Statutory Wills: adding complexity

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About the author

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From 2008 – April 2017 Craig was a solicitor with Teece Hodgson & Ward. From 2015 to April 2017 he was an Accredited Specialist in Wills & Estates Law. He was named as a Rising Star in the 2016 edition of Doyle's Guide in the area of Wills & Estate Litigation.

Craig is a member of the Society of Trust & Estate Practitioners (STEP) and a co-author of C Birtles and R Neal, Hutley's Australian Wills Precedents 8th Edition (LexisNexis Butterworths) 2013 and 9th Edition 2016. He is an adjunct lecturer for College of Law (Masters of Applied Law), Family Provision subject and is also a casual lecturer in the Law Extension Committee Diploma of Law, Succession Law subject.

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1. Resources

1. R Williams and S McCullough, *Statutory Will Applications, A Practical Guide,* LexisNexis Butterworths, 2014 is a comprehensive overview of the statutory will legislation in each Australian state and territory and the application of it. Summaries of cases in each jurisdiction (to 2014 which was the date of publication) and commentary on the requirements when acting for an applicant, or other interested persons, are provided in that text.

2. *Fenwick, Re: Application of J.R. Fenwick & Re Charles* [2009] NSWSC 530 was the first instance in which the Supreme Court of NSW was required to consider and apply the statutory will provisions. In the judgment, Palmer J traces the law as it developed in the United Kingdom, and how it came to be legislated in New South Wales, and applied in other states. His Honour considers circumstances in which the legislation might be applied, differentiating between cases in which:

    a. the prospective testator having made a will ceases to have the capacity to change it: "lost capacity cases" (at paragraphs [24] and [154] – [170]);

    b. the prospective testator never had testamentary capacity: "nil capacity cases" (at paragraphs [26] and [171] – [176]); and

    c. those in which the prospective testator was old enough to form relationships and express reasonable testamentary wishes before ceasing to have testamentary capacity: "pre-empted capacity cases" (at paragraphs [28] and [177] – [188]).

3. This paper draws on and refers to the analysis of Palmer J in *Re Fenwick*.

2. Statutory Will legislation in New South Wales

4. I have set out the relevant parts of Chapter 2, Pt 2.2, Div 2 of the Succession Act 2006 in Annexure "A" to this paper.

3. History of Statutory Will Legislation

3.1 United Kingdom Statutory Will History

5. Section 171(1) of the *Law of Property Act* 1925 (UK) (introduced in 1926) provided (as extracted in *Re Fenwick* at [34]) that:

> *"(1) **The Court may direct a settlement to be made of the property** of a lunatic or defective, or any part thereof or any interest therein, on such trusts and subject to such powers and provisions as the Court may deem expedient, and in particular may give such directions ...*
>
> *(c) where **by reason of any change** in the law of intestacy or of any change in circumstances since the execution by the lunatic or defective of a testamentary disposition, or of any absence of information at the time of such execution, or on account of the former management of the property or the expenditure of money in improving or maintaining the same or for any other special reason the Court is satisfied **that any person might suffer an injustice** if the property were allowed to devolve as undisposed of on the death intestate of the lunatic or defective or under any testamentary disposition executed by him.*
>
> *(3) This section applies whether or not the lunatic or defective has executed a testamentary disposition and notwithstanding that it is not known whether he has executed such a disposition or not, but does not apply when he is an infant."*

6. The legislation applied to lost capacity cases. The words underlined (my emphasis) on the face of it require evidence of a change in the circumstances of the lunatic or defective, or some flaw in the making of the original will to be identified; and the focus is not on the person for whom the settlement was ordered, but on the beneficiaries.

7. Cases in which s 171 were applied are set out in *Re Fenwick* at [36] – [47]. An objective standard was generally applied.

8. In 1959, s 171 of the *Law of Property Act* was replaced by sections 102 and 103 of the *Mental Health Act* 1959 (UK). Those sections relevantly provided:

> *"102(1) The judge may, with respect to the property and affairs of a patient, do or secure the doing of all such things as appear necessary or expedient –*
>
> *(a) for the maintenance or other **benefit of the patient**,*
>
> *(b) for the maintenance or other **benefit of members of the patient's family**,*

*(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, or*

(d) otherwise for administering the patient's affairs.

*102(2) In the exercise of the powers conferred by this section **regard shall be had first of all to the requirements of the patient**, and the rules of law which restricted the enforcement by a creditor of rights against property under the control of the judge in lunacy shall apply to property under the control of the judge; but subject to the foregoing provisions of this subsection the judge shall, in administering a patient's affairs, have regard to the interests of creditors and also to the desirability of making provision for obligations of the patient notwithstanding that they may not be legally enforceable.*

103(1) Without prejudice to the generality of the foregoing section, the judge shall have power to make such orders and give such directions and authorities as he thinks fit for the purposes of that section, and in particular may for those purposes make orders or give directions or authorities for –

...

