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Informal and Statutory Wills – Succession Act 2006 (NSW)

Ramena Kako, Barrister-at-Law

Informal Wills

The phrase ‘informal wills’ is used to refer to wills which do not satisfy the formal requirements of a will. They are usually documents upon which the testamentary intentions of the deceased appear and there is evidence that shows that it was more probable than not, that the deceased intended the document to constitute his/her will.

Section 8 of the Succession Act 2006 provides:

“Dispensing with requirements for execution, alteration or revocation of a will

8 When may the Court dispense with the requirements for execution, alteration or revocation of wills?

(1) This section applies to a document, or part of a document, that:

- (a) purports to state the testamentary intentions of a deceased person, and
- (b) has not been executed in accordance with this Part.

(2) The document, or part of the document, forms:

- (a) the deceased person’s will—if the Court is satisfied that the person intended it to form his or her will, or
- (b) an alteration to the deceased person’s will—if the Court is satisfied that the person intended it to form an alteration to his or her will, or
- (c) a full or partial revocation of the deceased person’s will—if the Court is satisfied that the person intended it to be a full or partial revocation of his or her will.

(3) In making a decision under subsection (2), the Court may, in addition to the document or part, have regard to:

- (a) any evidence relating to the manner in which the document or part was executed, and
- (b) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person.

(4) Subsection (3) does not limit the matters that the Court may have regard to in making a decision under subsection (2).

(5) This section applies to a document whether it came into existence within or outside the State.

Section 8 deals with the court's dispensing power in relation to will formalities regarding execution, alteration or revocation if the court is satisfied that the deceased intended the document, or part of the document, to:

- Constitute his/her will;
- Amend his/her will;
- Revoke, partially or fully, his/her will.

What are the 'will formalities'?

Section 6 of the Succession Act deals with the way in which a will should be validly executed. It provides:

(1) A will is not valid unless:

- (a) it is in writing and signed by the testator or by some other person in the presence of and at the direction of the testator, and
- (b) the signature is made or acknowledged by the testator in the presence of 2 or more witnesses present at the same time, and
- (c) at least 2 of those witnesses attest and sign the will in the presence of the testator (but not necessarily in the presence of each other).

...

(6) This section does not apply to a will made by an order under section 18 (Court may authorise a will to be made, altered or revoked for a person without testamentary capacity).

Section 6 applies to wills made on or after 1 March 2008. The section repeals sections 7 and 9 of the WPAA. Those sections still apply to wills made before 1 March 2008, whether the testator dies before, on or after that date.

Section 18A of the Wills, Probate & Administration Act 1898 (WPAA)

The former provision dealing with informal wills, and which would be familiar to most people, is s18A (1), which states:

“A document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in accordance with the formal requirements of this Act, constitutes a will of the deceased person, an amendment of such a will or the revocation of such a will if the Court is satisfied that the deceased person intended the document to constitute the person’s will, an amendment of the person’s will or the revocation of the person’s will.

S18(2) In forming its view, the Court may have regard (in addition to the document) to any other evidence relating to the manner of execution or testamentary intentions of the deceased person, including evidence (whether admissible before the commencement of this section or otherwise) of statements made by the deceased person.

Section 8 of the Succession Act applies to wills whether made before, on or after 1 March 2008, if the testator dies on or after 1 March 2008. Where the testator dies on or after 1 November 1989 and before 1 March 2008, s18A of the WPAA continues to apply. (Section 18A was repealed by the Succession Act 2006.)

Background

Section 18A of the WPAA came into effect on 1 November 1989 following the recommendations of the NSW Law Reform Commission in its Report *Wills – Execution and Revocation* (LRC 47, 1986) in Ch 6.

The purpose behind s18A was for Parliament to acknowledge the injustices which the strict application of the law as to will formalities had caused in particular cases. Parliament accepted, by inference, the Law Reform Commission’s rebuke that “the rule of literal compliance can produce results so harsh that sympathetic courts are inclined to squirm”.

Section 18A was remodeled on s12(2) of the Wills Act 1936 (SA). There were some differences however between the 2 provisions. In particular, the SA provision requires a criminal onus of proof namely, that the Court must be satisfied that there can be no reasonable doubt that the deceased intended the document to constitute a will. The NSW provision only requires a civil

standard of proof. Namely, that on balance, it was more probable than not that the deceased intended the document to constitute a will.

Regardless of the differences, South Australian case law has been referred to, and applied, in NSW s18A cases. Of course, the cases on s18A will be relevant to cases on s8 of the SA.

Tests & procedure for admitting informal wills

- A document (or part of a document) that purports to state testamentary intentions; and
- Which forms the deceased's will (provided the Court is satisfied the deceased intended it to form his will).

What is a document?

In comparison with s18A of the WPAA, s8 expands the court's dispensing power to parts of a document (s8(1)) and documents which came into existence outside NSW (s8(5)).

The wide definition of document in s21 of the Interpretation Act 1987 applies to s8 and a document is not restricted to "any paper or material on which there is writing": s3(1). The s21 Interpretation Act definition of 'document' is:

'document means any record of information, and includes:

- (a) anything on which there is writing, or
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or
- (d) a map, plan, drawing or photograph.'

In *Treacey v Edwards* (2000) 49 NSWLR 739 Austin J considered the application of s21 of the Interpretation Act definition to the WPAA. His Honour in that case held that an audio tape was capable of being incorporated by reference into a formally executed will or alternatively treated as a testamentary document in accordance with s 18A of the WPAA. The same reasoning would apply to an audio tape, CD or DVD.

Evidence and standard of proof

Evidence of deceased's intention that document is to form a will:

The court is not limited by s8(3) in relation to the evidence it may consider in making its decision under s (2). S18A did not have a corresponding provision. Extrinsic evidence can be adduced to establish the deceased's testamentary intentions. For example, words that were said by the deceased to persons either at the time of making the document or after.

Other relevant evidence includes: where the document was found and whether it was found with other important documents; whether the testator ever referred to the document; the habits of the testator, was s/he a person who would normally approach a solicitor for things like this or was s/he a person who would tend to do things on his/her own bat or with the advice of a relative? And of course, the text of the document itself.

