were the freedom a testator with capacity has to alter her will in this way and that "to take such a step would neither offend the policy of the law nor exhibit moral obloquy on her part".[37]

This decision has been contrasted with the New South Wales case of *Hausfeld v Hausfeld*.[38] There, Justice White declined to authorise amendment of a will in such a way that would defeat a beneficiary's creditors. The point of distinction from *GAU* is his Honour's emphasis that it would be against the policy of the law to allow amendment for that purpose. The more recent Queensland decision of *Doughan v Straguszi*[39] can again be distinguished from *Hausfeld*, as although amendment of the will might have had affected creditors of the testator's son, the amendment was intended for the benefit of an entire family and to deal with matters that she had not addressed in her will.

These cases indicate that the intention discerned by the court for dealing with the will of a testator lacking capacity will be signal to the court's decision of whether or not to authorise it. Importantly, however, Justice Ann Lyons emphasised in *Lawrie v Hwang*[40] that the court should not descend into the artificial exercise undertaken by English courts of assessing what the particular testator might have wished, had she temporarily recovered her faculties. Instead, her Honour concluded that the words of section 21 itself should be applied, with the result that the amendment sought in that case was allowed.

IV Conclusion

We now find ourselves at the other end of the galaxy to where we started and I am sorry to say that there is no restaurant. The journey has been a long and varied one, but I hope that the stops along the way have been informative and useful to your practice. In answer to the question posed in the title, of whether it would save time simply to give up and go mad now, the answer is probably not. Although the law and medicine each continue to develop, questions of capacity in particular are still not easy to address.

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[37] *GAU v GAV* [2014] QCA 308 at [63].
[38] [2012] NSWSC 989. In relation to this and the following two cases, see generally Acting Justice Peter W Young AO, 'Recent Cases' (2014) 88 *Australian Law Journal* 241 at 244-246.
[39] [2013] QSC 295.
[40] [2013] QSC 289.

At the same time, an alternative view is emerging based in a human rights approach, that persons of reduced capacity should be supported to make their own decisions, rather than have them made by a substitute decision-maker. This is yet to be explored substantively in Queensland, although it was discussed in the Queensland Law Reform Commission's *Review of Queensland's Guardianship Laws* just a few years ago.[41] Whether that approach is legislated for or not, both the courts and the legal profession have a significant role to play in protecting vulnerable individuals, as well as supporting their pursuit of a full life through the exercise of their rights.

[41] Report No 67 (2011) <http://www.qlrc.qld.gov.au/__data/assets/pdf_file/0003/372540/r67_vol_1.pdf>, especially at 95 [4.243], 100-102 [4.261]-[4.264].