STATUTORY WILLS IN QUEENSLAND AND NEW SOUTH WALES: IS THERE ANY GUIDING PRINCIPLE?

Introduction

1. Between 1996 and 2010 each Australian State, the Australian Capital Territory, and the Northern Territory enacted legislation empowering the jurisdiction's Supreme Court to make an order authorising the making, alteration, or revocation of a will on behalf of a person without testamentary capacity who is alive when the order is made.[1]

2. The statutory wills legislation is not, in all respects, uniform throughout Australia, but most of the statutes have much in common. In particular, most of the statutory will provisions in Queensland and New South Wales are substantially identical. This degree of uniformity reflects the valuable work of State and Territory law reform bodies, including the contributions of their representatives to a National Committee that reported upon a reference by the Standing Committee of Attorneys-General.

3. The Queensland provisions commenced about two years earlier than New South Wales provisions:

   a. Part 2, Division 4, Subdivision 3 of the *Succession Act* 1981 (Qld) was introduced by an amending Act[2] that commenced on 1 April 2006.
   b. Chapter 2, Part 2.2, Division 2 of the *Succession Act* 2006 (NSW) commenced on 1 March 2008.

   The current New South Wales provisions, annotated with the section numbers of the similar provisions in force in Queensland, are reproduced in an appendix to this paper.

4. In this paper I discuss what limits or guidelines, if any, may apply in the exercise of the discretionary power conferred upon the Supreme Court of each State to authorise the making, alteration, or revocation of a will on behalf of a person without testamentary capacity.

The Queensland and New South Wales statutory will provisions

5. In the legislation of each of Queensland and New South Wales:

   a. A provision confers jurisdiction and empowers the court to make an order authorising the making, alteration, or revocation of a will in terms (in New South Wales, *specific* terms) stated and approved by the court on behalf of a person without testamentary capacity: Qld s 21; NSW s 18.

   b. That provision confers the power if two conditions are satisfied:

      i. the person is alive when the order is made; and

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1 The legislation is tabulated and discussed in *Statutory Will Applications: A Practical Guide*, Williams and McCullough (2013); see also *Law of Succession*, Dal Pont, 2nd edition (2017) at Chapter 3.

2 *Succession Amendment Act* 2006 (Qld).

ii. the person lacks testamentary capacity. (In this paper the expression "**the incapacitated person**" is used as shorthand for the person lacking testamentary capacity.)

c. The provision does not express any other condition of the exercise of the power, it confers the court's power in the broadest possible terms, by the expression "may … make an order", and it does not express any principle or consideration which must be applied or taken into account by the court in exercising or refusing to exercise the power.

6. An application for such an order may be made only with the court's leave: Qld s 22(1); NSW s 19(1).

7. An applicant for leave to apply for such an order must give the court information upon various subjects, described in these States' legislation in materially indistinguishable terms, and about any other relevant fact of which the applicant is aware: Qld s 23; NSW s 19(2).

8. In Queensland, the court may hear an application for the final order with or immediately after the leave application (Qld s 22(3)). In New South Wales, the court may, on hearing the application for leave, give leave and allow the application for leave to proceed as an application for a final order (NSW s 20(1)(a)). A difference between the States' legislation is that the Queensland legislation does not include any analogue of NSW s 20(1)(b): "the Court may … if satisfied of the matters set out in s 22, make the order."

9. Leave to apply for a final order may be given only if (in New South Wales, leave must be refused unless) the court is satisfied of five matters: Qld s 24; NSW s 22.

10. There are some differences between the descriptions of the matters in s 24 of the Queensland Act and the descriptions in s 22 of the New South Wales Act but, with the possible exception of one aspect of what I will call the "intention condition", the differences are not significant. The matters are:

(a) "the applicant for leave is an appropriate person to make the application" (Qld s 24(a) and NSW s 22(d)).

(b) "adequate steps have been taken to allow representation of all persons with a proper 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 an order … is sought" (Qld s 24(b). In NSW s 22(e), the word "legitimate" appears in place of the word "proper".)

(c) Qld s 24(c): "there are reasonable grounds for believing that the person does not have testamentary capacity".

NSW s 22(a): "there is reason to believe that the person in relation to whom the order is sought is, or is reasonably likely to be, incapable of making a will".

(d) The "intention condition":

Qld s 24(d): "the proposed will … **is or may be** a will … that the person would make if the person were to have testamentary capacity".

NSW s 22(b): "the proposed will … **is, or is reasonably likely to be**, one that would have been made by the person, if he or she had testamentary capacity …"

(e) Qld s 24(e) and NSW s 22(c): "it is or may be appropriate for an order to be made …"

Hypothetical Testamentary Intention

11. In *GAU v GAV*[3] the incapacitated person made a will before she lost testamentary capacity. The will provided for a benefit worth about $5 million for the testatrix's son. The testatrix's husband sought leave to apply for an order authorising the alteration of the will in terms stated in a codicil. That application was provoked by Family Court proceedings brought against the son by his estranged wife. The proposed codicil would replace the will's provision in favour of the son with a discretionary trust in which the primary beneficiaries were the son and the testatrix's grandchildren. The applicant accepted in the Court of Appeal that the purpose of the application was to prevent his son's wife from receiving any part of the testatrix's estate and, to the extent possible, to protect the son's expected interest under the will from the reach of property adjustment proceedings brought by his wife in the Family Court.

12. At first instance, Flanagan J refused the application for leave to apply for a final order on the ground that his Honour was not satisfied that (in terms of the statutory condition common to both jurisdictions: Qld s 24(e); NSW s 22(c)), a final order "is or may be appropriate".[4] That finding was informed by the timing and purpose of the application.

13. The Court of Appeal allowed an appeal, granted leave to apply, and made an order authorising the making of the codicil on behalf of the person lacking testamentary capacity. Gotterson JA, with whose reasons Muir and Morrison JJA agreed, concluded that the primary judge erred in refusing leave by failing to take into account evidence establishing that it was highly likely that, if the testatrix had testamentary capacity, she would have made the proposed codicil rationally and without pressure;[5] a consequence of the error was that, in considering whether it is or may be appropriate for an order to be made, "primacy was given to the competing interests of the testatrix's son and daughter-in-law as between themselves in the Family Court proceeding" to the exclusion of the testatrix in her testamentary power over her own property.[6] The Court of Appeal held that the consideration upon which the testatrix's daughter-in-law relied had a relevance only towards the margins. The competing claims in the Family Court proceedings were over their marital property; they were not claims upon the testatrix's bounty.[7] The same conclusions explained the Court of Appeal's orders granting leave to apply and authorising the making of the codicil on behalf of the person lacking testamentary capacity. Gotterson JA observed that the order would be in the interests of the testatrix, "because it would facilitate the

3 [2016] 1 Qd R 1.
4 *ADT v LRT* [2014] QSC 169.
5 [2016] 1 Qd R 1 at [55], [57].
6 [2014] QCA 308 at [57].
7 [2016] 1 Qd R 1 at [58].

taking of a step that she herself would most likely take were she able to do so", if she had testamentary capacity she would have been freely able to take that step in organising the testamentary fate of her own property, and that would not offend a policy of the law or involve moral obloquy by her.[8]

14. The Court of Appeal distinguished a New South Wales case, *Hausfeld v Hausfeld & Anor*,[9] in which White J (as White JA then was) refused an applicant leave to apply for an order authorising an alteration to provisions of his father's will under which the applicant was a beneficiary. In that case, the motivation for the application was a prospect that the applicant would be found liable in litigation against him in the Federal Court and be bankrupted as a result. The applicant proposed that his father's will be altered to provide that the applicant's share of the estate would instead go to his wife, upon the understanding that if he were bankrupted she would provide for the applicant out of that share. White J was not persuaded that it was reasonably likely that the father would have made such a will if he had testamentary capacity. (That conclusion itself required the refusal of the application for leave: NSW s 22(b).) For present purposes, the relevance of the decision lies in White J's additional finding that whilst the applicant's father, if capable, could leave the share of his estate in the way proposed by his son, the court should not condone such a course. In so finding, his Honour identified and applied a policy of the law that debtors should pay their debts so far as they are able.[10]

15. An important question raised by these and other decisions discussed in this paper concerns the significance for the exercise of the statutory discretion of a finding that (in terms of the intention condition) the incapacitated person would have made the proposed will, or a finding that it "may be" (Qld) or is "reasonably likely" (NSW) that the person would have done so.