The standard of proof is a civil standard. That is, the Court must be satisfied that it is more likely than not that the deceased intended the document to constitute his/her will. The court can draw an inference as to the relevant intention. The question is a question of fact.

Procedurally, a Summons is usually filed seeking a declaration under s8 of the Succession Act that a document [insert details] constitutes the last Will of the deceased. All persons who could have an interest in the deceased's estate should be served with citations to see the proceedings. Any defendant?

Cases and examples

To date, I am aware of only 2 cases on s8 of the Succession Act: *the Estate of Smith and Steggall v Quartermine* (see below).

Smith, Estate of A.N.H. - Application of P.A. Smith [2009] NSWSC 907

The Plaintiff sought a declaration under s 8 of the *Succession Act* 2006 (NSW) that a document dated 14 January 2008 constituted the last Will of the late Arthur Norman Henry Smith.

The document was dated 14 January 2008 and was wholly in the handwriting of the deceased. It was a stationer's form of Will. It had been fully filled in by the deceased who had appointed the Plaintiff as Executor and had then made dispositions of the whole of his estate.

The document was, on the back, filled in with the name of the deceased (his initials and surname), his address and the date of the document. The document was not, however, formally executed and witnessed as required. In fact, the space provided for the signature of the testator and the signature of witnesses had been left blank entirely, although above it the deceased had written the date of the document, "14 January 2008".

In that case, Palmer J found that there was a very obvious inference that the testator intended that the document represent his last Will. His Honour said [at 4] "The absence of his duly

witnessed signature may possibly be explained by the fact that he lived alone on a farm property with no convenient neighbours. Perhaps he could not immediately find anyone to witness his signature and contented himself with filling in the details on the back of the document, regarding that as an indication that the Will was final and immediately effective. [5] I am satisfied by the evidence adduced in support of the application that, after he had completed the document dated 14 January 2008, the deceased made statements to third parties confirming that he had made an effective will in terms of the document. In other words, I am satisfied that the deceased did not regard the document as a draft.” Palmer J was satisfied that the deceased intended the document to operate as his last Will and made the declaration.

Quartermain Estate - Steggall v Quartermain [2009] NSWSC 553

This was an application in solemn form that there be admitted to probate a will, formally and duly executed, together with a handwritten document, not executed by the deceased, but said to be a codicil to the formal will. The Plaintiff sought a declaration, pursuant to s 8 of the *Succession Act 2006* (NSW), that the informal codicil constitutes a valid codicil to the formal will. All beneficiaries under the formal will and the informal codicil, being six of deceased’s eight children, were given notice of the proceedings and only one appeared to oppose the declaration as to the validity of the informal codicil.

The Plaintiff was the executor appointed by the deceased in a will dated 21 June 2005. That will was prepared by the Plaintiff, who was the deceased’s solicitor for many years. The will was duly executed and witnessed. There was no issue as to its validity.

The deceased was admitted to hospital on 25 April 2008 and died there on 22 May 2008.

After his death, there was found on the dining room table in the deceased’s home a spiral bound notebook, about A5 in size, in which the deceased had written in his own handwriting. The writing, which occupied two and a half pages, was not dated but Sackville J inferred from the evidence of the deceased’s daughter and his ex-wife that it was written by the deceased between 24 March and 25 April 2008.

There was no one else living in the deceased’s home at that time. There are no words in the document which expressly stated that the deceased intended it to operate as a will or codicil. This was the ‘informal codicil’.

In October 2007 the deceased said to a solicitor in the Plaintiff’s office that he intended to change the formal will. He did not say what changes he wished to make. He never asked the solicitor, with whom he had dealt for many years, to take instructions for a new will or a codicil. One of the deceased’s daughters, Kanisa (also known as Alicia and, familiarly, as PeeWee) received nothing under the formal will. The evidence was that over the years she was “*in and out of favour*” with the deceased. However, the evidence suggested that there was a

reconciliation between the deceased and this daughter before the deceased's death. Sackville AJ accept that the deceased expressed an intention to include her in his will.

The deceased was a successful company director and was obviously well acquainted with business affairs. Sackville AJ inferred that the deceased would have appreciated that it was highly advisable to have a solicitor assist him to change his will. Because of the size of his estate and his long term dealings with the Plaintiff and his firm, I infer that the deceased would have had no difficulty, in ordinary circumstances, in contacting the Plaintiff or his firm between October 2007 and April 2008 if he had wished to give instructions for a new will or a codicil.

The informal codicil commenced without preamble or explanation as follows:

"Lyn & Mark NIL

Bernice, her painting, also paintings of Paul, Adrian and Raquel to be sent to each."

There then followed a list of personal items of relatively little value. At the conclusion of the list are the words *"Bernice also receives A\$250,000"*. (Under the formal will Bernice received UK£250,000 and a fifth of residue).

On the next line of the document appears *"Paul"*, followed by a list of personal items amongst which appear the words *"A\$500,000 + family coat of arms"* and then more personal items. Under the formal will Paul received UK£250,000 and a fifth of residue.

On the next line appears *"Adrian As above"* and a list of personal items amongst which are the words *"A\$250,000"*. Under the formal will Adrian received UK£250,000 and a fifth of residue.

There was a space of one line and then the words: *"Raquel to received Leather products same as Bernice plus her portrait. In addition she is to receive A\$400,000 + 10 paintings from my home"*. Under the formal will Raquel received UK£25,000 and a fifth of residue.

Then follows: *"Jomphol (who is a son of the deceased) you have received so much but never enough I bequeath you A\$500,000. You liked my leather jackets, black & red (2). There may be other clothes that Paul cannot use. You are welcome after Paul has helped himself."*

Then follow the words: *"PeeWee (Kanisa) Well kid, last but not least. I leave you A\$500,000 and [undecipherable] furniture, fixtures, fittings + 3 4 paintings"*.