*(d) **the settlement** of any property of the patient, **or the gift of any property** of the patient to any such persons or for any such purposes as are mentioned in paragraphs (b) and (c) of subsection (1) of the foregoing section."*

9. The 1959 provisions changed the potential categories of beneficiaries of a "settlement" from "those who might suffer injustice" to "the patient", "the patient's family" and "other persons or purposes for whom or which the patient might be expected to provide". The legislation also mandated that regard must first be had to the requirements of the patient.

10. Cases in which the 1959 provisions were considered are described at paragraphs [49] – [86] in *Re Fenwick*.

11. The initial cases applied a subjective "substituted judgment" test, assuming a "brief interval of sanity" – *Re L (WJG)* [1966] Ch 135; 3 All ER 865, referenced in *Re Fenwick* at [49] – [54] and *Williams and McCullough* at 1.3.

12. Later, in *re D (J)* [1982] 1 Ch 237, Sir Robert Megarry VC took this further, stating, inter alia, that during the "lucid interval" the patient had full knowledge of the past, knew that he or she would after executing the will lapse into the actual mental state that previously existed, and was advised by (and would accept the advice of) a competent solicitor.

13. In 1983 the Mental Health Act 1959 (UK) was replaced by the Mental Health Act 1983 (UK) but the relevant sections (ss95-6) were largely the same as ss 102-3 of the 1959

Act. Cases applying the 1983 Act are described in *Re Fenwick* at [87] – [96].

14. Those cases grappled with the artificiality of the exercise of attempting to make a will that a person would have made if they were sane. They leaned towards an objective approach – see *Re C (a patient)* [1992] 1 FLR 51; [1991] 3 All ER 866 and *G v Official Solicitor* [2006] WTLR 1201; [2006] EWCA Civ 816 referenced in *Williams and McCullough* at 1.6 to 1.7.

15. Palmer J observed in *Re Fenwick* at [108] that by 2005 the UK Courts "were taking the realistic and pragmatic approach that whether a statutory will should be ordered was to be determined having regard to the best interests of the patient, ascertained objectively, and to the wishes of the patient, if known".

16. The legislation in the United Kingdom was replaced to its current formulation in 2007 with the commencement of the *Mental Capacity Act 2005 (UK).* The relevant sections of that legislation are set out below:

> ***"1 The principles***
>
> *(1) The following principles apply for the purposes of this Act.*
>
> *(2) A person must be assumed to have capacity unless it is established that he lacks capacity.*
>
> *(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.*
>
> *(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.*
>
> *(5)* ***An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.***
>
> *(6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.*
>
> *(…)*
>
> ***4 Best interests***
>
> *(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—*
>
> *(a) the person's age or appearance, or*
>
> *(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.*
>
> *(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.*
>
> *(3) He must consider—*
>
> *(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and*
>
> *(b) if it appears likely that he will, when that is likely to be.*

(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.

(6) He must consider, so far as is reasonably ascertainable—

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of—

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare,

(c) any donee of a lasting power of attorney granted by the person, and

(d) any deputy appointed for the person by the court,

as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

(8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which—

(a) are exercisable under a lasting power of attorney, or

(b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.

(9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.

(10)"Life-sustaining treatment" means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.

(11)"Relevant circumstances" are those—

(a) of which the person making the determination is aware, and

(b) which it would be reasonable to regard as relevant.

(…)

16 Powers to make decisions and appoint deputies: general

(1) This section applies if a person ("P") lacks capacity in relation to a matter or matters concerning—

(a) P's personal welfare, or

(b) P's property and affairs.

(2) The court may—

(a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or

(b) appoint a person (a "deputy") to make decisions on P's behalf in relation to the matter or matters.

*(3) **The powers of the court under this section are subject to the provisions of this Act and, in particular, to sections 1 (the principles) and 4 (best interests).***

(…)

18 Section 16 powers: property and affairs

(1) The powers under section 16 as respects P's property and affairs extend in particular to—

(a) the control and management of P's property;

(b) the sale, exchange, charging, gift or other disposition of P's property;

(c) the acquisition of property in P's name or on P's behalf;

(d) the carrying on, on P's behalf, of any profession, trade or business;

(e) the taking of a decision which will have the effect of dissolving a partnership of which P is a member;

(f) the carrying out of any contract entered into by P;

(g) the discharge of P's debts and of any of P's obligations, whether legally enforceable or not;

(h) the settlement of any of P's property, whether for P's benefit or for the benefit of others;

(i) the execution for P of a will;

(j) the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise;

(k) the conduct of legal proceedings in P's name or on P's behalf.