Guidance in the exercise of a general discretion

16. In *Van der Meulen v Van der Meulen & Anor*,[11] Jackson J observed of the discretionary power in the Queensland Act to authorise the making of a will on behalf of a person lacking testamentary capacity that, "there is no definitive principle to be applied here", and that:

> "In the application of a general discretion of this kind, against the background of the statutory qualifying factors, it is of no assistance to articulate factors which influence or decide this particular case as though they have a legal significance beyond the exercise of the discretion in the particular circumstances."[12]

17. Accepting that any principle could not define the way in which the discretion is to be exercised in all cases and that the particular factors influencing a particular decision may not have a broader legal significance, the statutory power to authorise a will could not be absolute and unconfined. Kirby and Callinan JJ have described an absolute judicial

8 [2016] 1 Qd R 1 at [63].
9 [2012] NSWSC 989.
10 [2012] NSWSC 989 at [13].
11 [2014] QSC 33.
12 [2014] QSC 33 at [51]. This statement has been referred to with approval: *Re: CGB* [2017] QSC 128 (Brown J) at [210]

discretion as "a contradiction in terms" and "a form of tyranny".[13] Even in the case of a broad discretion conferred upon a Minister with reference to an amorphous criterion of public interest, the discretion is not arbitrary or unlimited.[14] No matter how widely expressed is a statutory power, limits may be found in its statutory subject matter, scope and purpose.[15]

18. An analogous problem was posed for the Family Court of Australia by the generally expressed discretion to alter the interests in property of parties to a marriage upon dissolution of the marriage. Section 79(1) of the *Family Law Act* 1975 (Cth) empowered that court to make "such order as it considered appropriate" for altering the interests of the parties to a marriage. Section 79(2) provided that the court should not make an order under s 79 unless it was satisfied that "in all the circumstances, it is just and equitable to make the order". Section 79(4) described matters the court was obliged to take into account in considering what order, if any, should be made under s 79. In *Mallet v Mallet*[16] Gibbs CJ identified some broad principles which the court was bound to apply, and some circumstances which the court was required to take into account in exercising the general discretion in s 79(2). One principle, derived from a section of the Act, was that as far as practicable the court would make such orders as would finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them. A second principle, that was found to be implicit in sections of Act, was that the parties to a marriage are equal in status. The circumstances which Gibbs CJ found the court was required to take into account were expressed in specific provisions of s 79 itself. Gibbs CJ noted that the Act did not indicate the relative weight that should be given to different circumstances, or how a conflict between them should be resolved; those matters were left to the court's discretion, to be exercised judicially.

19. More recently, in *Stanford v Stanford*,[17] French CJ, Hayne, Kiefel and Bell JJ discussed the expression "just and equitable" in s 79(2) of the *Family Law Act*:

> "The expression "just and equitable" is a qualitative description of a conclusion reached after examination of a range of potentially competing considerations. It does not admit of exhaustive definition [see *Mallet v Mallet* (1984) 156 CLR 605 at 608 per Gibbs CJ]. It is not possible to chart its metes and bounds."

20. Nevertheless, their Honours were able to derive three fundamental propositions upon an analysis of provisions of the Act, the context of the pre-existing law, and assumptions between the parties to a marriage about the arrangement of their property interests.[18] Those fundamental propositions were held to require that there be a "principled reason for

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13 *Gerlach v Clifton Bricks Pty Limited* (2002) 209 CLR 478 at 503 [69] (Kirby and Callinan JJ).

14 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at 400-401 [42] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), quoting Dixon J in *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504-505. These decisions were cited by Lindsay J in *Secretary, Department of Family & Community Services v K* [2014] NSWSC 1065 at [64].

15 *North Australian Aboriginal Justice Agency Limited v Northern Territory of Australia* (2015) 256 CLR 569 at [34] (French CJ, Kiefel and Bell JJ); *Gerlach v Clifton Bricks Pty Limited* (2002) 209 CLR 478 at 503 [70] (Kirby and Callinan JJ).

16 (1984) 156 CLR 605 at 608-609.

17 (2012) 247 CLR 108 at 120 [36].

18 (2012) 247 CLR 108 at 120-122 [37]-[41].

interfering with the existing legal and equitable interests of the parties to the marriage".[19]

21. The exercise of identifying the subject matter, scope, and purpose of the statute is an exercise in statutory construction. The purpose of the statute is to be found in the text and structure of the statute, rather than in the minds of the law reformers and legislators, but extrinsic evidence of statutory purpose may be taken into account.[20] Extrinsic material also may be considered to identify the existing state of the law and the mischief which the legislation was intended to remedy, but if the meaning of the text is clear, historical considerations and extrinsic materials cannot displace it.[21] At least for the purpose of identifying the mischief, that exercise should occur at first instance, rather than being deferred until ambiguity in the statutory text has been detected.[22] Material of that kind may be considered as an aid in the interpretive process of discovering the legislative purpose, although the standard Acts Interpretation Acts provisions may confine this to a case in which the statutory provision in issue is ambiguous or obscure.[23]

22. In relation to both States' statutory wills provisions there are important statements in law reform reports and the relevant Ministers' second reading speeches about the mischief in the pre-existing law and the related purpose of the legislation enacted to remedy that mischief, but in conformity with repeated exhortations by the High Court[24] I will commence the analysis by examining the statutory text.

The statutory text

<u>The section conferring the power and its statutory context</u>

23. The critical provision for present purposes is s 21(1), in Part 2 of the *Succession Act* 1981 (Qld) (NSW: s 18, in Part 2.2 of the *Succession Act* 2006 (NSW)), which confers upon the court power to authorise a statutory will. It is significant that the power is enacted in a part of an Act regulating wills, that it empowers the court to authorise the making, alteration, or revocation of a "will", and that any such will is to be made "on behalf of" an incapacitated person.

24. The first two points are significant because the property owner's intention as to the disposition of his or her property is at the core of the meaning of "will".[25] In *Estate of Scott; Re Application for Probate*, Lindsay J discussed the concept of a "will", with reference to its historical development from before the enactment of the *Statute of Wills* 1540 (32 Henry VIII Chapter 1).[26] Originally the word "will" (as distinct from "testament") related only to

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19 (2012) 247 CLR 108 at 122 [41].

20 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 389 [25] (French CJ and Hayne J).

21 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 388 [23] (French CJ and Hayne J) citing *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47].

22 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

23 See this discussion in *Statutory Interpretation in Australia*, Pearce and Geddes, 8th edition (2014), 109-110.

24 For example, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Revenue (NT)* (2009) 239 CLR 27 at [47].

25 Compare *Conway v The Queen* (2002) 209 CLR 203 at 207, 219 (Gaudron ACJ, McHugh, Hayne and Callinan JJ).

26 [2014] NSWSC 465 at [69]-[79].

real property, but in time it came to refer to the formal declaration by a person "of his intention as to the disposal of his property or other matters to be performed after his death …"[27] (Similarly, *Black's Law Dictionary* substantially incorporates the meaning of "will" given in *Law of Succession*[28] in the definition, "the legal expression of an individual's wishes about the disposition of his or her property after death …".) Lindsay J concluded that the "common, enduring features of a 'will' under NSW law, include a declaration of an intention, ascribed to a testator, providing for the distribution or administration of property after the testator's death"; "in the ordinary case, the existence of a testamentary intention, evidenced by writing formally executed, is the core concept of a current day, NSW will."[29]

25. As to the expression "on behalf of", it is capable of conveying different meanings, including "on the part of …, in the name of, as the agent or representative, on account of, for, instead of". The *Oxford English Dictionary* suggests that those meanings carry a notion of "official agency".[30] In the present context, this expression suggests that the intended beneficiary of the legislation is the incapacitated person, as the principal in the agency relationship.

26. Consistently with the importance of the property owner's intention in the meaning of "will", the most obvious way in which an incapacitated person may be regarded as benefiting by having a statutory will made on his or her behalf is by the statutory will giving effect to his or her testamentary intention at the time of the court's decision.[31] Because the person lacks testamentary capacity at that time, an implication is arguably available (particularly when regard is also had to intention condition discussed in the next section) that the person's testamentary intention to be reflected in a statutory will is the intention the person would have had if the person had testamentary capacity.

27. In considering what falls within the "best interests" approach expressly required by the quite different United Kingdom legislation for statutory wills in the context of mental health legislation, some judges have found a philosophical justification for a broader view in the idea that people have an interest "in being remembered as having done the 'right thing', either in life or, *post mortem*, by will".[32] That approach wrongly assumes that persons who benefit from a testamentary disposition made by a court, that has not been found to reflect what the incapacitated property owner would have intended if he or she did not lack capacity, will overlook that fact.[33] Such an approach is also not compatible with the indications in Qld s 21 and NSW s 18, and in the extrinsic material referred to in a different section of this paper, that the intended beneficiary of this legislation is the incapacitated person rather than any possible beneficiary of that person's testamentary bounty.