On the next page appears: *"Gold. To be put into 6 piles. Gems to be valued and divied as evenly as possible between all. My watch collection to be divided between the three sons on a value basis. The ladies gold watch to go to Bernice."*

On a new line appears: *“The balance of value above what has been bequeathed after costs to be shared on an equal basis between Bernice Paul Adrian, Raquel, Kim and Alicia (6)”*.

There was nothing further written in the notebook.

The informal codicil gave expression to the deceased’s stated intention of including Kanisa (“PeeWee”).

His Honour said [at 20]: “The question is purely one of fact: am I satisfied that the deceased intended the informal codicil, though not executed as a will, to form an immediately effective alteration to the formal will: *In the estate of Masters (dec’d); Hill v Plummer* (1994) 33 NSWLR 446, at 449 per Kirby P and at 466 per Priestley JA.

[21] There are two possibilities. The first, for which Bernice contends, is that the deceased wrote the document merely as an aide memoire, or draft, of instructions which he might have wished to give his solicitors for the alteration of the formal will. If this is so, then it may be assumed that the deceased had no intention that any alteration of the formal will should be effective until embodied in a formally executed codicil. The second possibility, for which Kanisa contends, is that the deceased intended that the informal codicil be given testamentary effect even though he must have realised that it had not been executed formally.

[22] I am satisfied that the second possibility is correct. It is true that the deceased had the opportunity to instruct his solicitors to prepare a formal codicil. It is true also that the deceased did not write anything at the commencement of the document to show that he intended it to have immediate testamentary effect. The document in part reads like an aide memoire in that it lists minor personal items that the testator would like the relevant beneficiary to have although it does not always make a gift of those items in so many words. If the document had contained no more than such lists I could not have concluded that it was anything more than a draft or an aide memoire. However, when the deceased came to deal with Jomphol and Alicia (Kanisa) it is very clear that he was addressing each of them directly. He intended Jomphol to read the document because he admonished Jomphol about his past conduct. Then, despite the admonition, the testator immediately made an effective disposition in the language of will-making: *“I bequeath you A\$500,000”*.

[23] Likewise, the deceased clearly intended Kanisa to read and understand what he had written to her. As with Jomphol, he expressed himself in words of immediate gift in the language of will-making: *“I leave you A\$500,000”*, etc.

[24] In the final paragraph, the deceased again uses the formal language of will-making, i.e. *“bequeath”* to refer to the specific dispositions which, he suggests, have been made earlier in the document. He then directs that the *“balance of value”* is to be divided equally between six of his children, including Kanisa.

[25] I consider it to be of significance that the notebook containing the informal codicil was left by the deceased on the dining table, where it would doubtless be seen immediately, rather than left amongst other papers in some less visible or accessible place. As I have noted, in the weeks before he was taken to hospital the deceased was living alone in his home. There was nobody to whom he could easily give the informal codicil for safe keeping. It is highly possible, if not probable, that the deceased, realising that he would have to go to hospital very soon and that he might not have the opportunity of instructing his solicitors to draw a formal codicil, decided to write down his testamentary intentions in his notebook and leave it where it would easily be seen so that it could be given effect.

[26] The informal codicil certainly contains vague terms as to the identity of various personal items to be given to various beneficiaries. This vagueness may give rise to problems of construction. However, there is nothing in the document as a whole to suggest that it is merely a rough draft or notes of instructions to be given to a solicitor. The document is written fluently and without multiple crossings out or insertions. Indeed, the deceased seems to have made an effort to control shaky handwriting and to write legibly.

[27] For these reasons, I am satisfied that the deceased intended that the informal codicil form an alteration to the formal will. Both the formal will and the informal codicil will be admitted to probate.”

***Bannister v Perpetual Trustee Co Ltd; Estate of Mascot Zita Blake deceased* [2008] NSWSC 1283 Young CJ in Eq**

These were proceedings for the plaintiff to obtain a grant of probate in solemn form of the will of the deceased testatrix which was made on 24 December 2002.

Young CJ in Eq said at [2] “Were it not for a document of 15 February 2005, which the defendants say should be held to constitute Mrs Blake's last will pursuant to s 18A of the *Wills, Probate and Administration Act 1898*, there would be no doubt that probate should be granted of the 2002 will. However, the document of February 2005 at least purported to revoke the 2002 will.”

The document of 15 February 2005 as presented to the court had two separate pieces of paper. On the larger piece of paper, a double sheet, the first page was numbered 1 on the obverse side and on the reverse side the page was numbered 2. It appeared to have been torn from an A4 size exercise book. Pages 3 and 4 were blank, however, there was on page 3, that is the blank page, the impression of page 1 which showed that page 3 was directly under page 1 when the document was written. The separate and smaller sheet did not bear any impression of the writing on pages 1 or 2 and was a single sheet of paper which appeared as if it may well have been taken from the same exercise book, but it was not written resting on the double sheet.

The document reads as follows:

“ 1

TUESDAY 15th FEBRUARY 2005

THIS DOCUMENT IS MY LAST WILL AND TESTAMENT.

I HAVE ONE SON, PAUL JONATHAN BLAKE
AND ONE GRANDSON DUSTIN BLAKE.

I OWN MY HOME WHERE I HAVE RESIDED
SINCE 1970 WITH MY SON PAUL JONATHAN BLAKE.
MY GRANDSON, DUSTIN BLAKE RESIDES AT
THE HOME OF HIS MOTHER
ESTELLA CAMPBELL IN GOSFORD AND HIS
STEPFATHER SCOTTIE CAMPBELL.

I WISH TO REVOKE ALL PREVIOUS WILLS
WHICH WERE DEPOSITED WITH
MR PETER KENNEDY
LAWYER OF SYDNEY N.S.W.
AND MR LEON DAVIES
LAWYER OF SYDNEY N.S.W.

AT THIS TIME I HAVE SPOKEN WITH
MR BRUCE HOCKING LAWYER OF SYDNEY N.S.W.

