ESTATE PLANNING FOR A TESTATOR WHO LACKS CAPACITY: COURT-AUTHORISED WILLS IN QUEENSLAND

ANTHONY W COLLINS*

I INTRODUCTION

The *Succession Amendment Act 2006* (Qld) ('*2006 Act*') implemented significant changes to the *Succession Act 1981* (Qld) ('*Succession Act*'), including provision for the Supreme Court of Queensland to authorise the making of a will for a person lacking testamentary capacity. Prior to the *2006 Act*, '... Part 2 of the Act did not contain provisions comparable with those which now compose Subdivision 3 of Division 4'.[1] Pertinently, Part 2, Division 4, Subdivisions 2 (minors) and 3 (persons without testamentary capacity) introduced a statutory scheme whereby an application can be made for a court-authorised will, also known as a statutory will.

II LEGISLATIVE CONTEXT

A *Background*

Similar statutory provisions have been introduced in each Australian state and territory. This was a significant law reform, which occurred within a short timeframe. The development has been described as follows:

> In Australia, the impetus for statutory will regimes came chiefly from a 1992 New South Wales Law Reform Commission Report, which recommended that a will-making scheme be introduced both for persons who had never had testamentary capacity (including minors) and those who had once had capacity but had since lost it. An equivalent recommendation ensued from a Victorian law reform body two years later, before forming part of the 1998 recommendations of the National Committee for Uniform Succession Laws.[2]

The movement for reform was influenced by the *Mental Health Act 1959* (UK), where the power to make a statutory will derived from s 103(1) which provided inter alia:

> The judge may, with respect to the property and affairs of the patient, do or secure the doing of all such things as appear necessary or expedient —
>
> …
>
> (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…

The words '… for whom or which the patient might be expected to provide if he were not mentally disordered' can be traced through to the legislation that has been enacted in Australia and, in Queensland, s 24(d) of the *Act*. That section requires that one of the five

---

* Barrister-at-law, practising at 31 Sturt Chambers Townsville. The author gratefully acknowledges the guidance and assistance of the peer reviewers Charles Rowland and Richard William Barrister-at-law, any error is the author's alone

[1] *GAU v GAV* [2016] 1 Qd R 1 [14] (Morrison J).

[2] Gino dal Pont and Ken Mackie, *Law of Succession* (LexisNexis Butterworths, 1st ed, 2013) [3.1].

matters of which the Court must be satisfied before granting leave to make a statutory will application is that:

> (d) the proposed will … is or may be a will … that the person would make if the person were to have testamentary capacity.

B *The difference between cases where capacity has been lost as opposed to where it never existed*

This requirement, and the similar requirement under the corresponding legislation in other states, has given rise to controversy, particularly regarding how the Court should attempt to determine the intent of a person who has never had cognitive ability.

Shortly after the relevant legislation was introduced in New South Wales, Palmer J dealt with two separate applications in *Re Fenwick; Application of J R Fenwick; Re Charles*, involving very different facts.[3]

The applicant in *Re Fenwick* was the brother of an incapacitated person who had lost capacity as a consequence of an accident. There was a will which pre-dated the injury and an appreciable risk that because of changed circumstances, the estate would vest in the Crown *bona vacantia*.

By contrast, *Re Charles* involved an application brought by the Minister for Community Services on behalf of an 11-year-old boy who had suffered irreversible brain damage as a baby. The child had received an award of $50 000 under a criminal compensation scheme. The funds were held by the New South Wales Public Trustee until 'Charles' (a pseudonym) turned 18 years of age. Charles was the subject of a child protection order and was under the care of the Minister. The application was brought in circumstances where, should Charles die, his parents (who were alleged to be responsible for his injuries) would take his estate under the rules of intestacy.

Palmer J undertook an examination of the legal history of statutory wills, to reveal what he characterised as a legal fiction in the original approach to statutory wills by Courts in England and Wales:

> This review is not merely of academic interest. It shows, I think, that the law in the United Kingdom as to statutory wills had reached a highly unsatisfactory state by the time that Australian jurisdictions began incorporating similar statutory will provisions into their succession legislation. In cases in which an incapacitated person had never been able to form even the most rudimentary testamentary intention, the English Courts were resorting to a legal fiction in purporting to ascertain what testamentary disposition that person subjectively would have intended to make. Even where the incapacitated person had previously expressed some valid testamentary intention, the Courts were attributing to him or her a new testamentary intention upon the basis that the person, if temporarily restored to testamentary capacity, would have changed his or her mind. The fiction was employed to disguise, needlessly, that what the courts were really doing in such cases was making decisions, objectively based, in the best interests of the incapacitated person and his or her family.[4]

---

[3] (2009) 76 NSWLR 22 ('*Re Fenwick & Re Charles*'). Subsequent in-text short titles refer to the relevant application ('*Re Fenwick*' and '*Re Charles*').
[4] Ibid [7].

Palmer J recognised a number of competing social interests, including: testamentary freedom; the practical reality that testamentary dispositions made before a person loses capacity may fail to meet potential claims and/or expectations which 'contemporary society regards as just and reasonable'; and the desirability of recognising the wishes of an incapacitated person, where possible. His Honour also recognised as a risk the type of injustice inherent in cases like *Re Charles*, which the strict application of the rules of intestacy might cause.[5]

However, at the heart of the criticism of the legal fiction was the recognition that there are a number of situations where it would be impossible to determine the testator's wishes.