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27 See also *Oxford English Dictionary*, Ed., IV. 23. a.

28 Mellows, 3rd edition, 1997.

29 [2014] NSWSC 465 at [79], [81].

30 *Oxford English Dictionary*, 2nd edition.

31 See *GAU v GAV* [2016] 1 Qd R 1 at [63].

32 *Re M (Statutory Will)* [2009] EWHC 2525 at [38]; *Re D (Statutory Will)* [2010] EWHC 2159 (Ch); [2012] Ch 57 at [16]; [2011] 3 WLR 1218.

33 *Re G (TJ)* [2011] WTLR 231 at [53]; *Re JC; D v JC* [2012] WTLR 1211. These decisions are discussed in *The Rise of Statutory Wills and the Limits of Best Interests Decision-making in Inheritance*, *Rose Harding,* (2015) 78(6) MLR 945-970.

28. A construction that gives effect to a will that the incapacitated person would have made if he or she did not lack testamentary capacity supplies a principled justification for the court to take the very large step of authorising the disposition by will of that person's property. Professor Croucher has articulated a philosophical justification for this approach:[34]

> "Statutory wills which are based on the intentions of the real person, as best they can be fathomed, can be seen to be an extension of that person, and his or her autonomy, exercised in a surrogate sense. Where the person lacks capacity, he or she lacks the ability to exercise that autonomy to make decisions – including about their property on death. The statutory will-making power, by allowing a court to step into the person's place, can be seen to be giving back that autonomy, though exercised by a judge."

<u>The "intention condition" (Qld s 24(d); NSW s 22 (b))</u>

29. When the intention condition in Qld s 24(d) is considered in its context, it is seen to be consistent with the view that the legislative purpose is to give effect to the testamentary wishes of the incapacitated person as ascertained by the court.

30. Statements in various judgments in New South Wales and Queensland support that conclusion. For example, in *Re Will of Jane*,[35] Hallen AsJ (as his Honour then was) described the court's concern under NSW s 22(b) as being "with the actual, or reasonably likely, subjective intention of the person lacking capacity" and observed that "the jurisdiction of the court is, so far as is possible, to make a statutory will in terms in which a will would have been made by that person if the person had testamentary capacity at the time of the hearing of the application".[36] In *A Ltd v J,*[37] Robb J endorsed the passage from which that quote was extracted as expressing "the primary objective" of the exercise of determining the terms of a statutory will. In *Estate of Scott; Re Application for Probate*, Lindsay J referred to *Re Fenwick*,[38] *Re Will of Jane*,[39] and s 22(b) of the NSW Act, and observed that, "Conceptually, the radical step taken in legislation providing for a "statutory will" is the authorisation of a will to be made based upon the *presumed intention* of a person lacking testamentary capacity". The legislation directed the court's attention towards the determination of "an actual, subjective intention, if any" notwithstanding that this might be

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34 '*An Interventionist, Paternalistic Jurisdiction'? The Place of Statutory Wills in Australian Succession Law,* R Croucher (2009) 32(3) UNSWLJ 674.

35 [2011] NSWSC 624 at [73]. See also at [98]: "… the power … is not a power to review the reasonableness of the earlier dispositions made by a person then having testamentary capacity … it is not a power of 'substituted judgment.' "

36 In the *Re Will of Jane* [2011] NSWSC 624, the application for leave to apply for a final order was refused on the ground that the court was not satisfied with the least stringent requirement in the condition of a grant of leave to apply for a final order (NSW s 22(b)) that it is "reasonably likely" (in the sense of it being no more than "a fairly good chance that it is likely") that the proposed will would have been made by the person if he or she had testamentary capacity. It was therefore not necessary for his Honour to decide how the principle might be applied in a case in which the court finds that there is no more than " a fairly good chance" that the person would have made the proposed will. Nor was it necessary for his Honour to consider a case in which there is a matter that might militate against the exercise of the discretion to give effect to the hypothetical testamentary intention of the person or to explore the effect of the qualification "so far as possible".

37 [2017] NSWSC 736 at [86].

38 (2009) 76 NSWLR 22 at 54-57.

39 [2011] NSWSC 624 at [73]-[84], [98].

characterised as legal fiction.[40] In *VMH v SEL and Anor*,[41] Jackson J accepted that Qld s 24(d) recognised that in exercising the discretionary power under s 21 "the court should aim to authorise a will that the person would have made if they had been of capacity". (Jackson J added that where there is no reliable evidence of actual wishes, all the court can do is "authorise a will that a reasonable person of capacity in the person's position would have made having regard to the person's circumstances". As Brown J pointed out in *Re: CGB*,[42] s 24(d) (NSW s 22(b)) refers to the person lacking capacity to whom the application relates; it does not refer to a hypothetical or reasonable person.[43])

31. It is necessary though to discuss the view that the effect of the intention condition in Qld s 24(d) is that the power to authorise a statutory will arises, and it is sufficient to make such an order so far as intention is concerned, if the court finds only that the proposed will "may be" a will the person would have made if the person had testamentary capacity.[44] In *Re: CGB*,[45] Brown J held that there must be an evidentiary basis for a decision that a will is one that the incapacitated person may have made; the court was not to speculate but to conduct an evaluative exercise based upon the information supplied to the court, although the circumstances that the court is not bound by the rules of evidence (Qld s 25; NSW s 21) and the broad nature of the matters to which the court has regard indicated that a "broad brush approach" is appropriate. Even so, "may be" encompasses mere possibilities. If a possibility that a proposed will reflects a will the incapacitated person would have made is a sufficient basis for an order authorising a statutory will, it hardly could be said that the legislative purpose is to empower the court to give effect to the testamentary intentions of an incapacitated person. If there is no more than a possibility that a person would have made the statutory will, its terms necessarily must be decided upon the basis of the court's own view of whether such a will should be made and, if so, what its terms should be. No criterion for such decisions is expressed or, in my view, implied in the Act.

32. A similar issue arises in New South Wales upon Palmer J's construction of the least stringent requirement of s 22(b) in *Re Fenwick.*[46] Palmer J construed the least stringent test in s 22(b), "reasonably likely", as meaning "a fairly good chance that it is likely" or "some reasonable people could think that there is a fairly good chance that it is likely".[47] In practice the difference between those meanings and "may be" seems rather subtle, especially in the context of the limits upon the accuracy of an assessment of possibilities in the hypothetical exercise required by the intention condition. If some reasonable people could think there is a fairly good chance that a statutory will is likely to represent a will the person would have made if he or she had testamentary capacity, it seems to follow that at least an equal number of reasonable people (perhaps including the judge hearing the application) might think that the statutory will is **not** likely to reflect a will the person lacking capacity would have made. On the test in *Re Fenwick*, the court must again be entitled to act upon its own

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40 [2014] NSWSC 465 at [87].

41 [2016] QSC 148 at [118].

42 [2017] QSC 128 at [214]-[220].

43 See also *Secretary, Department of Family & Community Services v K* [2014] NSWSC 1065 at [76].

44 See, for example, *Re Matsis; Charalambous v Charalambous & Ors* [2012] QSC 349 at [29] and *Re D* [2014] QSC 164 at [29].

45 [2017] QSC 128 at [231].

46 (2009) 76 NSWLR 22 at [150]-[153].

47 See also *Re Will of Jane* [2011] NSWSC 624 at [76]-[80].

view of what will is appropriate, whether or not that view is consistent with a finding (or an inability to make any finding) about what will the person would have made if he or she had testamentary capacity.

33. The critical question is whether fulfilment of the least stringent requirement of the intention condition ("may be"/"is reasonably likely to be", in the sense of a fairly good chance) is a sufficient ground for the court to authorise a statutory will. In *Re Fenwick*, Palmer J decided that, so far as the testamentary intentions of the person lacking capacity was concerned, that was sufficient.[48] In *A Ltd v J,*[49] Robb J concluded that it did not follow that the court was obliged to grant leave or authorise the will if s 22(b) was satisfied; it "would have been entirely unsatisfactory if the Court had been required to authorise the making of a will simply because it was within the range of what the incapacitated person could reasonably have made …". I would respectfully agree with that view, but the question I am addressing is not whether satisfaction with the least stringent test in the intention condition obliges a court to authorise the proposed will, but whether Qld s 24(d); NSW s 22(b) implies that satisfaction with the least stringent requirement is sufficient to justify the court in authorising the proposed will.