2

MAINLY ABOUT ESTABLISHING A DRAMA
S IN MY SONS NAME
PAUL JONATHAN BLAKE. BUT THIS IS STILL
BEING NEGOTIATED
I WISH MY SON TO BE CARED FOR IN MY HOME AT CASTLECRAG UNTIL
HIS DEATH.
PERPETUAL TRUSTEES WHO MANAGE
MY SONS ESTATE WILL APPLY TO THE
COURT FOR DISTRIBUTION OF FUNDS HELD
BY THEM, AT THE TIME OF PAULS DEATH.

IT IS MY UNDERSTANDING THAT IF PAUL
PREDEC ME [deleted] HIS MOTHER, THEN HIS
NEXT OF KIN IS DUSTIN BLAKE TO WHOM
CONSIDERATION MUST BE GIVEN REGARDING

[deleted] CAREFUL MANAGEMENT OF HIS INHERITENCE.

5

VALUE OF MY HOME IN CASTLECRAG

MONIES IN WESTPAC BANK (NORTHBRIDGE BRANCH AT THE TIME OF MY DEATH

RENOVATIONS AND ADDITIONS TO MY HOME

IN CASTLECRAG, UNDER MR DENNIS LEACH (ARCHITECT) OF LEACH & ASSOCIATES

MR JOHN HERBERT BANNISTER

[line deleted]

[line deleted]

IN THE EVENT OF MY DEATH

IS TO BE CONSIDERED FINANCIALLY FOR HAVING FAITHFULLY SERVED PAUL, MYSELF

AND THE STAFF IN CASTLECRAG, [deleted] IN ADDITION

TO WHICH HE LIASED WITH THE ARCHITECT (LEACH)

AND SIMPLIFIED THE COMPLEXITIES OF MY UNDERSTANDING

[deleted] PLANS ETC."

Young CJ in Eq said *"However, it is impossible to set out exactly how it appears in the handwritten original. For instance, where on page 5 two lines are crossed out, in the original before the crossing out they read: "MR JOHN HERBERT BANNISTER, DR DESERVES AND IS ENTITLED TO A FEE FOR HAVING FOR FAITHFULLY."* In relation to s18A His Honour said at [10] *"the section has been construed by courts on a number of occasions though there is little conflict in the various decisions. One of the early decisions is Re Masters (1994) 33 NSWLR 446 where the Court of Appeal made it clear that s 18A should be given a beneficial application. In Permanent Trustee Co Ltd v Milton (1995) 39 NSWLR 330 at 334, Hodgson J said that where a section 18A document operates as a will, then once the testator has evidenced the intention that that document operate as a will, "it is clear that it is not sufficient to deprive the document of effect that the testator forgets about the document or loses testamentary capacity."*

[11] So that once a testator evinces the intention, either at the time the testator makes the document or subsequently, that it is to operate as a will or revocation or an amendment under s 18A, then the document is not deprived of that effect by the testator afterwards forgetting

about it. However, the fact that the testator does forget about it or acts inconsistently with it may assist the court to find that it was never intended to be a will in the first place.”

...

...

[13] The court must under s 18A be satisfied of certain things and that is that the document was intended by the deceased to constitute either a will or, in the present case, revocation.

[14] Courts look at various guidelines when working out that matter. One guideline is where the document was found. In the instant case, it appears that the 2005 document was found with other important documents. Secondly, whether the testatrix ever referred to the document. I will revert to that. Thirdly, the habits of the testatrix, was she a person who would normally approach a solicitor for things like this or was she a person who would tend to do things on her own bat or with the advice of a relative. And, fourthly, the text of the document itself. Of course, there will be other cases where other factors will also impinge on it.

His Honour said, in relation to testatrix's acknowledgement of the document [at 16] “the strongest the evidence appears to me to go is in paragraph 19 of the affidavit of Ms Marshall where she says that the testatrix phoned her on about 28 April 2007, that was about ten days before she died, and said that she had done a deal with the devil and that she thought that she was being overheard whenever she discussed things on the phone. She said: “I have done the wrong thing with a really important document, I was stupid doing it but I had to. I've written more paperwork and I've fixed it.” Ms Marshall said: “Do you mean your will?” to which the testatrix replied: “It is not a safe line. We will talk when you come over next.” However, there was no such occasion because the testatrix died.

...

[18] The document itself says that it is the last will and testament of the deceased, however, it hardly qualifies as a will because it neither appoints an executor, nor does it make any disposition of property. It also contains wishes such as, “I wish my son to be cared for”, rather than setting out any firm arrangement. If the one page document is part of the whole document then it also shows that the testatrix was thinking about what property she had and what she should do with it.

[19] In my view, it is more likely than not that the odd page is part of the document. It is written, it would seem to me, in the same pen and on paper from the same exercise book. Furthermore, the text on page 2 shows that the testatrix was still thinking about establishing a drama studio or such in her son's name, but she acknowledged that this had not yet come to fruition. It was still being negotiated and, indeed, other evidence shows that this thought had come to her from time to time from at least 2002, but had never come to fruition. Accordingly, it seems to me that the whole document was one where the testatrix was setting

down her thoughts about what she would do rather than something which was to operate as a testamentary instrument.

[20] It is clear from the authorities that ordinarily drafts or instructions to solicitors to prepare a will are not within s 18A because they are not intended by the testatrix to have immediate effect, but, as Hodgson J said in Milton's case, it does not disqualify if it is intended to be an interim testamentary document to take effect until a solicitor prepares a better one.

[21] Speaking of solicitors, it is clear in this case that previous wills were made by the testatrix with the aid of a solicitor and this was acknowledged by her on the first page, which indicates that her previous wills were with two named solicitors and that further, she had spoken with a third solicitor about establishing a trust. It is, accordingly, unlikely that she would want her own writing to constitute a will.

[22] Accordingly, in my view, the document cannot operate as a will and that there is not the intention there that the document constitute the deceased's will.

[23] The next matter is whether it can operate to revoke. Certainly she says, "I wish to revoke all previous wills". Now, one could be semantically precise and say that that was not a statement of revocation, it is only a wish of what she wants to do and, indeed, that would fit in with the general intention that the thing was to operate as a recording of her thoughts. However, if one put that thought aside and said: "Well, here we have the words, 'revoke all previous wills' ", surely that should be enough.