Palmer J recognised three circumstances where statutory wills could be utilised. Firstly '… where a person, having made a will, loses testamentary capacity and cannot make a later will or codicil in order to deal with changed circumstances', which he characterised as 'lost capacity cases'. Secondly, where '…persons who have never had testamentary capacity, usually because of mental infirmity from an early age', which he called 'the nil capacity cases'. Finally, the 'pre-empted capacity' cases, such as where a minor although capable of expressing a testamentary intentions is injured and then loses capacity.[6]

III THE CORE TEST

A *The controversy*

The statutory provision that gives rise to this controversy (in Queensland, s 24(d)) has been described as the 'core test',[7] not because the legislation elevates that requirement above the other requirements of s 24 but because in practice many statutory will applications succeed or fail depending on whether this provision can be met.

The concept is difficult in practice because the Australian states and territories have each adopted a slightly different, but nonetheless crucial, formulae of words in the relevant sub-section:

- '… is or may be a will … that the person would make if the person were to have testamentary capacity'*: Succession Act 1981* (Qld) s 24(d);
- '… reflects what the intentions of the person would be likely to be, or what the intentions of the person might reasonably be expected to be, if the person had testamentary capacity': *Wills Act 1997* (Vic) s 21B(b);
- '… is, or is reasonably likely to be, one that would have been made by the person if he or she had testamentary capacity': *Succession Act 2006* (NSW) s 22(b); *Wills Act 1968* (ACT) s 16E(b);
- '… would accurately reflect the likely intentions of the person if he or she had testamentary capacity': *Wills Act 1936* (SA) s 7(3)(b);

[5] Ibid [9].
[6] Ibid [23]–[28].
[7] Richards Williams and Sam McCullough, *Statutory Will Applications: A Practical Guide* (LexisNexis Butterworths Australia, 1st ed, 2014) 38.

- '…is one which could be made by the person concerned if the person were not lacking testamentary capacity': *Wills Act 1970* (WA) s 42(1)(b);
- '… is or is reasonably likely to be one that would have been made by the proposed testator if he or she had testamentary capacity': *Wills Act 2008* (Tas) s 24(e); and
- '… is or might be one that would have been made by the proposed testator if he or she had testamentary capacity': *Wills Act 2000* (NT) s 21(b).[8]

These nuances have prevented a uniform approach by the Courts of the different states and territories of Australia.

B *Substituted judgment*

In England, a concept of 'substituted judgment' developed, in relation to the application of the English statutory provision, *Mental Health Act 1959* (UK) s 103(1)(dd). This was derived from the judgment of Megarry V-C in *Re D(J)*.[9] His Honour identified five principles, based upon an artificial premise of what the subject testator would have done had he or she been in a lucid interval:

1. that it was to be assumed that the patient was having a lucid interval at the time the will is made;
2. during that lucid interval the patient has a full knowledge of the past, and a full realisation that as soon as the will is executed he or she will relapse into the actual mental state that previously existed;
3. that it is to be the actual patient who is to be considered and not a hypothetical patient;
4. during the hypothetical lucid interval, the patient is to be envisaged as being advised by competent solicitors; and
5. the patient is to be envisaged as taking a broad brush to the claims on his bounty, rather than an accountant's pen.

The limitations, and artificiality, of this approach were recognised in subsequent English decisions.[10] However, Megarry V-C's principles may, to some extent, have survived in Australia.

The Victorian Court of Appeal undertook an examination of the Victorian legislation, as it then was, [11] in *Bolton v Sanders*. [12] In that case, Dodds-Streeton AJA adopted Megarry V-C's five principles, applying them to the then s 26(b): 'the proposed will or revocation accurately reflects the likely intentions of the person if he or she had testamentary capacity':

---

[8] Ibid [2.4]
[9] [1982] Ch 237.
[10] *Re C (a patient)* [1991] 3 All ER 866; *G v Official Solicitor* [2006] EWCA Civ 816.
[11] See *Wills Act 1997* (Vic) s 21B(b).
[12] (2004) 9 VR 495.

> While not excluding flexibility in matters of 'detail', s 26(b) requires satisfaction on the balance of probabilities that the proposed will accurately reflects the testator's likely intentions. The question is not whether the testator would probably have preferred the proposed will to intestacy; nor whether the proposed will is one of a number of possible proposed wills, all of which might be equally likely to reflect the testator's likely intentions. If the proposed will no more probably reflects 'likely intentions' than a number of other possible dispositions, in my view the requirements of s 26(b) will not be satisfied.
>
> Section 26(b) does not demand certainty, but probability. However, as Mandie J recognised, the requirement of accurate reflection demands a substantial degree of precision and exactitude about the 'likely intentions'.[13]

C *Re Fenwick; Re Charles*

The approach of Dodds Streeton AJA should be contrasted with the views of Palmer J in *Re Fenwick* and *Re Charles*, where his Honour was particularly critical of 'substituted judgment':