34. Five considerations suggest that it is not sufficient.

35. Firstly, the intention condition is expressed as a condition, not as a factor favouring the making of an order.

36. Secondly, satisfaction of the intention condition, like all other conditions in s 24 (NSW s 22), is expressed as a condition only of the grant of leave. Recent Queensland decisions support the view that the "intention condition" in s 24(d) is quite separate from, and it is not a condition of, the power to authorise a statutory will. In *GAU v GAV*,[50] Gotterson JA observed that the structure of the Queensland legislation made it clear that the discretionary power to grant leave for an applicant to apply for an order authorising the making of a will by a person lacking testamentary capacity was "distinctly separate" from the discretionary power of the court to make an order authorising the alteration of a will. More directly, in *VMH v SEL & Anor*,[51] Jackson J referred to the requirement in s 24(d) of the Queensland legislation that "before granting leave the court must be satisfied that the proposed will, is or may be" a will that the person would make if the person had testamentary capacity, and observed that s 21 was "not conditioned on that question".

37. Thirdly, satisfaction of the conditions in Qld s 24(c); NSW s 22(a) ("reasonable grounds for believing that the person does not have testamentary capacity")/"reason to believe that the person … is or is reasonably likely to be, incapable of making a will") plainly would be insufficient to satisfy the testamentary incapacity condition of an order for a statutory will under Qld s 21; NSW s 18. It may be argued by analogy that satisfaction with the least stringent requirement of the intention condition is similarly insufficient.

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48 (2009) 76 NSWLR 22 at [218] with reference to [212]-[215] (*Re Fenwick*), and at [246]-[256] (*Re Charles*).

49 [2017] NSWSC 736 at [82].

50 [2016] 1 Qd R 1 at [47] (Gotterson JA, with whose reasons Muir and Morrison JJA agreed).

51 [2016] QSC 148 at [122]-[123]. In *Re: CGB* [2017] QSC 128 at [210] Brown J referred to that statement with approval.

38. Fourthly, the context in which the intention condition is found suggests that the least stringent requirement of that condition is relevant in an application for leave and the most stringent requirement of the condition (the proposed will "… is … a will … that the person would make …") is relevant in an application for a final order. Precisely the same (incongruous) structure of expressing two inconsistent requirements upon the same topic in the alternative ("is or may be"/"is or is reasonably likely to be") also appears in Qld s 24(e); NSW s 22(c) ("is or may be appropriate"). In the latter case, it seems quite clear that the least stringent requirement is relevant in an application for leave and the most stringent requirement is relevant in the application for a final order made with leave. That is so notwithstanding that the most stringent requirement is not expressed in Qld s 21; NSW s 18. Thus the presence in the intention condition of the most stringent requirement ("the proposed will … is … a will … that the person would make …) may be understood as an indication that the legislative purpose is to empower the court to authorise a statutory will that accords with a will that the person would have made if he or she had testamentary capacity.

39. I note that s 20(1)(b) of the New South Wales Act provides that, on hearing an application for leave, "the Court may … (b) if satisfied of the matters set out in s 22, make the order." The words "the order" refer to an order under s 18. This provision should not be given its literal meaning, which would empower the court to make an order authorising a statutory will merely if there was "reason to believe" that the person was "reasonably likely" to lack testamentary capacity (s 22(a)), and although it only "may be appropriate" for the order under s 18 to be made.

40. Fifthly, it is not surprising to find that at the leave stage the applicant is required to produce only such information as is sufficient to satisfy the court of what the incapacitated person's hypothesised testamentary intention may be (or is reasonably likely to be), whereas at the final hearing the court will be required to be satisfied that the proposed will reflects that testamentary intention. Although in practice an application for a statutory will is almost always heard together with the necessary application for leave to apply for a statutory will, the court may adopt that or the different practice of hearing the leave application separately and in advance of any final application (Qld s 22(3); NSW s 20(1)). Furthermore, at the leave stage the court may dispense with the requirement to supply any or all of the information that would be required at the hearing of an application for a final order (Qld s 23; NSW s 19(2)). In the course of discussing s 22(c) of the New South Wales Act (Qld s 24(e)), Palmer J observed that the court may grant leave if satisfied that "as the evidence now stands", a final order *will* be appropriate, or that it *may* be appropriate, having regard to the possibility that further evidence may be adduced at the final order stage which will positively satisfy the Court that the final order *is* then appropriate."[52] Such an analysis is equally applicable in relation to the intention condition in Qld s 24(d); NSW s 22(b).

41. It may be put in opposition to those matters that Qld s 21 and NSW s 18 do not express a condition of an order for a statutory will that the proposed will reflects a will the person lacking testamentary capacity would have made if the person had testamentary capacity. That is an important consideration, but it does not undermine the proposition that Qld s 24(d) and NSW s 22(b) do not imply that, so far as testamentary intention is concerned, it is

[52] (2009) 76 NSWLR 22 at [189].

sufficient to justify an order authorising a statutory will that the proposed will merely "may be"/"is likely to be" a will the person would have made if he or she had testamentary capacity. On the other hand, because the power is granted to a court, which must act judicially and in accordance with legal principle, the grant should be construed liberally and not subjected to a limitation that does not appear in the words of that grant.[53] As *Stanford v Stanford*[54] illustrates, however, that interpretive principle is not inconsistent with the application in the exercise of a statutory discretion of principles derived from the proper construction of the statutory power.

Qld s 23; NSW s 19(2): the information required for a leave application

42. Subject to any contrary order of the court, s 23 obliges applicants for leave to give the court certain information and any other facts relevant to the application of which the applicant is aware. Paragraphs (a), (b), (c), (e) and (l) do not assist in identifying the purpose of the legislation, but the other paragraphs support the view that the legislation gives effect to the ascertained testamentary intention of the incapacitated person. Each of the other paragraphs describes information of a kind that would be expected to be taken into account by a person making a will.[55] Accordingly, all of that information – or at least such of it as is available and relevant in the particular case – necessarily must be taken into account by a court if it is to decide whether the proposed statutory will reflects a will that a person would have made if he or she had testamentary capacity. The information is therefore relevant in an application for leave because it bears upon the viability of the proposed application for a statutory will.

43. In *Re Fenwick*, Palmer J concluded, however, that NSW s 19(2)(i) (Qld s 23(h)) "requires the court to consider whether the proposed statutory will would accommodate a person who would have a successful claim under the family provision legislation"[56] His Honour observed that it would not be appropriate to grant leave or make a final order in a case in which a statutory will was bound to provoke a successful claim under the family provision legislation, because the policy of the law is to quell disputes rather than to create them.[57] In the course of discussing hypothetical cases in which a foreseeable family provision application would be contestable,[58] Palmer J observed that where an application was made in respect of a person who had little time to live and there was not likely to be any material change in the relevant circumstances, including those of the "putative claimant", it might be "desirable to hear a contested putative family provision claim in the course of the leave application in order to decide whether the terms of the statutory will are appropriate within the meaning of s 22(c)". Upon that approach, in a statutory will authorised by the court the ascertained testamentary intentions of the person lacking capacity may be subordinated to the interests of putative family provision claimants.

44. The starting point, that the court is required by NSW s 19(2)(i) to consider whether the proposed statutory will would accommodate potentially successful family provision

53 See *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205 (Gaudron J).
54 (2012) 247 CLR 108 at 120 [36].
55 See *Banks v Goodfellow* (1870) LR 5 QB 549, 565.
56 (2009) 76 NSWLR 22 at [193].
57 (2009) 76 NSWLR 22 at [194].
58 (2009) 76 NSWLR 22 at [195]-[199].

claimants, treats the subject matters of the information required to be supplied to the court on an application for leave to apply, including the likelihood of a family provision application, as expressing factors to be taken into account in the exercise of the discretion to authorise a statutory will.[59] In that respect, Palmer J's analysis may have been informed by his Honour's conclusion[60] that *the Succession Act* 2006 (NSW) embodies the provision recommended in the New South Wales Law Reform Commission Report delivered 14 years earlier.[61] The 1992 report is discussed elsewhere in this paper. At this point it is relevant to mention two matters:

a. Whilst the text of paragraph (i) of NSW s 19 mirrors the text of paragraph (e) of clause 32FJ of the draft "Wills Probate and Administration (Statutory Wills) Amendment Bill 1992" appended to the 1992 report, there are significant differences between the introductory words in NSW s 19 ("In applying for leave, the person must (unless the Court otherwise directs) give the Court the following information") and the introductory words in draft clause 32FJ in the 1992 report ("In considering an application for an order **the Court must take into account** the following matters"). Draft clause 32FJ was directed to the court hearing an application for a final order and it specified matters the court was required to take into account. NSW s 19(2) (Qld s 23) is instead directed to the applicant for leave, it specifies information that person is required to give the court, and it confers power upon the court to dispense with that requirement.
b. The enacted provisions in both States instead embody the substance of clause 20(2) of the draft *Wills Bill* 1997 recommended in a report to the Standing Committee of Attorneys-General by a national committee in which both States' law reform commissions were represented. In December 1997 and April 1998 respectively the Queensland Law Reform Commission and the New South Wales Law Reform Commission endorsed the draft *Wills Bill* 1997 in reports to the Attorney-General.