17. Because of the structure of the 2005 legislation, the Court in deciding whether to make an order for settlement of property, or for the execution of a will, was expressly required to consider the best interests of the prospective will-maker. This was a fundamental shift in the legislation, even if by the time of its introduction the Court had come to consider best interests in applying the 1983 legislation.

3.2 New South Wales compared to other states and territories

18. The New South Wales Law Reform Commission issued a Report in 1992 entitled *"Wills for Persons Lacking Will-Making Capacity"* (Report 68)[1].

19. That Report:

    a. Recommended that statutory will applications be heard by the Protective Division of the Supreme Court of New South Wales (there is no longer such a division though there is a Protective List and a Protective List Judge).

[1] (available from http://www.lawreform.justice.nsw.gov.au/Documents/report_68.pdf)

b. Provided an overview of both the Court's Protective and Probate jurisdictions.

c. Does not specifically mention the interests of the person for whom an application might be made.

d. At 32 FP, recommended:

> ***"Application of common law and equity***
>
> *The principles and rules of the common law and of equity are, to the extent that they are not inconsistent with this Part, to apply to a valid statutory will in the same way as they apply to a will executed in accordance with section 7."*

e. At 32 FH, the Report recommended:

> ***"Basic principle for making of statutory will***
>
> *In considering an application for an order, the Court is to apply the principle that a statutory will should, as nearly as practicable, be made in the terms in which a will would have been made by the person lacking will-making capacity if the person had the capacity to make a will at the time of the hearing of the application."*

20. Tasmania was the first state to adopt statutory wills legislation, introduced by the *Wills Legislation Amendment Act* 1995. The amending act permitted the Guardianship and Administration Board to make a statutory will, but such a will is not valid if there was a prior valid will. The Board was required to make, as nearly as practicable, the will which would have been made by the person for whom it is proposed to be made (s 27E Wills Act 1992)

21. Clause 6 of the *draft Wills Act* 1994 (Vic) required that the proposed will be or might be one which would have been made by the person had he or she had testamentary capacity.

22. Section 7 of the *Wills Act* 1936 (SA) (in effect from 10 June 1996) required that the Court be satisfied that the proposed will would accurately reflect the likely intentions of the person if he or she had testamentary capacity.

23. Part 3, Division 2 of the *Wills Act* 1997 (Vic) commenced on 20 July 1998, but s 26(b) of the legislation enacted followed the South Australian formulation requiring that the proposed will would “accurately reflect the likely intentions of the person, if he or she had testamentary capacity”. In *Boulton v Sanders* [2004] VSCA 112, the Court of Appeal declined to "do the best it can" in the absence of evidence sufficient to permit

the Court to form a view about the testator's likely intentions. The legislation was subsequently amended to include an alternative, "(will which) 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".

24. In Report 85 (1998), Uniform Succession Laws, The Law of Wills, the National Committee recommended that the formulation in the draft of the Wills Act 1994 (Vic) be adopted, namely that the will “is or might be one which would have been made by the proposed testator if he or she had testamentary capacity”.

25. The provisions introduced in the Northern Territory (s 21 *Wills Act*), Queensland (s 24 *Succession Act* 1981 - using the words “is or may be”) largely followed these recommendations. In Western Australia, s 42 *Wills Act* 1970 uses the words “which could be made”.

26. Section 22 of the *Succession Act* 2006 (NSW) provides that:

> *"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.*"

27. The words "reasonably likely to be", ultimately included in the New South Wales legislation, depart from those words recommended by the National Committee. Arguably the words “may be” (recommended by the National Committee) would permit the granting of an application where the proposed statutory will is within the range of wills which the prospective testator might have made, and the breadth of the words arguably would have permitted an objective test to be applied. It is probable that the additional words used in the New South Wales legislation derive from the Victorian experience (and the problems in *Boulton v Sanders*) but again the words of the amended Victorian legislation “might reasonably be expected to be” lend towards an objective test, whereas the words “reasonably likely” read strictly might require a

subjective standard to be applied.

28. In the Second Reading Speech for the Wills Amendment Bill 2007 (Vic), amending the Victorian legislation to include the words “might reasonably be expected to be”, the Attorney General Mr Hulls said that the statutory will provisions made it *“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.*” Thus the rationale for the amendment was to address “nil capacity” cases.