> The fiction is undesirable because legal fictions usually distort, rather than clarify, what the Court is actually doing. As was said by Crennan J (with whom Gleeson CJ, Gummow and Heydon JJ agreed) in *Harriton v Stephens* (2006) 226 CLR 52, [269]: 'The common law is hostile to the creation of new legal fictions and the use of legal fictions concealing unexpressed considerations of social policy has been deprecated.' … See also per Gummow J in *Scott v Davis* (2000) 204 CLR 333, [128], [265], and in *Pyrenees Shire Council v Day* (1998) 192 CLR 330, [163]. If that approach had been taken to the development of the law of statutory wills in the United Kingdom, the fictions proposed in *Re D(J)* and *Re C* would have been discarded. In my opinion, the law of statutory wills in Australia should be developed in a way which justifies a result by a transparent process of reasoning founded upon reality, not upon contra-factual assumptions.
>
> More importantly, however, the fiction is unnecessary because the words of s 22(b) can be applied sensibly and pragmatically without it. Whether a proposed will is 'reasonably likely' to have been made by a person who never had, and never will have, the smallest capacity to form testamentary intentions may be answered only in the sense, discussed above: 'is there a fairly good chance that a reasonable person, faced with the circumstances of the incapacitated minor, would make such a testamentary provision?' In my opinion, in a nil capacity case, as distinct from a lost capacity case, this is the question which the words 'reasonably likely' in s 22(b) require the Court to answer. The considerations involved in the question are entirely objective.[14]

The legislative provision considered by Dodds-Streeton AJA in *Boulton v Sanders*[15] was subsequently amended by the *Wills Amendment Act 2007* (Vic). As has been observed by Williams and McCullough:

> This amendment was recommended by the Probate Users Committee, chaired by Harper J. In the Second Reading speech, the Attorney-General explained that under the core test on the leave application as it then stood:
>
> … it is very difficult for an application to be brought on behalf of a person who has never had testamentary capacity. This is because their likely intentions cannot be established with the required degree of precision and exactitude … As such, the current provisions of the [*Wills Act 1997* (Vic)] are not sufficiently wide to cover all of the cases that they should …[16]

---

[13] Ibid [111]–[112].
[14] Ibid [175]–[176].
[15] *Wills Act 1997* (Vic) s 26(b).
[16] Williams and McCullough, above n 7, [1.21].

It can be seen that the core test is not uniform. The formulation of the test that applies in the Northern Territory, Queensland and Western Australia should be somewhat easier to satisfy than those formulations that apply in the Australian Capital Territory, New South Wales and Tasmania. The South Australian and Victorian wording sets the bar somewhat higher.

IV Statutory Wills in Queensland

There are two distinct regimes under the Act. Section 19 empowers the Court to make an order authorising a minor to make, alter or revoke a will. Section 21 confers jurisdiction on the Court to authorise a will to be made, altered or revoked on behalf of a person without testamentary capacity (whether an adult or a minor).

A *Applications by or made on behalf of minors*

Under s 19, the application can be made by the minor or by a person acting on their behalf. Section 19(3) provides that the Court may make the order only if satisfied that: the minor understands the nature and effect of the proposed will and the extent of any property disposed of under it (s 19(3)(a)); the proposed will 'accurately reflects the intentions of the minor' (s 19(3)(b)); the Court is satisfied that it is reasonable in all the circumstances that the order be made (s 19(3)(c)); and the Court has approved the proposed will (s 19(3)(d)).

In *Re K*,[17] Atkinson J authorised the making of a will by a 16 year old who had suffered serious personal injuries in a motor vehicle accident. It was understood that litigation for personal injuries compensation was likely to result in a substantial damages award to be received before he was 18 years of age. The minor had become estranged from his father and was fully aware that should he die intestate, his father would receive part of his estate under the rules of intestacy. The minor's desire was that his mother (who had been his primary carer) should inherit from him should he predecease her. A child psychiatrist had provided a report which indicated clearly that the minor had testamentary capacity.

Her Honour authorised the making of the proposed will, concluding in the final paragraph of the judgment:

> This is an example of precisely the kind of case in which it is beneficial for the Court to be able to authorise a minor, who would not otherwise be able to do so, to make a will, so that his estate does not suffer the consequences which would follow if he were to die intestate.

B *Applications on behalf of persons who lack capacity*

A two-stage approach applies. An applicant must first seek leave of the Court under s 22. If leave is granted, the Court determines whether or not to make an order under section 21.

Section 23 of the Act requires that certain information be placed before the Court, on the hearing of an application for leave:

[17] [2014] QSC 94.