45. I suggest that the paragraph in Qld s 23 ; NSW s 19(2) referring to the likelihood of a family provision claim does not express a consideration the court is required to take into account in exercising the discretion to make an order authorising a statutory will. Rather, it merely describes one category of information a person applying for leave must give the court unless the court otherwise directs. Even a provision that specifies matters that must be taken into account in exercising a general discretion is not to be conflated with the general discretion itself.[62] The distinction between a provision that requires the supply of information and a provision conferring a general discretion is markedly clearer.

46. For these reasons, Qld s 23(h); NSW s 19(2)(i) does not imply that a court hearing a statutory will application is empowered to adjudicate upon a potential family provision application. If, as I have suggested, the focus on the legislation is upon what the incapacitated person would have done if he or she did not lack capacity, the likelihood of a

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59 See *Secretary, Department of Family & Community Services v K* [2014] NSWSC 1065 at [74]; *A Ltd v J* [2017] NSWSC 736 at [79].

60 (2009) 76 NSWLR 22 at [112]-[116] (especially at [116]: "the 1992 report's "recommendations were enacted in the *Succession Act* 2006").

61 New South Wales Law Reform Commission, *Wills for Persons Lacking Will-Making Capacity*, Report No 68, 1992.

62 *Stanford v Stanford* (2012) 247 CLR 108 at 120 [35] (French CJ, Hayne, Kiefel and Bell JJ).

family provision application is relevant only as evidence bearing upon the will that person would have made. (For example, in the extreme case hypothesised by Palmer J in which the information revealed an irresistible claim under the family provision legislation, that would make it seem very unlikely that a person with testamentary capacity would have made a will that cut out the putative claimant.)

47. Other considerations appear to be opposed to a construction of this provision under which parties may litigate a putative family provision application during the hearing of an application for leave to apply for a statutory will. As Palmer J recognised,[63] unlike a statutory will decision, a decision in a family provision claim must be made with reference to the circumstances existing after the death of the testator and at the time of the trial. The exercise of deciding a putative family provision claim in a statutory will application would therefore be a hypothetical one. A procedural provision about the giving of information to the court concerning the likelihood of a family provision application seems an improbable vehicle for the conferral of jurisdiction to conduct that hypothetical exercise. Furthermore, the result of a construction under which the children of the incapacitated person, and others, may litigate about the justice or reasonableness of provisions in that person's will while he or she is still alive would involve the legislature in a discriminatory approach both in relation to that person and putative family provision claimants, since the property rights of all other persons are not amenable to family provision applications whilst those persons are alive.

48. For the reasons given in paragraph 42, Qld s 23; NSW s 19(2) may be regarded as supplying some support for the view that the legislative purpose is to empower the court to authorise a statutory will that reflects a will the person lacking capacity would have made if he or she had testamentary capacity.

Qld s 24(e); NSW s 22(c): "it is … appropriate for the order to be made"

49. In *Re Fenwick*, Palmer J considered that although NSW s 22(c); (Qld) s 24(e)) gives no guidance as to the circumstances which, other than those set out in other paragraphs in the same section, were to be taken into account in determining whether a final order was "appropriate", NSW s 19(2) (Qld s 23) "gives an indication of some such circumstances but the generality of s 22(c) makes it clear that s 19(2) is not intended to be an exhaustive check list".[64] Palmer J concluded that the obligation of the court under s 22(c) was to objectively assess whether, and to what extent, it was "appropriate" to accede to the wishes of the incapacitated person.[65] In the preceding section I have expressed a different view about the effect of NSW s 19(2); Qld s 23.

50. The word "appropriate" seems merely to reflect the nature of the discretion conferred by the words "may … order" in Qld s 21; NSW s 18. It does not convey any information about what, if any, principles or considerations should be applied or taken into account in the exercise of the discretion to authorise a statutory will. The relevant considerations and

63 (2009) 76 NSWLR 22 at [196].

64 (2009) 76 NSWLR 22 at [190].

65 (2009) 76 NSWLR 22 at [193]. See also *A Ltd v J* [2017] NSWSC 736 at [80].

principles are to be found, if at all, in Qld s 21; NSW s 18 and other provisions, construed with reference to the context in which they were enacted. [66]

Conclusion

51. An examination of the statutory text suggests that it is at least a tenable construction of each State's legislation that the legislative purpose is to empower the court to authorise the making of a will that reflects a will the incapacitated person would have made if he or she had testamentary capacity.

Extrinsic evidence of the mischief in the pre-existing law and the purpose of the legislation

52. That construction derives powerful support from extrinsic evidence of the mischief the legislatures perceived in the pre-existing law and the remedial purpose of the legislation.

53. Before the enactment of the statutory wills legislation, the law in each jurisdiction did not empower a court to authorise the making of a will on behalf of a person who lacked testamentary capacity. The Supreme Court's *parens patriae* jurisdiction did not comprehend such a power. There was, however, a judicial power to authorise *inter vivos* payments out of the estate of one class of persons lacking testamentary capacity. In *Re Fenwick*,[67] Palmer J explained that, before the introduction of a statutory power in s 171 of the *Law of Property Act* 1925 (UK), the Lord Chancellor (and, from 1852, the Lord Justices of Appeal in Chancery exercising the Lord Chancellor's jurisdiction in lunacy) directed voluntary payments out of the income of the lunatic for the benefit of his or her children or others with moral claims. (This jurisdiction was inherited by the Supreme Court of New South Wales under the Charter of Justice.[68]) Palmer J quoted a statement by Cotton LJ in *Re Darling*[69] that the court would "do for the lunatic what the lunatic would have done himself if of sound mind"; the judges did not take into account what a reasonable person would have done but instead considered "what the lunatic or herself would have done, having regard to what the evidence showed of his or her character and his or her past dealings with the claimant for provision".[70]

54. Section 171(1) of the *Law of Property Act* 1925 (UK) empowered *inter vivos* settlements in certain cases where the Court was "satisfied that any person might suffer an injustice if the property were allowed to devolve as undisposed of on the death intestate of the lunatic or defective for under any testamentary disposition executed by him". Palmer J referred to decisions upon that provision and concluded that the law "seemed to be travelling in the direction that whether provision *inter vivos* should be made was to be determined by reference to what a reasonable person with capacity would do in all of the circumstances."[71] It also should be noted that the text of s 171(1) suggests that the

66 And see *Conway v The Queen* (2002) 209 CLR 203 at 219 (Gaudron ACJ, McHugh, Hayne and Callinan JJ).

67 (2009) 76 NSWLR 22 at [29]-[31].

68 Third Charter of Justice for New South Wales (1823), pursuant to 4 Geo IV c. 96, cl XVIII: see *Re Fenwick* (2009) 76 NSWLR 22 at [31].

69 (1888) LR 39 Ch D 28 at 211.

70 (2009) 76 NSWLR 22 at [30].

71 (2009) 76 NSWLR 22 at [47].

objective of the provision was to avoid injustice to persons who would not benefit under a will or in an intestacy. As will appear, the mischief intended to be addressed by the Australian legislation, and the object of that legislation indicated by extrinsic material, were instead focussed upon the positon of the incapacitated person.

55. In 1959 much broader provisions concerning *inter vivos* transactions for mental health patients were made by the *Mental Health Act* 1959 (UK). Section 102(1) of that Act empowered a judge to do what was necessary or expedient with respect to the property of the patient for the maintenance or other benefit of the patient or members of the patient's family, for administering the patient's affairs, and (s 102(1)(c)) "for making provision for other persons or purposes for whom or which the patient might be expected to provide if he were not mentally disordered". Section 103(1)(d) made it clear that the available orders comprehended settlements or gifts of the patient's property to the patient's family and other persons or purposes described in s 102(1)(c). For present purposes the most significant development occurred in 1969. The range of available orders was then extended to orders making wills for patients, by the introduction of paragraph (dd) in s 103(1):[72]

> "(dd) The execution for the patient of a will making any provision (whether by way of disposition of property or exercising a power or otherwise (which could be made by a will executed by the patient if he were not mentally disordered …"

These provisions were substantially re-enacted in ss 96 and 97 of the *Mental Health Act* 1983 (UK).