[24] However, revocation involves two elements, namely (1) a physical doing of something to satisfy s17 or s 18A; and (2) an intention. When one looks at the whole document one can see that primarily the testatrix was thinking that if this document was to operate, it was to operate as her last will and testament and that the revocation bit was only part of a whole. This marries in with the doctrine of dependent relative revocation, which is to the effect that if a testator revokes a will with the intention of setting up a new will, and the new will fails for some reason or other, then the revocation clause lapses or does not take effect.

[25] It seems to me that either there is insufficient evidence to show that this was merely an indication that when the new will was set up the old will would be revoked or, alternatively, if technically it does operate as a revocation, the doctrine of dependent relative revocation applies. It follows then that I cannot give this document, which is DXO1, testamentary effect, either as a will or as an instrument of revocation, and thus the plaintiff is entitled to a grant of probate in solemn form of the will of 24 December 2002."

In relation to costs, His Honour said:

[29] The question then is whether the first defendant is entitled to any costs. The rule is that in adversary proceedings, the person who is successful gets his costs and the person who is

unsuccessful pays the costs. However, an exception, which is relevant in this sort of case, is that where the problem has been caused by the testator it is fair that the estate should bear all the costs of undoing the problem the testator caused.

[30] It would seem from a surface look at the authorities that in s 18A cases if the testator has written the document which causes the problem, as is clear that the testatrix did in the instant case, and that the case is one which at least should not be struck out, that ordinarily the costs are paid out of the estate on the party and party basis. I think the instant case comes within that exception. Accordingly, the first defendant's costs should be paid out of the estate on the party and party basis and I suppose it follows that the second defendant's costs on a submitting basis should also come out of the estate.

STATUTORY WILLS UNDER THE SUCCESSION ACT 2006 (NSW)

INTRODUCTION

For the first time in NSW, the Supreme Court has exercised its powers under the *Succession Act 2006* (NSW) (the **Act**) and made an order authorising a statutory will for two people lacking testamentary capacity.

The applications – *Re Fenwick* and *Re Charles* were heard separately before His Honour Justice Palmer. On 12 June 2009 Palmer J delivered his decision granting leave to the applicants to make the application and also making a final order authorising the proposed will and/or codicil. His Honour set out detailed reasons for his decision and provided a very useful analysis of the English and Australian legislative provisions and authorities dealing with statutory wills. The decision warrants a read and provides practitioners with the guiding principles and procedure for those considering bringing an application for a court authorised will.

Legislative Overview:

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

- (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.
- (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.
- (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.
- (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

(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:

(a) a written statement of the general nature of the application 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 18 is sought,

(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,

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

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

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

(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, or that can be discovered with reasonable diligence, of any persons who might be entitled to claim on the intestacy of the person,

(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,

(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,

(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,

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

20 Hearing of application for leave

(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:

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

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

(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:

(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

(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

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

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

(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

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

Re Fenwick [2009] NSWSC 530

Facts

The Plaintiff is the older brother of the incapable person ("R"). The Plaintiff sought an order granting leave under s19(1) of the Act and, at the same time, for a final order for a statutory codicil under s18 of the Act.

R, aged 60 years, made a will in July 1987. In November 1987 he suffered a severe head injury, causing severe and permanent cognitive impairment. The Plaintiff was appointed as R's financial manager and is his full time carer.

Medical evidence tendered at the hearing of the application demonstrated that R did not have any understanding of his affairs or of testamentary issues. He was also incapable of making a will and will never regain testamentary capacity.

R's estate comprises real estate and cash and was substantial . The terms of his 1987 will were:

- his estate to pass to the Plaintiff;
- if the Plaintiff predeceases R, his estate to pass to R's children;
- if R had no children, his estate was to go to his two cousins who survive him, and if both, equally. (There was no gift over if R's two cousins predeceased him.)

The evidence disclosed that the Plaintiff and two cousins all have life-threatening medical conditions and it is quite possible that R will outlive all of them and his estate will go on intestacy.

There was only one surviving relative who could take R's estate in an intestacy, namely an uncle now aged over 80 years. It is possible that the uncle will predecease R and the estate will vest in the Crown as *bona vacantia*.

The Plaintiff's application for a court authorised codicil was made to avoid consequences resulting from an intestacy. The proposed codicil provided that if the Plaintiff and the two cousins predecease R, an authorised trustee company will be appointed executor of the will and there will be a gift over in favour of the children of the two cousins. The uncle was given notice of the application and did not appear at the hearing .

R is unmarried and has no children. He was not a member of any household other than that of his parents. Before his accident, he often associated with his two cousins and their children. The evidence also showed that R did not have any relationship with any member of his extended family which could have supported an application for provision out of his estate under Chapter 3 of the Act. He also did not have a regular association with any charity.

Re Charles [2009] NSWSC 530

These proceedings concerned a minor given the pseudonym 'Charles'. The application was made by the Minister for Community Services. Charles was born in 1997 and has been under the care of the Minister since 1998 following severe head injuries sustained by him at the age of 4 months. The Defendants are his parents. His parents, although never criminally convicted, are suspected of having deliberately inflicted the injuries on Charles which were consistent with 'Shaken Baby Syndrome'. The parents deny causing the injury and although notified of the Minister's application, did not appear at the hearing nor oppose the proposed orders. Evidence tendered by the Minister demonstrated that Charles' parents regularly visited Charles and during the visits, they are highly attentive and affectionate to him.

In November 2000, the Victims Compensation Tribunal awarded Charles substantial damages in respect of his injuries. The money is held on trust for him by the Public Trustee until he reaches 18 years. The evidence demonstrated that Charles' life expectancy is diminished because of his medical conditions and that he will never have testamentary capacity. Unlike R in Fenwick, Charles has never made a will because he is a minor, and will be unable to make a will as an adult.