(a) a written statement of the general nature of the application to be made by the applicant under section 21 and the reasons for making it;

(b) satisfactory evidence of the lack of testamentary capacity of the person in relation to whom an order under section 21 is sought;

(c) any evidence available to the applicant, or that can be discovered with reasonable diligence, of the likelihood of the person acquiring or regaining testamentary capacity;

(d) a reasonable estimate, formed from the evidence available to the applicant, of the size and character of the person's estate;

(e) a draft of the proposed will, alteration or revocation in relation to which the order is sought;

(f) any evidence available to the applicant of the person's wishes;

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

(h) any evidence available to the applicant of the likelihood of an application being made under section 41 in relation to the person;

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

(j) any evidence available to the applicant, or that can be discovered with reasonable diligence, of the circumstances of a person for whom provision might reasonably be expected to be made by a will by the person in relation to whom the order is sought;

(k) any evidence available to the applicant, or that can be discovered with reasonable diligence, of any persons who might be entitled to claim on intestacy;

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

There are five matters of which the Court must be satisfied before granting leave, specified in s 24:

(a) the applicant for leave is an appropriate person to make the application;

(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 under section 21 is sought;

(c) there are reasonable grounds for believing that the person does not have testamentary capacity;

(d) the proposed will, alteration or revocation is or may be a will, alteration or revocation that the person would make if the person were to have testamentary capacity;

(e) it is or may be appropriate for an order to be made under section 21 in relation to the person.

Part of the function of the leave stage is to screen out unmeritorious applications,[18] although it is clear that the leave stage fulfils a wider purpose.[19]

At the second stage, the Court can only make the order if:

(a) the person in relation to whom the order is sought lacks testamentary capacity; and

(b) the person is alive when the order is made; and

(c) the court has approved the proposed will, alteration or revocation.

Section 25 of the Act provides that upon the hearing of an application for leave or an application at the second stage, the Court may have regard to the information provided pursuant to s 23 but the Court has the discretion to inform itself of any other matters, and is not bound by the rules of evidence.

C *Testamentary capacity*

One of the requirements for leave is that there are reasonable grounds for believing that the person does not have testamentary capacity. 'Testamentary capacity' is not defined in the *Succession Act*, but it is clear that the test to be applied is that in *Banks v Goodfellow* (1870) LR 5 QB 549 ('*Banks v Goodfellow*'). Ann Lyons J in *McKay v McKay* [2011] QSC 230 reiterated that test and its Australian evolution in the following terms:

> The test for testamentary capacity is well defined and is known as the *Banks v Goodfellow* test. In the 2009 decision of *Re Fenwick* [2009] NSWSC 530, Palmer J outlined the evolution of the UK and Australian statutory provisions in relation to statutory wills. His Honour specifically endorsed the *Banks v Goodfellow* test with respect to the lack of testamentary capacity required with respect to statutory wills. In *Frizzo v Frizzo* [2011] QSC 107, Applegarth J recently restated the test in the following terms: 'The classic test for testamentary capacity was enunciated in *Banks v Goodfellow*. The relevant principles were restated by Powell JA in *Read v Carmody* (unreported NSW Court of Appeal, Meagher, Powell and Stein JJA, 21 November 1998, BC9803374) '… that:
>
> 1. The testatrix must be aware, and appreciate the significance, of the act in the law upon which she is about to embark;
> 2. The testatrix must be aware, at least in general terms, of the nature, extent and value of the estate over which she has a disposing power;
> 3. The testatrix must be aware of those who may reasonably be thought to have a claim upon her testamentary bounty, and the basis for, and nature of, the claims of such persons;
> 4. The testatrix must have the ability to evaluate, and discriminate between, the respective strengths of the claims of such persons.
>
> In this last respect, in the words of *Banks v Goodfellow*, no disorder of the mind should poison her affections or pervert her sense of right, nor any insane delusion influence her will, nor anything else prevents the exercise of her natural faculties.
>
> The *Banks v Goodfellow* test does not require perfect mental balance and clarity; rather, it is a question of degree. As Cockburn CJ put it in that case, "the mental power may be reduced below the ordinary standard" provided the testatrix retains "sufficient intelligence to understand and appreciate the testamentary act in its different bearings".[20]

---

[18] *Boulton v Sanders* (2004) 9 VR 495, [11] (Dodds-Streeton AJA).
[19] *GAU v GAV* [2006] 1 Qd R 1, [45].
[20] [2011] QSC 230, [22].

The test enunciated by Applegarth J in *Frizzo v Frizzo* remains the standard test for testamentary capacity in Queensland.[21]

D *The application of the Core Test in Queensland*

The *Succession Act* does not differentiate those cases which Palmer J characterised as the 'lost capacity' cases and the 'nil capacity' cases.

The interpretation of s 24(d) in Queensland is not settled. In *Re Keane, Mace v Malone* [2011] QSC 47 ('*Re Keane*'), Daubney J followed and applied Megarry V-C's five principles. His honour observed:

> It seems to me that the appropriate approach under s 24(d) of the Queensland legislation ought be one which is informed by the five principles articulated by Megarry V-C In *Re D(J)*. The patent differences between the terms of the Queensland legislation and the statutory provisions in New South Wales, Victoria and South Australia render it quite inappropriate to import the tests which have been applied in those other places. … I would reject the submission that the exercise under the Queensland legislation requires an assessment of whether the proposed will would more accurately reflect the testator's likely intentions more probably than other possible dispositions. That may be the appropriate test under legislation in other States, but it is not the test under s 24(d).[22]

Ann Lyons J found in both *McKay v McKay* [2011] QSC 230 and in *Re Matsis; Charalambous v Charalambous* [2012] QSC 349 that it was sufficient to focus on the plain wording of the sub-section, without needing to resort to the approach taken in *Re D(J)*.