56. In *Boulton v Sanders*,[73] Dodds-Streeton AJA referred to two English decisions upon those provisions, *Re D (J)*[74] and *Re C (a patient)*.[75] Those decisions, and many others, were discussed in more detail in *Re Fenwick*.[76] Palmer J gave this pithy summary of the position:

> "It will be seen that, in its 80 year evolution from s 171(1) of the *Law of Property Act* 1925 (UK), the law in the United Kingdom relating to statutory wills has travelled a full circle. After a shaky start in *Re Freeman*, the objective approach was established in *Re Greene*. Some 50 years later, *Re D (J)* re-established the highly artificial "substituted judgment" approach of the old lunacy cases. By 2005, courts, while paying lip service to the "substituted judgment" approach, were taking the realistic and pragmatic approach that whether a statutory will should be ordered was to be determined having regard to the best interest of the patient, ascertained objectively, and to the wishes of the patient, if known. That approach is now enshrined in legislation.
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> In Australia, however, the statutory will concept was adopted before it had completed its evolutionary cycle in the United Kingdom."[77]

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72 *Administration of Justice Act* 1969 (UK).
73 [2004] 9 VR 495 at paras 20-26.
74 [1982] 1 Ch 237.
75 [1991] 3 All E.R. 866.
76 (2009) 76 NSWLR 22 at [33]-[107].
77 (2009) 76 NSWLR 22 at [108]-[109].

The reference to the legislation enshrining "the best interest of the patient" approach is to the *Mental Capacity Act* 2005 (UK).

57. In *Re D (J),* Sir Robert Megarry V-C articulated five principles which should guide the court when deciding what dispositions should be made by a will executed under the *Mental Health Act* 1959 (UK):

> 1. "It is to be assumed that the patient is having a brief lucid interval at the time when the will is made."
>
> 2. "During the assumed lucid interval full knowledge of the past and a realisation of the future prognosis is to be attributed to the patient."
>
> 3. "The actual patient and not a hypothetical patient must be considered. Making due allowance for the patient's known antipathies or affections, provided they are not "beyond reason" the court is to do for the patient what the patient would fairly do for himself, if he could."
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> 4. "The patient should be envisaged as advised by competent solicitors during the hypothetical interval."
>
> 5. "In all normal cases the patient is to be envisaged as taking a "broad brush" to the claims on his bounty, rather than an accountant's pen."[78]

58. Those principles, particularly principle 3, allow some limited departure from what the patient would have done if he or she could have made a will, but for the most part they merely elaborate upon the guiding principle in the lunacy jurisdiction that the court would do for the lunatic what the lunatic would have done if of sound mind. Palmer J considered,[79] however, that the words of the United Kingdom legislation "do not require the judge to put himself or herself into the shoes of the actual patient[80] … and to make the will which he or she would have made if sane."[81]

59. After discussing the movements for law reform in Victoria and New South Wales, and the 1992 New South Wales Law Reform Commission Report,[82] the statutory will provisions in the New South Wales *Succession Act* 2006, and decisions upon the original form of the *Wills Act* 1997 (Vic) (notably, *Boulton v Sanders*[83]) Palmer J expressed this conclusion:

> "My somewhat elaborate review of the UK decisions and the Victorian cases will show, I hope, that in interpreting and applying s 22(b) of the New South Wales *Succession Act*, this Court should not attempt to seek guidance from earlier authority. In interpreting s 22(b) this 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: see, for e.g.,

78 [1982] 1 Ch 237 at 242.
79 (2009) 76 NSWLR 22 at [74]-[77].
80 (2009) 76 NSWLR 22 at [76].
81 (2009) 76 NSWLR 22 at [76].
82 (2009) 76 NSWLR 22 at [110]-[117].
83 [2004] 9 VR 495.

Roberts v Repatriation Commission (1992) 39 FCR 420 at 423; *Parramatta City Council v Shell Co of Australia Ltd* [1972] 2 NSWLR 632 at 634-635 per Manning JA; *Re Dominion Insurance Company of Australia Ltd and the Companies Act* [1980] 1 NSWLR 271 at 274, per Needham J."[84]

(A somewhat less emphatic approach to the usefulness of the United Kingdom cases in Australia was expressed in *Boulton v Sanders*.[85])

60. The Australian law reform bodies were naturally aware of the law applicable in the "lunacy" jurisdiction and the provisions in the United Kingdom legislation empowering the judges to make wills on behalf of mental health patients and the approach to that legislation, but the Australian legislation was to be much broader in scope. It was to comprehend not only "lunatics" or "patients", but any person lacking testamentary capacity, and it was not enacted in the context of mental health legislation.

61. In 1985 the Chief Justice of Victoria issued a report by a subcommittee upon "Wills for Mentally Disordered Persons", which recommended that power be conferred on a judge to direct or authorise that a will be made for a person of full age who was incapable of making a valid will. That report was not acted upon. In 1987 the New South Wales Attorney-General referred the same subject matter to the New South Wales Law Reform Commission. In 1991 the Standing Committee of Attorneys-General approved the development of uniform succession laws for the whole of Australia. A National Committee for Uniform Succession Laws for the Australian States and Territories was constituted, with one person from each jurisdiction nominated on the committee. The Queensland Law Reform Commission co-ordinated the project. One aspect of that project included wills for persons who lacked testamentary capacity.

62. The 1992 New South Wales Law Reform Commission Report recommended the conferral of power upon the Supreme Court to authorise the making of a will on behalf of persons who lacked testamentary capacity. Under a heading "the need for wills for persons lacking testamentary capacity", paragraph 1.5 stated that the legislation "would benefit persons lacking testamentary capacity" in three cases: "where … a person makes a valid will and subsequently loses testamentary capacity; a person who has testamentary capacity, never makes a valid will and subsequently loses testamentary capacity; or a person never has testamentary capacity and never makes a valid will." As to the need for law reform in the first situation, the report referred to circumstances in which the person's circumstances change but where there is currently no way of altering a will. The need identified for the second and third situation was that upon the death of the person his or her property would be distributed according to the rules of intestacy; the *Family Provision Act* 1982 benefitted only some of the possible beneficiaries under a will, and even then an order could be made only if certain statutory criteria were met. The Commission concluded:

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84 (2009) 76 NSWLR 22 at [148].

85 [2004] 9 VR 495 at [1] (Ormiston JA: "care should be taken in applying decisions under the English legislation"); [54] (Dodds-Streeton AJA, Charles JA agreeing "the crucial differences between the Victorian and United Kingdom legislation, already recognised in the Victorian decisions, dictate a cautious approach to principles derived from the English cases").

> "1.7 In these situations, therefore, a person's property may be distributed **in a way that is contrary to his or her intentions or, more accurately, what they would have been had he or she had testamentary capacity** and been able to devise property. A statutory will-making scheme would allow the alteration of an existing will or the creation of a will on behalf of any person lacking testamentary capacity."[86]

63. A statement to similar effect was made in paragraph 1.17:

> "The intestacy rules may therefore distribute property in a way that is contrary to the manner in which it would have been distributed had the person had testamentary capacity and been able to devise property."

64. In a section setting out the Commission's recommendations, the report: refers to the proposed legislation as **"a means of providing a person lacking testamentary capacity with a will reflecting, as far as possible, current intentions or at least what his or her intentions would have been but for the disability"**, states that "the power should be exercised only in situations where a will or a new will is necessary to avoid a person's property being distributed in a manner, contrary to his or her intentions or what those intentions would have been if he or she had testamentary capacity at the present time", and concludes in paragraph 2.4:

> "A statutory will-making scheme would greatly enhance the rights and dignity of persons with disabilities by enabling their property to be devised appropriately by having regard to their current situation."

65. The importance of this report should not be overstated, given that the New South Wales statutory will provisions were not enacted for another 14 years and the enacted provisions depart in material ways from the draft Bill appended to the report. (For example, the Commission recommended a guiding principle that "the Court should seek to make the will which would have been made by the person lacking will-making capacity if the person had the capacity to make a will at the time of the hearing of the application".[87]) Even so, it is significant that the mischief of the existing law identified in the New South Wales Law Reform Commission Report was that the property of a person lacking testamentary capacity might be distributed, either under an existing will or under the intestacy rules, in a way that was contrary to the way in which the property would have been distributed if the person had testamentary capacity. The corresponding legislative purpose described in the report was to enhance the rights and dignity of a person with a disability that resulted in the loss of testamentary capacity while allowing the person's property to be devised in an appropriate way that reflected, as far as possible, what the person's testamentary intentions would have been but for the disability.

66. In May 1994, the Victorian Parliamentary Law Reform Committee (assisted by Mr W A (Tony) Lee, a part-time member of the Queensland Law Reform Commission), recommended that the Supreme Court of Victoria be empowered to authorise the making

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86 Wills for Persons Lacking Will-Making Capacity, Report No. 68, New South Wales Law Reform Commission, 1992 at 1.7.