If Charles was to die intestate, his estate would go to his parents in equal shares under s61B(5) of the *Probate and Administration Act 1898* (NSW). The Minister's view was that the parents should not benefit from Charles' intestacy and that his whole estate should go to Charles' sister. If she predeceased him, the Minister proposed that the estate be divided equally between two charities which care for disabled children such as Charles. The evidence showed that but for his parents and sister, Charles does not have any family member who could have a claim on his testamentary bounty.

Leave under s19 of the Act to bring the application was granted in both case, and the statutory will and/or codicil were made in the terms propounded by the applicants by the making of a final order under s18 of the Act.

In Charles' application His Honour said:

[250] I do not need to found my decision on whether it is reasonably likely that the parents, in fact, caused Charles' injuries. All I need to decide – and do decide – consistently with the meaning of “reasonably likely” as discussed in paragraph [152], is that there is a fairly good chance that a reasonable person, faced with such evidence as there is as to the cause of Charles' injuries, would decide not to permit Charles' estate to pass to the parents on intestacy.

251 The next question is: is there a fairly good chance that a reasonable person, faced with Charles' circumstances, would make a will in favour of Charles' sister, with gifts over to the charities?

252 The closest person to Charles, apart from his parents, is his sister. His sister, who lives with the parents, visits him regularly, about every two months and it appears that he enjoys these visits. Charles has no family member beside his parents and his sister who could have a claim on his testamentary bounty.

253 There is a carer who has devoted herself full time to looking after Charles for ten years. As the evidence shows, Charles' needs are extremely high. If anyone has a claim on Charles' testamentary bounty, it is she. A reasonable person would unquestionably recognise that claim.

254 However, the carer has expressly disavowed any wish to share in Charles' estate. I suspect that she does so because she wants to make it clear that her devotion to Charles has nothing to do with the expectation of financial reward. She is to be admired for her generosity and devotion. But for her express disavowal, I would have required some provision to be made for her in Charles' statutory will.

255 As matters stand, however, I am satisfied that not only is it reasonably likely but it is highly probable that a reasonable person faced with Charles' circumstances would give the whole of the estate to Charles' sister.

256 If Charles' sister predeceases him, there is no suggestion that any other person who might take on intestacy, if his parents are excluded, has any claim on Charles' estate which could outweigh those of the two charities. They are both committed to caring for children suffering from the disabilities which Charles has. Both have been actively involved in Charles' care. I conclude that there is a fairly good chance that a reasonable person, faced with Charles' circumstances, would choose to provide in his will for a gift over to those charities.

257 There is no doubt that the Minister is an appropriate person to make this application.

258 There is no opposition to the statutory will proposed for Charles. There is no person other than the sister, the parents and the carer who could possibly make a family provision claim on Charles' estate. In any event, it would be premature to take such a putative claim into consideration in a case such as this, for the reasons discussed in paragraph [199]. I am satisfied that it is appropriate for an order under s 18 to be made.

Procedure

In considering the two applications, Palmer J identified the "best interests of an incapacitated person and of those having a proper claim on his or her testamentary bounty" as the objects of the jurisdiction which the Court exercises under Pt 2.2 Div 2 of the Act. His Honour described the jurisdiction as "remedial and protective" and "is, accordingly, not governed by the rules of adversarial litigation".¹

His Honour observed that "in the screening process for which the leave application is designed, it is sufficient to demonstrate a reasonable likelihood of testamentary incapacity, but in order to obtain a final order, a jurisdictional fact must be proved, i.e. that the subject person actually lacks testamentary capacity."² His Honour described the section 19(2) factors as a "check list" that "is neither exhaustive nor rigid".³ He stated that the Court could make an order dispensing with the information required in the check list if the information "exists, or might exist, but it could have no bearing on the fate of the leave application or on the application for a final order, so that to require it to be provided would entail needless expenses and delay."⁴

His Honour stated "the dispensing discretion will be exercised in the light of two fundamental considerations:

- What is in the best interests of the incapacitated person and of those who have a proper claim to his or her testamentary estate;
- What will facilitate the just, quick and cheap resolution of the real issue in the proceedings: s56(1) *Civil Procedure Act* 1006 (NSW).

¹ At [132].

² At [121].

³ At [123].

⁴ *Ibid.*

While the Court has a discretion in a leave application as to what information specified in s19(2) it will require in the particular circumstances of the case, it has no such discretion in relation to the information required by s22. All five categories of information specified must be addressed, although it is clear that within some of those categories what the Court will require is a matter of discretionary assessment.”⁵

Section 22(b) of the Succession Act

After reviewing the English and Victorian authorities on statutory wills, Palmer J stated that in interpreting and applying s22(b) of the NSW Act, the Court should not attempt to seek guidance from earlier authority.

His Honour was particularly critical of unprincipled development of English authority, which His Honour considered should be avoided in considering the NSW legislation. Further due to differences in wording His Honour found that Victorian cases decided before the 2007 amendments in that State and South Australian legislation were of no real assistance in construing the NSW legislation.

Rather, in interpreting s22(b) His Honour considered that the “Court should start ‘with a clean slate; it must interpret the words of the section in the light of the problems and difficulties which the legislation seeks to remedy, bearing in mind that legislation of this kind should receive a benevolent construction’”.⁶

In *Re Fenwick*, Palmer J formed the view that if R now had testamentary capacity, it is “reasonably likely, in the sense of a fairly good chance, that R would have selected [his cousin’s] children as the ultimate fall back beneficiaries”.⁷ His Honour classified R’s case as a “lost capacity case in which R is unable to indicate whether, if the gifts in his present will fail, he would prefer his estate to pass on intestacy.”⁸

In *Re Charles*, Palmer J found that Charles “never had, and never will have, testamentary capacity”. His Honour described the case as a “nil capacity case” and decided the application by a two step process:

⁵ At [124-125].

⁶ At [148] and cases cited therein.

⁷ At [215].

⁸ At [214].