In *Van der Meulen v Van der Meulen*, Jackson J determined that the power under s 21 was discretionary and while recognising that there 'are some differences in the cases as to the approach to be followed … [and therefore he] need not consider [these cases as] there is no definitive principle to be applied'.[23]

In *JW v John Siganto as litigation guardian for AW and CW*, McMeekin J followed and adopted Jackson J's approach, recognising the competing arguments as follows:

> A number of cases have examined the appropriate approach to applying the generally expressed discretionary power in s 21 of the Act and provisions conferring similar powers in other States: *Re Keane* [2011] QSC 49 (Daubney J); *McKay v McKay* [2011] QSC 230, [79] (Ann Lyons J); *Re Matsis; Charalambous v Charalambous* [2012] QSC 349 (Ann Lyons J); *Lawrie v Hwang* [2013] QSC 289 (Ann Lyons J); *Re JT* [2014] QSC 163 (Ann Lyons J); *Sadler v Eggmolesse* [2013] QSC 40 (Atkinson J); *Van der Meulen v Van der Meulen* [2014] QSC 33 (Jackson J). There is little point to examining the differing factual situations and the resulting exercise of the discretion. As Jackson J observed in *Van der Meulen* (at [51]):
>
> "In my view, there is no definitive principle to be applied here. 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 circumstance".[24]

Jackson J again considered this issue in *VMH v SEL* and held:

---

[21] [2011] QSC 107, [21]–[22].
[22] [2011] QSC 47, [73].
[23] [2014] QSC 33, [50]-[51] ('*Van der Meulen*').
[24] [2015] QSC 300, [27].

> The parties submit 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. The validity of that consideration is recognised in the text of s 24(d). An alternative approach is that the court should authorise the will that a reasonable person of capacity in the person's position would have made having regard to the person's circumstances. That is all the court can do in some cases, because there is no reliable evidence of any relevant actual wishes.[25]

In *Re CGB*[26] Brown J refused an application seeking leave to make a statutory will. CGB was an 83 year old quadriplegic. Her Honour described him as a 'complex man' and indicated that he had made his fortune after being severely injured at the age of forty. The application was brought by his litigation guardian. Her Honour recognised the difference in the application of the core test between the States:

> While it was intended that the succession laws, including with respect to statutory wills, would be uniform throughout Australian States, that did not in fact occur. In particular, in the context of statutory wills, the test often described as the 'core test' that has to be satisfied with respect to the proposed differs between the various Australian jurisdictions. In Queensland, the core test and one of the pre-conditions for leave is that 'the proposed will … is or may be a will … that the person would make if the person were to have testamentary capacity'. That wording differs from other States such as New South Wales and Victoria.[27]

The estate in *Re CGB* was substantial,[28] the application was brought in the context that CGB was '…strongly independent and not an easy man to deal with on any level' and 'He thought he was going to live for ever or at least said that was the case.'[29] Her Honour went on to say, 'Despite numerous attempts by his advisors to get him to make a will for some 15-20 years, he did not make one and the present application has been brought about by the fact that he has still not made a will.'[30] It was clear on the evidence that the concept of intestacy was thoroughly explained to CGB.[31]

On the core test in section 24(d) Her Honour held:

> The use of the word 'may' speaks in the present tense.[32] In the sense used in the present legislation it is expressing possibility.[33] The court's role is not however to engage in an exercise of speculation. There must be an evidential basis for determining the will is one the testator is or may have made if the testator had capacity. It is not a case of determining what the testator should do.'[34]

Her Honour then went on to discuss the differing approaches to s 24(d), including the approaches of Palmer J in *Re Fenwick, Re Charles* that of Jackson J in *VMH v SEL*[35] and held:

> I do not consider on its proper construction s 24(d) provides for an exercise to be carried out by a reference to a 'hypothetical person' or 'reasonable person' but rather by reference to the person themselves. The section clearly refers to the will being one that is or may be one the person would make.

---

[25] [2016] QSC 148, [148].
[26] [2017] QSC 128.
[27] Ibid [27].
[28] Ibid [36]. It was valued at $17,370,699.
[29] Ibid [7]–[8].
[30] Ibid [8].
[31] Ibid [87].
[32] The wording of legislation originally proposed used the term 'might' referring to the past tense. See Queensland Law Reform Commission, *The Law of Wills*, Report No 52 (1997).
[33] John Simpson and Edmund Weiner (eds), *Oxford English Dictionary* (Oxford University Press, 2017).
[34] [2017] QSC 128, [198].
[35] [2016] QSC 148.

> The provision of 'may' in s 24(d) does provide for a will to be inferred by reference to matters other than just references to the proposed testator's or testatrix's intention and for the Court to draw an inference on the basis of the facts before it. This is supported by s 23 and s 25 of the *Act*. The approach is a similar one to that adopted by Hallen AJ in *Re Will of Jane* [2011] NSWSC 624, [81].
>
> This is consistent with the approach adopted by Philippides J in *RKC v JNS* [2014] QSC 313 where there was no direct evidence available of the testamentary wishes given the proposed testator's disability she had little or no ability to understand and communicate her wishes.
>
> This is also consistent with the fact that the application requires the court to be satisfied that the person does not have testamentary capacity at the time of determining leave. The lack of testamentary capacity may be a matter which was lost by the person in question or which never existed. The person in question may not have ever been in a position to express any testamentary intention or wishes such as in the 'nil capacity' cases.
>
> In such a case the Court's determination will depend on evidence of the relationships formed by the person in question and who is responsible for their primary care and infer whether it is a will the testator or testatrix may have made. This is consistent with the approach adopted in *Sadler v Eggmolesse* [2013] QSC 40.
>
> In the present case the test to be applied by the court has been identified in s 24(d) and the information to which the court is to have regard, although not exhaustive, is identified in s 23. The determination is ultimately a fact-finding exercise based on the evidence before the court.[36]