87 Wills for Persons Lacking Will-Making Capacity, Report No. 68, New South Wales Law Reform Commission, 1992 at 2.19-2.20.

of a will for a person lacking testamentary capacity.[88] The report referred to ss 96 and 97 of the *Mental Health Act* 1983 (UK) and to law reform reports, including the 1985 report by the Chief Justice of Victoria and the 1992 New South Wales Law Reform Commission Report. The Committee recommended that one of the conditions required for the grant of leave to apply for an order authorising a statutory will should be that "the proposed will … is or might be one which would have been made by the person if he or she had testamentary capacity".[89] The report listed "examples of the need for the legislation" and stated:

> "s.5A.11 To these examples may be added the general proposition that there will inevitably be occasions **where a person would wish to make provision by will for a person or persons** who could not benefit under the terms of an existing will, under intestacy provisions, or under existing family provision legislation. … If a will cannot be made for the benefit of such dependant or deserving person because of the incapacity of the person **who would, if of full capacity, wish to make such provision**, it is just that there should be some mechanism to make such testamentary provisions."[90]

67. Although that paragraph referred to possible beneficiaries of the bounty of a person lacking testamentary capacity, it contemplated an injustice only if the incapacitated person would have made provision for such beneficiaries if the incapacitated person had been of full capacity.

68. The Committee also recognised the relationship of the proposed provision with the existing succession law:

> "s 5A13… It enables provision to be made for a person who could not otherwise claim under any will, or upon the intestacy of a person, or under family provision legislation. It may be seen as remarkable that such a person can be provided for only from the estate of a person who lacks testamentary capacity. Such a person could not be provided for from the estate of a competent testator."[91]

69. In December 1997 the National Committee reported back to the Standing Committee of Attorneys-General. The National Committee endorsed cl 6 of the *Draft Wills Act* 1994 (Vic) as the basis for model provisions for statutory wills[92] and recommended legislation in the

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88 Reforming the Law of Wills, Report No. 82, Parliament of Victoria – Law Reform Committee, May 1994 at 81-82.

89 Reforming the Law of Wills, Report No. 82, Parliament of Victoria – Law Reform Committee, May 1994 at 43.

90 Reforming the Law of Wills, Report No. 82, Parliament of Victoria – Law Reform Committee, May 1994 at 36-37.

91 Reforming the Law of Wills, Report No. 82, Parliament of Victoria – Law Reform Committee, May 1994 at 37.

92 Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills, National Committee for Uniform Succession Laws, Queensland Law Reform Commission Miscellaneous Paper 29, December 1997.

form of an attached draft *Wills Bill* 1997, which, with some refinements and some borrowing from South Australian legislation, substantially reproduced the Victorian draft *Wills Act* 1994.[93] (The draft "*Wills Bill* 1997" included the requirement for a grant of leave to apply for an order authorising a will that "the proposed will … is or might be one that would have been made by the proposed testator if he or she had testamentary capacity".)

70. Also in December 1997, the Queensland Law Reform Commission endorsed the recommendations of the National Committee in a report to the Attorney-General for Queensland.[94] Similarly, in April 1998 the New South Wales Law Reform Commission delivered a report to the Attorney-General for New South Wales responding to the reference to the Commission dated 16 May 1995. The Commissioners endorsed the National Committee's December 1997 Report. (The draft Bill implementing the New South Wales Law Reform Commission's recommendations was in the form of the draft *Wills Bill* 1997.)

71. The *Succession Amendment Bill* 2005 (Qld) did not depart in any material way from the Bill recommended in the Queensland Law Reform Commission Report. The mischief in the pre-existing law sought to be remedied, and the related purpose of the *Succession Amendment Act* 2006, were expressed in the Second Reading Speech:

> "The *Succession Amendment Bill* introduces the new concept of court authorised wills for minors and for people lacking testamentary capacity. This is arguably the most significant and innovative aspect of the bill as **it provides a means by which a will can be made to give effect to the testamentary wishes of a person who, though still alive, does not have the legal capacity to make a will**.
> …
>
> A person who lacks testamentary capacity may never have had the capacity to make a will or they may have lost that capacity—for example, through injury or disease. The bill enables the court to make a will in specific terms on behalf of that person who lacks such testamentary capacity. **This mechanism gives effect to a person's known or ascertainable wishes** and avoids reliance on intestacy rules, which may not operate to benefit those whom the person wanted to benefit had he or she had the capacity to make a will and in circumstances where the person became incapable of making an updated valid will which obviates the need for an overlooked spouse, child or other dependant to bring a family provision application after the person has died.
> …
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> **In summary, the concept of statutory wills is all about giving the greatest possible effect to a person's known testamentary intentions and to achieve certainty before the person dies**."[95]

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93 The Law of Wills, Report No. 52, Queensland Law Reform Commission, December 1997, at 59-71, and Appendix 2 (Draft "*Wills Bill* 1997").

94 The Law of Wills, Report No. 52, Queensland Law Reform Commission, December 1997 at 59-71.

95 Second Reading Speech, Hansard, 14 Feb 2006, pp 68, 69.

72. In New South Wales, the *Succession Bill* 2006 was introduced into the legislative assembly on 19 September 2006. The Explanatory Notes for the *Succession Bill* 2006 (NSW) stated that the Bill's object "is to restate, with amendments, the law relating to wills in New South Wales in order to implement (with modifications) the recommendations of the National Committee for Uniform Succession Laws regarding the law of wills contained in its final report to the Standing Committee of Attorneys-General in December 1997". The Second Reading Speech referred to the various law reform reports, summarised the relevant provisions of the bill and stated:

> "This new aspect of the court's jurisdiction also applies to minors; it is intended to complement the court's jurisdiction in respect of competent minors. This means the court can make a statutory will for a minor to whom the court cannot otherwise give authorisation because the minor lacks the requisite degree of understanding, for example, because of immaturity or because of a particular incapacity. **Many aspects of the bill reinforce previous reforms to shift the emphasis from matters of "form" to the intent of the testator; it moves us from a system where formalities were paramount to one where the court has greater discretion to interpret the testator's intentions. This underlines the policy thrust of the bill: that the greatest possible effect should be given to the testator's intentions**."

Conclusion

73. In *IW v City of Perth*,[96] Brennan CJ and McHugh J explained that "beneficial and remedial legislation … is to be given 'a fair, large and liberal' interpretation rather than one which is 'literal or technical' … [but] … a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural". In *Re Fenwick*,[97] Palmer J endorsed the similar approach that the New South Wales legislation should be interpreted in light of the problems and difficulties which the legislation sought to remedy and bearing in mind that legislation of this kind should be given a benevolent construction. Those principles are applicable upon the footing that the intended beneficiary of this legislation is the incapacitated person.

74. Upon an examination of the text of each State's statutory wills provisions I concluded that it is a tenable construction that the legislative purpose is to empower the court to authorise the making of a will that reflects a will a person lacking testamentary capacity would have made if he or she had testamentary capacity. That construction receives substantial support from the extrinsic evidence that in each State the perceived mischief in the pre-existing law was that the property of a person lacking testamentary capacity might be distributed, either under an existing will or under the intestacy rules, contrary to the way in which the property would have been distributed if the person had testamentary capacity. Conversely, the perceived mischief did not include injustice to persons who did not benefit under a previous will or the intestacy rules, except in cases where the incapacitated person would have wished to make provision by will for such persons.

75. Similarly, that construction is supported by the extrinsic evidence that the purpose of the legislation in each State was to remedy the perceived mischief by empowering the court to

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96 (1997) 191 CLR 1 at 12.

97 See, to similar effect, *Re Fenwick* (2009) 76 NSWLR 22 at [99], [148].

authorise the making of a will on behalf of an incapacitated person that reflected what the person's intentions would have been if he or she did not lack testamentary capacity. Again, the extrinsic evidence does not justify a conclusion that the statutory remedy was to be extended in favour of persons with possible claims upon the bounty of the incapacitated person, except where the incapacitated person would have wished to make provision by will for such persons.

76. I conclude that it is open for a court in either jurisdiction to hold that, upon the proper construction of the statutory wills provisions in that jurisdiction, the statutory purpose is to empower the Supreme Court to authorise the making of a will that reflects a will a person lacking testamentary capacity would have made if he or she had testamentary capacity. Upon this view, that statutory purpose should guide the exercise of the discretion to authorise a statutory will and, if a statutory will is authorised, to approve its terms.