- (a) whether, and consistently with the meaning of ‘reasonably likely’ [in s22(b) of the Act]... there is a fairly good chance that a reasonable person, faced with such evidence as there is to the cause of Charles’ injuries, would decide not to permit Charles’ estate to pass to the parents on intestacy;⁹ and
- (b) if so, whether there is a fairly good chance that a reasonable person, faced with Charles’ circumstances, would make a will in favour of Charles’ sister, with gifts over to the charities?¹⁰

Proof of testamentary incapacity

Palmer J affirmed that the test as to the lack of testamentary capacity is that enunciated in *Banks v Goodfellow* (1870) LR 5 QB 549¹¹. In a leave application however, His Honour stated “the threshold of proof of testamentary capacity, at the lowest, requires merely that the applicant demonstrate that there is reason to believe that the subject person is reasonably likely to lack testamentary capacity...the minimum threshold is appropriate only in applications of real urgency. Absent urgency or some other compelling reason, an applicant for leave should provide the best evidence available in the circumstances as to lack of testamentary capacity”.¹² His Honour concluded that “if the evidence as to permanent testamentary capacity available at the second stage of the application still leaves the Court in doubt, it need not merely refuse the order: it can take matters into its own hands”.¹³

The meaning of “reasonably likely” in s22(b)

In considering whether 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, Palmer J held that “reasonably likely” for the purposes of s22(b) must be understood in one or other of its nuances in different applications of s22(b).¹⁴ His Honour considered the various meanings of

⁹ At [250].

¹⁰ At [251].

¹¹ At [126].

¹² *Ibid.*

¹³ At [131].

¹⁴ At [153].

“reasonably likely” “because those words in s22(b) will have to be applied in widely different types of case.”¹⁵

His Honour identified three types of capacity cases: lost capacity case; nil capacity case and pre-empted capacity case.

Intention in a ‘lost capacity case’

Palmer J described the ‘lost capacity cases’ as those “where the incapacitated person is adult, has formed family/other personal relationships, has made a valid will before losing testamentary capacity, and is now said to have expressed some testamentary intention regarding the circumstances sufficient to warrant an application for a statutory will or new codicil”.¹⁶

In such cases, His Honour observed that “[T]here are two questions involved in a case of alleged actual intention under s22(b): has the incapacitated person actually expressed the intention attributed; would the person have held that intention if possessed of testamentary capacity?”¹⁷ Whether the person has actually expressed the intention attributed is a question of fact.¹⁸

His Honour identified another question: “is the expressed intention the product of the incapacitated person’s free choice, or has some undue pressure or influence been applied?” This question is better considered under s22(c).¹⁹

The other ‘lost capacity case’ is where an adult with established family/other personal relationships has made a valid will but, since losing testamentary capacity, has not expressed, or is incapable of expressing, any testamentary intention to deal with changed circumstances ... under the existing will. ..In such a case the Court may be satisfied as to what the incapacitated person is *“reasonably likely”* to have done, in the light of what is known of his or her relationships, history, personality and the size of the estate...”²⁰

¹⁵ At [150].

¹⁶ At [154].

¹⁷ At [158].

¹⁸ At [155].

¹⁹ At [159].

²⁰ At [160 -161].

Where the person has never made a will in a lost capacity case, Palmer J indicated that “the Court ought not to start with a presumed intention against intestacy. The Court must be satisfied by the evidence that it is *“reasonably likely”* – in the sense of a fairly good chance – that the person would have made a will at some time or other, had not testamentary incapacity supervened”.²¹ Further, His Honour said “In such cases there will generally be evidence which will satisfy the Court that there is a fairly good chance that the incapacitated person either intended at some stage to make a will or else intended to die intestate. In the latter case, the Court will not approve a statutory will. If there is insufficient evidence for the Court to form any view one way or the other, then the applicant will have failed to discharge the burden of proof under s22(b) and the application must be dismissed”...and “in a lost capacity case, the Court’s concern under s22(b) is with the actual, or reasonably likely, subjective intention of the incapacitated person”.²²

Intention in a nil capacity case

Palmer J classified cases where a person has been born with mental infirmity or has lost testamentary capacity well before ever being able to develop any notion of testamentary disposition as the ‘nil capacity cases’.²³ In such cases, “[t]he Court must start from the position that, if there are significant assets in the minor’s estate, it should authorise some kind of statutory will unless it is satisfied that what would occur on intestacy would provide adequately for all the reasonable claims on the estate”.²⁴ His Honour opined that “[t]he Court can be satisfied by reference to common experience that if the incapacitated minor had attained testamentary capacity and had assets of any significant worth, then it is reasonably likely – in the sense of a fairly good chance – that, in common with most people, he or she would have chosen to make a will”.²⁵

If the Court is so satisfied, the “next question is: is it reasonably likely that the incapacitated minor would have made the proposed will?”²⁶ His Honour held that “[w]hether a proposed will is ‘reasonably likely’ to have been made by a person who never had, and never will have, the

²¹ At [166].

²² At [169-170].

²³ At [171].

²⁴ At [172].

²⁵ At [173].

²⁶ At [174].

smallest testamentary capacity may only be answered as: ‘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 a nil capacity case, as opposed to a lost capacity case, this is the question which the words ‘reasonably likely’ in s22(b) require the Court to answer. The considerations involved in the question are entirely objective”.²⁷

Intention in a pre-empted capacity case

A pre-empted capacity case was described by Palmer J one in which an “incapacitated person is still a minor but has lost testamentary capacity at an age which he or she had formed relationships and had, or could reasonably be expected to have had, a fairly good understanding of will-making, intestacy and their consequences”.²⁸

His Honour held that in such cases, the Court must first be satisfied, “as a matter of fact, that the asserted intention is truly that of the incapacitated person”.²⁹

If the Court is satisfied that the asserted intention is truly that of the incapacitated person, “the next question is whether it is reasonably likely that the person would have expressed that intention if he or she had attained testamentary capacity... The question posed by s22(b) is: is there a fairly good chance that the proposed statutory will reflects the testamentary intention that this particular person, acting reasonably, would express if he or she were at least 18 years of age? It is a question which contains both subjective and objective elements”.³⁰

In answering this question, the first question for the Court is: “is it reasonably likely that the minor would have made any will at all rather than die intestate?”³¹ His Honour then identified as the “second, and most substantial question... is it reasonably likely that the person would have made the will which is now proposed?” This question, His Honour held, involves “both subjective and objective considerations”.³²

His Honour was of the view that in a pre-empted capacity case, “the Court is concerned under s22(b) with a question which involves both subjective and objective consideration: given what

²⁷ At [176].