Ultimately, Brown J declined to make an order under s 22 for a number of reasons. The case was complex because of the competing interests of natural children and a party who claimed to be a de facto spouse and the clear evidence that CGB did not choose to make a will when competent and armed with cogent advice. Her Honour found that '[CGB] dying intestate was a matter of indifference to him'.

Applegarth J in a further complex case, *Re APB, ex parte Sheehy* granted leave and made a statutory will.[37] That case was determined upon the background of where an attorney under an Enduring Power of Attorney was granted an injunction in the Supreme Court against the purported revocation of that enduring power of attorney. The matter was referred to QCAT for determination of capacity. Mr Sheehy was appointed a litigation guardian and then, subsequent to the QCAT matter, brought an application for a statutory will.

APB suffered a medical incident in April 2013, he was admitted to St Andrews Hospital for cardiac care.

Applegarth J described four of the respondents as 'new friends'. CL was a real estate agent who in mid-2012 met APB concerning a property he owned. A friendship developed between CL and her husband JHL, KLA a retired doctor and MSR a Gold Coast solicitor who all became friends of APB.[38]

On 17 April 2013 CL, JHL and MSR assisted APB to leave St Andrews Hospital and thereafter took him to a solicitor with a view to having his existing power of attorney revoked. On 18 April 2013 APB purported to revoke the enduring power of attorney and made a new will.

---

[36] [2017] QSC 128, [221]–[225].
[37] [2017] QSC 201.
[38] Ibid [46]–[47]

His Honour after considering both *VMH v SEL* and *Re Fenwick; Re Charles* stated:

> As a general proposition, the wishes of a person who does not have capacity do not carry the same weight as those of someone who does.[39] The weight to be given to any statement of intention depends on the circumstances under which it came to be made. Substantial weight may be given to a statement of actual intention if the extent of incapacity is slight.[40] By contrast, a statement of intention by a party who lacks capacity may warrant very little weight if the incapacity leads the person to be mistaken about the truth or even deluded 'about the natural objects of his or her testamentary bounty — a not infrequent symptom of testamentary incapacity'.[41] It also may warrant very little weight if the person was vulnerable to suggestion, improper influence or bad advice, being a vulnerability which the person would not have experienced if he or she had testamentary capacity.[42]

After a thorough analysis of the authorities his Honour went on to hold:

> Before granting leave the Court must be satisfied, in terms of s 24(d), that the proposed will 'is or may be' a will that the person would make if the person were to have testamentary capacity. The words 'may be' and the scheme of the *Succession Act* make it possible to imagine cases in which there is more than one possible will which would satisfy the terms of s 24(d). The will proposed by the applicant for leave may be one. Wills in a different form, proposed by other parties, also 'may be' a will that the person would make if he or she had testamentary capacity. The differences between them may be slight or substantial.
>
> Section 24(d) does not require that the will proposed by the applicant be the one that is most likely that the incapacitated person would have made.[43] The will proposed by the applicant in seeking leave may require amendment in the light of evidence which emerges, draft wills proposed by other parties and suggestions by parties and the Court.
>
> If the proposed will satisfies the requirement of s 24(d) and the other requirements of s 24, and leave is granted, this does not mean that the proposed will necessarily will be approved. Approval depends on the exercise of a separate discretion.
>
> If leave is granted to make the application, then an order authorising a will to be made on behalf of the person requires proof that the person lacks testamentary capacity. If that and the other requirements of s 21 are satisfied then the Court exercises a broad and flexible jurisdiction,[44] and the Court may make the order on the conditions the Court considers appropriate.[45]
>
> The discretion at the second stage is not constrained by express statutory criteria. Instead, the discretion should be exercised in the particular circumstances and having regard to the purpose of the legislation. Having regard to the beneficial purpose of the legislation and the protective nature of the jurisdiction, an important consideration in the exercise of the discretion under s 21 is the will the person probably would have made if he or she had testamentary capacity. Other considerations will apply in the particular circumstances, and the legislature having not listed factors, it is inappropriate and unhelpful to articulate the factors which might influence a discretion of the kind conferred by s 21.

Both Brown J in *Re CGB* and Applegarth J in *Re APB ex Parte Sheehy* recognised the unsettled nature of the dispute concerning the core test in Queensland.[46] Both recognised 'the broad and flexible jurisdiction' of the Court. It is plain that the evidence in both these cases played heavily upon the exercise of the jurisdiction.