Hugh Fraser JA

Court of Appeal, Supreme Court of Queensland

Chambers, 23 August 2017

(2) An order under this section may be made on the application of a minor or by a person on behalf of the minor.

(3) The Court may impose such conditions on the authorisation as the Court thinks fit.

(4) Before making an order under this section, the Court must be satisfied that:

(a) the minor understands the nature and effect of the proposed will or alteration or revocation of the will or part of the will and the extent of the property disposed of by it, and

(b) the proposed will or alteration or revocation of the will or part of the will accurately reflects the intentions of the minor, and

(c) it is reasonable in all the circumstances that the order should be made.

(5) A will is not validly made, altered or revoked, in whole or in part, as authorised by an order under this section unless:

(a) in the case of the making or alteration of a will (in whole or in part)—the will or alteration is executed in accordance with the requirements of Part 2.1, and

(b) in the case of a revocation of a will (in whole or in part):

(i) if made by a will—the will is executed in accordance with the requirements of Part 2.1, and

(ii) if made by other means—is made in accordance with the requirements of the order, and

(c) in addition to the requirements of Part 2.1, one of the witnesses to the making or alteration of the will under this section is the Registrar, and

(d) the conditions of the authorisation (if any) are complied with.

(6) A will that is authorised to be made, altered or revoked in part by an order under this section must be deposited with the Registrar under Part 2.5.

(7) A failure to comply with subsection (6) does not affect the validity of the will.

17 Will made by minor under an order of a foreign court

(1) A will of a deceased person that is a court authorised will for a minor is a valid will.

(2) A will is a ***court authorised will for a minor*** if:

(a) a court, in a place outside New South Wales, made an order authorising a minor to make the will, and

(b) the will was executed according to the law of the place relating to wills of minors, and

(c) the minor was a resident in the place at the time the will was executed.

Division 2 Court authorised wills for persons who do not have testamentary capacity

18 Court may authorise a will to be made, altered or revoked for a person without testamentary capacity

Qld: 21(1)

(1) The Court may, on application by any person, make an order authorising:

(a) a will to be made or altered, in specific terms approved by the Court, on behalf of a person who lacks testamentary capacity, or

(b) a will or part of a will to be revoked on behalf of a person who lacks testamentary capacity.

Note. A person may only make an application for an order if the person has obtained the leave of the Court—see section 19.

Qld: 21(1)

(2) An order under this section may authorise:

(a) the making or alteration of a will that deals with the whole or part of the property of the person who lacks testamentary capacity, or

(b) the alteration of part only of the will of the person.

Qld: 21(2)(b)

(3) The Court is not to make an order under this section unless the person in respect of whom the application is made is alive when the order is made.

(4) The Court may make an order under this section on behalf of a person who is a minor and who lacks testamentary capacity.

Qld: 21(3); 21(4)

(5) In making an order, the Court may give any necessary related orders or directions.

Note. The power of the Court to make orders includes a power to make orders on such terms and conditions as the Court thinks fit—see section 86 of the *Civil Procedure Act 2005*. The Court also has extensive powers to make directions under sections 61 and 62 of that Act.

(6) A will that is authorised to be made or altered by an order under this section must be deposited with the Registrar under Part 2.5.

(7) A failure to comply with subsection (6) does not affect the validity of the will.

19 Information required in support of application for leave

Qld: 22(1)

(1) A person must obtain the leave of the Court to make an application to the Court for an order under section 18.

(2) In applying for leave, the person must (unless the Court otherwise directs) give the Court the following information:

Qld: 23(a)

(a) a written statement of the general nature of the application and the reasons for making it,

Qld: 23(b)

(b) satisfactory evidence of the lack of testamentary capacity of the person in relation to whom an order under section 18 is sought,

Qld: 23(d)

(c) a reasonable estimate, formed from the evidence available to the applicant, of the size and character of the estate of the person in relation to whom an order under section 18 is sought,

Qld: 23(e)

(d) a draft of the proposed will, alteration or revocation for which the applicant is seeking the Court's approval,

Qld: 23(f)

(e) any evidence available to the applicant of the person's wishes,

Qld: 23(c)

(f) any evidence available to the applicant of the likelihood of the person acquiring or regaining testamentary capacity,

Qld: 23(g)

(g) any evidence available to the applicant of the terms of any will previously made by the person,

Qld: 23(k)

(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 person,

Qld: 23(h)

(i) any evidence available to the applicant of the likelihood of an application being made under Chapter 3 of this Act in respect of the property of the person,

Qld: 23(j)

(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 person,

Qld: 23(i)

(k) any evidence available to the applicant of a gift for a charitable or other purpose that the person might reasonably be expected to make by will,

Qld: 23(l)

(l) any other facts of which the applicant is aware that are relevant to the application.

20 Hearing of application for leave

Qld: 22(3)

(1) On hearing an application for leave the Court may:

(a) give leave and allow the application for leave to proceed as an application for an order under section 18, and

(b) if satisfied of the matters set out in section 22, make the order.

(2) Without limiting the action the Court may take in hearing an application for leave, the Court may revise the terms of any draft of the proposed will, alteration or revocation for which the Court's approval is sought.

21 Hearing an application for an order

In considering an application for an order under section 18, the Court:

Qld: 25(a)

(a) may have regard to any information given to the Court in support of the application under section 19, and

Qld: 25(b)

(b) may inform itself of any other matter in any manner it sees fit, and

Qld: 25(c)

(c) is not bound by the rules of evidence.

22 Court must be satisfied about certain matters

The Court must refuse leave to make an application for an order under section 18 unless the Court is satisfied that:

Qld: 24(c)

(a) there is reason to believe that the person in relation to whom the order is sought is, or is reasonably likely to be, incapable of making a will, and

Qld: 24(d)

(b) the proposed will, alteration or revocation is, or is reasonably likely to be, one that would have been made by the person if he or she had testamentary capacity, and

Qld: 24(e)

(c) it is or may be appropriate for the order to be made, and

Qld: 24(a)

(d) the applicant for leave is an appropriate person to make the application, and

Qld: 24(b)

(e) adequate steps have been 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.

23 Execution of will made under order

Qld: 26(1)

(1) A will that is made or altered by an order under section 18 is properly executed if:

(a) it is in writing, and

(b) it is signed by the Registrar and sealed with the seal of the Court.

Qld: 26(2)

(2) A will may only be signed by the Registrar if the person in relation to whom the order was made is alive.

24 Retention of will

(1) Despite section 52 (Delivery of wills by Registrar), a will deposited with the Registrar in accordance with this Part may not be withdrawn from deposit with the Registrar by or on behalf of the person on whose behalf it was made unless:

(a) the Court has made an order under section 18 authorising the revocation of the whole of the will, or

(b) the person has acquired or regained testamentary capacity.

(2) On being presented with a copy of an order under section 18 authorising the revocation of the whole of a will, the Registrar must withdraw the will from deposit.

25 Separate representation of person lacking testamentary capacity

If it appears to the Court that the person who lacks testamentary capacity should be separately represented in proceedings under this Division, the Court may order that the person be separately represented, and may also make such orders as it considers necessary to secure that representation.

26 Recognition of statutory wills

(1) A statutory will made according to the law of the place where the deceased was resident at the time of the execution of the will is to be regarded as a valid will of the deceased.

(2) In this section:

statutory will means a will executed by virtue of a provision of an Act of New South Wales or other place on behalf of a person who, at the time of execution, lacked testamentary capacity.

Division 3 Rectification of wills by Court

27 Court may rectify a will (cf WPA 29A)

(1) The Court may make an order to rectify a will to carry out the intentions of the testator, if the Court is satisfied the will does not carry out the testator's intentions because:

(a) a clerical error was made, or

(b) the will does not give effect to the testator's instructions.

(2) A person who wishes to make an application for an order under this section must apply to the Court within 12 months after the date of the death of the testator.

(3) However, the Court may, at any time, extend the period of time for making an application specified in subsection (2) if:

(a) the Court considers it necessary, and

(b) the final distribution of the estate has not been made.

28 Protection of personal representatives who distribute as if will had not been rectified (cf WPA 29A)

(1) This section applies if:

(a) a will is rectified under section 27, and

(b) a personal representative made a distribution to a beneficiary as if the will had not been rectified.

(2) A personal representative is not liable if:

(a) the distribution was made under section 92A (Personal representatives may make maintenance distributions within 30 days) of the *Probate and Administration Act 1898*, or

(b) the distribution was made at least 6 months after the date of the death of the testator and at the time of making the distribution the personal representative was not aware of an application in respect of the estate having been made under section 27 or under Chapter 3,

and the personal representative has complied with the requirements of section 92 (Distribution of assets after notice given by executor or administrator) of the *Probate and Administration Act 1898*.