²⁸ At [177].

²⁹ At [179].

³⁰ At [180].

³¹ At [182].

³² At [185].

is known about the person's relationships and history, is there a fairly good chance that a reasonable person, weighing up those circumstances, would have made the proposed statutory will"?³³ If the Court is satisfied that the proposed statutory will qualifies under s 22(b), the application for leave must then pass the s22(c) test (that is, the Court can make a final order).

Observations on Future Practice and Procedure

Palmer J observed that in relation to future applications for court approved wills, it is "desirable that they should be dealt with by the Court as expeditiously as possible and with as little expense to the parties as possible".³⁴ Accordingly, His Honour suggested that in straightforward and unopposed cases, such as the present cases, there is no need for the applications to be heard in open Court or for Counsel to appear and make submissions. Instead, "such applications can be dealt with on the papers by a Judge in Chambers, pursuant to s71(d) or s71(f) *Civil Procedure Act*."³⁵

His Honour further observed that "if an application is, or may be, opposed it should be listed and heard in open Court in the usual way. Likewise, if a Judge dealing with the matter in Chambers has reservations about the quality of the evidence adduced, the matter can be listed in Court so that the Judge can see and hear the witnesses whose affidavit evidence in unsatisfactory. However, if the Judge merely has a query about a particular aspect of the information provided, the query may be addressed by a requisition from the Registrar."³⁶

Palmer J indicated that there is no need for publication of reasons for a decision made in Chambers in straightforward uncontested applications for a statutory will, as there "is no public interest in publishing reasons for judgment in such cases"³⁷ as the issues in such applications only concern immediate family members.³⁸ When an application is contested and heard in open Court, then reasons for the decision will be required.³⁹ His Honour also commented that a practice note will be warranted once the Court receives further applications for statutory wills.

³³ At [188].

³⁴ At [262].

³⁵ At [263].

³⁶ At [264].

³⁷ At [265].

³⁸ *Ibid.*

³⁹ *Ibid.*

Only time will tell whether the 'issues in such applications' will affect only immediate family members of the incapacitated person. One must wonder whether charities or extended family members will fall within the category of affected persons. It is suggested that the decision is one which must be read by any legal practitioner considering bringing an application for a statutory will in NSW.

AB v CB & Ors [2009] NSWSC 680

This was a 'pre-empted capacity' case and another decision of Palmer J. The incapacitated person was given the pseudonym 'CB'.

CB was severely incapacitated at the age of 16 years. He had always been cared for solely by his mother, the plaintiff 'AB'.

CB's father (FB) had been divorced from her mother for some years. Palmer J found that the father had been estranged from the family and his daughter for quite some time.

The will proposed that the whole estate be left to the mother. If she did not survive CB, then the estate was to pass to CB's brother (SB) and, in default, 2 charities (with whom CB had had an involvement with before she became incapacitated) were named as beneficiaries.

CB's father was joined as a defendant to the proceedings and both he and his mother were served with notice of the application. There was evidence that the father himself was suffering from illness or infirmity and may not be able to himself respond appropriately to the application.

Palmer J was satisfied that CB lacked testamentary capacity and would never regain capacity. His Honour said:

[40] The will makes no provision for FB. As I have said, it is clearly the purpose of this application to counter what would otherwise occur if CB died intestate: in those circumstances, both AB and FB would take. The statutory will is designed to exclude FB from testamentary provision so that the estate goes wholly to AB or wholly to SB or, in the event they predecease CB, wholly to the two charities.

[41] It seems to me that there is, to quote the words which I have used in *Re Fenwick*, "a fairly good chance" that the proposed will, in excluding FB, would represent the actual intentions of CB if she were now of testamentary capacity and aware of the present circumstances.

[42] I accept that, for whatever reason, FB has removed himself from responsibility and care within the family, at least from the time that CB was aged nine. I accept that there has been no

normal relationship of father and daughter, at least in an on-going caring sense between the two of them since that time.

[43] It seems to me that there is a fairly good chance that the proposed will reflects what a reasonable person in CB's position would do to recognise in her testamentary provision the fact that AB will have devoted the whole of the remainder of her life to the very onerous task of caring for CB. A reasonable person in CB's position would recognise that the overwhelming moral responsibility which she had in regard to testamentary provision was in favour of AB.

[44] It seems also to me that there is a fairly good chance, in the sense in which I have used that phrase in *Re Fenwick*, that if AB predeceased CB, CB would recognise that her testamentary obligation was directed towards SB and, if not to him, then to the two charities with which she was actively involved.

[45] I do not think that one can say, having regard to the absence of FB in the family involvement for now more than ten years, that there is a fairly good chance that CB would wish to make any provision for him.

[46] As matters stand, therefore, I am persuaded that the proposed will is one that CB is reasonably likely to have made.

And note: ***In the Matter of RAK [2009] SASC 288*** per Gray J.

Of course, the success of an application for a statutory will will depend upon the strength of the evidence.

Solicitors may find themselves having to advise trustees or managers of estates of incapacitated persons. The making of court authorised wills for such persons may be very beneficial especially if the outcome on an intestacy would have disastrous consequences.

It should be borne in mind that *Re Fenwick*, *Re Charles and AB v CB* were all heard by Palmer J and with no contradictor. Things might be different if there is a contradictor and Palmer J's reasoning is challenged. Time will tell.

Ramena Kako
Barrister-At-Law
13 Wentworth Selborne Chambers
180 Phillip Street, Sydney NSW 2000
Ph: 02 9232 7750
E: rkako@wentworthchambers.com.au