---

[39] *VMH v SEL* [2016] QSC 148, [132].
[40] *Re Fenwick; Re Charles* (2009) 76 NSWLR 22, 55 [157].
[41] Ibid.
[42] [2017] QSSC 201, [104]
[43] See *A Limited v J* [2017] NSWSC 736, [82] in relation to the comparable provision of the New South Wales legislation.
[44] *GAU v GAV* [2016] 1 Qd R 1, [48].
[45] *Succession Act* s 21(4).
[46] [2017] QSC 201, [121]–[125].

E *Section 24(e)*

In *ADT v LRT*, Flanagan J considered an application brought by the husband of an incapacitated testatrix in circumstances where the applicant readily stated that the amendment of his wife's will may impact property settlement proceedings in the Family Court in respect of the separation of her son and her daughter-in-law.[47]

His Honour found that s 24(d) was satisfied on the evidence, but refused the application, by reason of s 24(e). That case was the subject of a successful appeal, reported as *GAU v GAV*.[48] The Court of Appeal was primarily concerned with the operation of s 24(e):

> The scope of operation of clause 24(e) is to be discerned against that background and by reference to the words of the provision itself. It is clear from those words that the court need be satisfied that an order under s 21 is, or may be, appropriate, and no more. The court need not be satisfied that such an order is appropriate; satisfaction that it may be appropriate will suffice. The nature and extent of the enquiry the court need undertake is so informed: the enquiry need only be one that is sufficient for the court to be satisfied as to the appropriateness of making an order under s 21, at either level. Where the court is not satisfied at either level, it may not give leave.[49]

F *The second stage*

Subsequently, in *VMH v SEL*, Jackson J determined an application in which leave had already been granted pursuant to s 22, and the Court was accordingly concerned with the nature of the enquiry to be conducted at the second stage.[50] His Honour observed:[51]

> The parties submit 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. The validity of that consideration is recognised in the text of s 24(d). An alternative approach is that the court should authorise the will that a reasonable person of capacity in the person's position would have made having regard to the person's circumstances. That is all the court can do in some cases because there is no reliable evidence of any relevant actual wishes.

G *Standing*

Section 24(a) provides that the Court must be satisfied that the applicant is an appropriate person to make the application. Being a potential beneficiary under the proposed statutory will does not disqualify an applicant. McMeekin J examined this proposition in *JW v John Siganto as Litigation Guardian for AW and CW*:

---

[47] [2014] QSC 169.
[48] [2016] 1 Qd R 1.
[49] Ibid [49].
[50] [2016] QSC 148.
[51] Ibid [148].

> Consideration of s 24(a) is important in this case as the applicant will benefit significantly if the proposed will is made. Obviously, some caution is justified in these circumstances but that is not a disqualifying factor. As Ann Lyons J has observed that feature will often be present in these cases: *Lawrie v Hwang* [2013] QSC 289, [24]; *McKay v McKay* [2011] QSC 230 where the applicant/husband was considered to be the appropriate person to bring the application even though he was to take the whole of the estate in circumstances very similar to those here.[52]

A notable example is *Re JT*,[53] where the application was brought by an ex-husband of the proposed testator, in circumstances where he would receive a significant benefit under the proposed will.

H *Identifying interested persons*

Section 24(b) requires the Court to be satisfied that adequate steps have been taken to allow representation of all persons with a proper interest in the application.

At the core of the Court's consideration is the possibility that the interests of particular persons could be overlooked, or impacted by the proposed will.

The factual background in *JW v John Siganto as Litigation Guardian for AW and CW*[54] provides an interesting illustration. The applicant was the incapacitated person's father. RW had suffered catastrophic injuries as a consequence of a motor vehicle incident when he was 20 years old. His claim for damages was settled for $5.2 million. RW required, and received from his parents, 'around the clock' assistance. His father had left his employment. Prior to his injury, RW was in a de-facto marriage and had two children, AW and CW. His de facto wife had 're-partnered' and had two further children. AW and CW were cared for by the applicant and his wife, due to Department of Child Safety intervention. McMeekin J made an order in favour of the applicant, remarking:

> Because of their personal devotion to RW's care the significant costs that the award allowed for in the way of provisional daily care have not been incurred. This has resulted that, with investments, the value of the RW's estate has grown and is now over $9,000,000.[55]

The statutory will made provision for the applicant and his wife (20%) and for RW's sister (5%) and each child receiving a gift held in trust until they reached the age of 25 (37.5% each).

V SITUATIONS WHERE A STATUTORY WILL MAY BE APPROPRIATE

A *Examples*

There are numerous examples where a statutory will should be considered. The following is a non-exclusive list of such circumstances:[56]

1. where a specific gift is addeemed by the lawful actions of an attorney;

---

[52] [2015] QSC 30, [17].
[53] [2014] QSC 163.
[54] [2015] QSC 300.
[55] Ibid [11].
[56] See Williams and McCullough, above n 7, Ch 3.

2. where a gift has lapsed;
3. where a person who has never made a will becomes incapacitated, and has a large estate;
4. where there is a 'caring parent' and an 'absent parent' in a situation where both would take equally if the rules of intestacy were to apply;
5. misconduct of a potential beneficiary;
6. where there are worthy recipients who would be disadvantaged by a strict application of the rules of intestacy;
7. where there has been a reconciliation between a child and an elderly parent; and,
8. to protect assets presently held by a person lacking testamentary capacity.

B *Family Court proceedings*

Section 79 of the *Family Law Act 1975* (Cth) provides the Family Court and the Federal Circuit Court with broad powers to alter property interests of parties to a marriage. There is a four-step process.

1. the identification of the property pool;
2. an assessment of the contributions of the parties;
3. an assessment of future factors; and,
4. the property adjustment must be just and equitable.

As mentioned above, in *GAU v GAV*, the Queensland Court of Appeal allowed an appeal in circumstances where leave had been refused at first instance in respect of the proposed amendment of the applicant's wife's will, for the reason that such amendment may impact property settlement proceedings in the Family Court. The proposed alteration was by way of a codicil which was designed to amend a gift to her son, so that the relevant property instead passed into a testamentary discretionary trust. *GAU v GAV* is an important case and illustrates the protective nature of the statutory wills jurisdiction. Relevantly, the property the subject of the application was still in the hands of the person who lacked capacity. Had she testamentary capacity, there was no doubt that she could have amended her will to put in place a discretionary trust.

C *Bankruptcy*

In *Doughan v Straguszi*, Henry J granted leave to apply in an unopposed application where there was the prospect of bankruptcy arising out of a beneficiary's business failings.[57] His Honour distinguished the decision of White J of the New South Wales Supreme Court in *Hausfeld v Hausfeld*, where it had been found to be inappropriate to make a statutory will '… in order to defeat the creditors of the testator's son'.[58] White J held: 'I do not think that

[57] [2013] QSC 295.
[58] [2012] NSWSC 989, [13].

the court should condone such a course. The policy of the law is that people should pay their debts so far as they are able. It is not that they be sheltered in the way proposed'.[59]

Henry J distinguished the case before him on a number of grounds, holding:

> What is proposed here is quite different. There is no material to suggest that any part of the proposed testamentary arrangement is structured to allow someone else to provide for Mr Straguszi in the event he is made bankrupt. To the contrary, the materials show, if there be any connection between the proposed new will and Mr Straguszi's problems, that the intention is to protect a much broader array of family members and their future potential interest. The intention is that part or all of the family farm not be lost to them because of Mr Straguszi's specific problems. That is, the actuating purpose, if it be connected at all with Mr Straguszi's present problems, is not to defeat his creditors but to protect the broader family's future beneficial interest, an interest which the testatrix plainly long aspired to would persist through the generations.[60]

Plainly, Henry J took the view that had the testatrix had capacity, undoubtedly she would have taken steps to protect her estate in the best interests of her grandchildren.

VI COSTS

A *Risks where an application is unsuccessful*

Many applications that come before the Court are unopposed and a common order, where such applications are found to have been properly brought, is that the costs of the application be paid out of the estate of the proposed testator on the indemnity basis.[61] However, the jurisdiction is protective of the rights of the subject person. In *Re Keane; Mace v Malone (No 2)*,[62] other considerations were relevant, where the application was unsuccessful:

> Submissions on costs were also received from the Public Trustee of Queensland, on behalf of Patrick. The Public Trustee had not appeared at the hearing of the application, because of an assurance given by the applicant that no adverse costs order would be sought against Patrick. Having been notified, however, that the respondent now sought costs to be paid out of Patrick's estate, the Public Trustee delivered submissions opposing such an order. It was submitted by the Public Trustee that such an order would cause the burden of costs to fall on Patrick, even though the respondent's contest of the application was motivated by their attempt to preserve their ultimate entitlement to Patrick's estate. The Public Trustee submitted:
>
> > "[Patrick] is a person under a disability. He is in his advanced years in a nursing home in Toowoomba. His inter vivos estate should not be further diminished so as to deprive him of any part of it for his personal use and well being simply because members of his family have sought to engage in litigation in which he has played no part."
>
> I accept the Public Trustee's submissions in this regard. In practical terms, the benefit of success in this piece of litigation was and is for the respondent, who has protected their ultimate entitlement to receive Patrick's estate when he dies. There was, and is, no benefit for Patrick in this litigation. Moreover, I see no reason why the assets which are available to maintain Patrick in the nursing home should in any way be diminished by this spat between the competing camps in the family.

---

[59] Ibid.
[60] [2013] QSC 295, 4.
[61] See, eg, *McKay v McKay* [2011] QSC 230 and *Re Matsis; Charalamblous v Charalambous* [2012] QSC 349.
[62] [2011] QSC 98, [4]-[5] (Daubney J).

His Honour ordered the unsuccessful applicant to pay the respondents' costs on the standard basis.

VII CONCLUSION

Where a person lacks testamentary capacity and there is some risk to their estate, whether it be by way of anticipated estate litigation, or uncertainty or patent unsuitability as to dispositions under an existing will or on intestacy, a lack of capacity is no bar to action. An application for a statutory will should be considered as an appropriate tool for successful estate planning.

The requirements as set out in sub-division 4 are a roadmap for a successful application, but care must be taken to ensure that the relevant information is provided to the Court in accordance with s 23 of the *Succession Act* and that the s 24 requirements, particularly the 'core test', can be met. As Daubney J observed in *Re Keane*, judges will be aware of the possibility that an application represents no more than 'a spat between competing camps in the family'. For that reason, practitioners should be careful to ensure that any such application has merit.