29. As to the test to be applied in New South Wales, in *Re Will of Jane* [2011] NSWSC 624, Hallen AsJ (as his Honour then was) said (at [73] and [76]):

> *"[73] The Court's concern under s 22(b) is with the actual, or reasonably likely, subjective intention of the person lacking capacity. It is the specific individual person who is, or is reasonably likely to be incapable of making a will, that must be considered. It is not an objective, or hypothetical, person who is considered. The jurisdiction of the Court is, so far as is possible, to make a statutory will in the terms in which a will would have been made by that person if the person had testamentary capacity at the time of the hearing of the application.*
>
> *[…]*
>
> *[76] If an actual intention cannot be established, the sub-section speaks in the chameleon-like language of reasonable likelihood. The degree of satisfaction that the phrase "reasonably likely" contemplates is difficult to discern. The phrase has a different connotation from the single word "likely". The qualifying adverb "reasonably" requires that the word "likely" be given a meaning less definite than "probable". It is that word ("reasonably") which governs the standard of likelihood. It lessens the intensity of the word "likely". In other words, quantitative guidance is suggested by the word "reasonably" whilst the word "likely" requires a qualitative judgment.*"

30. As set out above, it does seem that "likely" requires an exercise of subjective fact-finding. But it was not necessary to consider the "nil capacity" case in *Re Will of Jane*. In *Re Fenwick*, Palmer J said in respect of such a case (at [171] – [173])

> *'[171] A search for any degree of subjective intention is impossible in a nil capacity case, where the person has been born with mental infirmity or has lost testamentary capacity well before ever being able to develop any notion of testamentary disposition. Nevertheless, the statutory will-making power is available in such a case: s 18(4).*
>
> *[172] As, in the absence of a statutory will, the person in a nil capacity case must inevitably die intestate, I do not think that the Court starts with the meaningless question: would this particular person have chosen to make a will if he or she had attained testamentary capacity? Rather, I think that the Court must start from the position that, if there are assets of any significance 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.*
>
> *[173] Is that position justified by the words of s 22(b)? I think that the justification is to be found in the elastic phrase “reasonably likely”. In a nil capacity case, where there cannot be any meaningful search for actual or likely subjective intention, the Court of necessity*

*must make objective assessments of likelihood. The Court can take notice of the fact that people in our society who have assets of any worth and who have a family and other relationships usually choose to make wills rather than die intestate. In my opinion, the 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."*[2]

4. How the Best Interests of the person are relevant in New South Wales

31. In *Re Fenwick*, Palmer J said (at [132]) that:

> *"The best interests of an incapacitated person and of those having a proper claim on his or her testamentary bounty are the objects of the jurisdiction which the Court exercises under Pt 2.2 Div 2 of the Succession Act. It is a remedial and protective jurisdiction and is, accordingly, not governed by the rules of adversarial litigation. In other words, the Judge is not a referee; rather, the Judge is to endeavour to rectify a problem which is affecting people's lives, in the best possible way.*[3]

32. In, *Re RB, a protected estate family settlement* [2015] NSWSC 70, Lindsay J said, in the context of a combined "family settlement" involving the provision of release to apply for Family Provision under Section 95 of the *Succession Act* 2006 at [54]:

> *"The primacy of the welfare of a protected person generally prevails against all comers, even in the context of decisions required to be made about allowances from a protected estate sought by members of the protected person's family or others to whom he or she might reasonably be supposed to have a personal obligation…"*

33. There are a number of ways in which best interests of the person the subject of the application are relevant to the application of the legislation.

4.1 Appropriateness

34. Section 22(c) of the Act provides that the Court cannot make an order unless it is or may be appropriate for the order to be made. The legislation does not give guidance as to what "appropriate" means or requires. The Court is also given general and broad powers in the nature of discretion. Two decisions have dealt specifically with "appropriateness".

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[2] Applications of the "fairly good chance" assessment: *AB v CB & Ors* [2009] NSWSC 680; *A Limited v J* [2017] NSWSC 736

[3] cited in *A Limited v J (No 2)* [2017] NSWSC 896 at [31]; see also *AB v CB* [2009] NSWSC 680 at [5]*; Secretary Department of Family & Community Services v K* [2014] NSWSC 1065 at [66]; *Re RB, a protected estate family settlement* [2015] NSWSC 70 at [54]; *GAU v GAV* [2014] QCA 308 at [48]; *A Limited v J* [2017] NSWSC 736 at [86]

35. *Hausfeld v Hausfeld & Anor* [2012] NSWSC 989 concerned an application to have a will amended to protect an estate from creditors in circumstances where the beneficiary's bankruptcy was imminent. The Court held that, despite the fact that the will is likely to have been made, an alteration for such a reason would be inappropriate for the purposes of 22(c). White J said at [13]:

> "*In my view it is not appropriate, nor might it become appropriate, for the court to authorise an alteration to Colin Hausfeld's will in order to defeat his son's creditors. Whilst I accept that Colin Hausfeld, if he were capable, could leave the share of his estate that would otherwise pass to his son to his son's wife in the expectation that she would provide for his son out of that share if his son were made bankrupt, I do not think that 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*."

36. *Hausfeld v Hausfeld* is an example of where an assessment of what is "appropriate" may differ from what objectively might be considered to be in the best interests of the person.

37. In contrast, in *GAU v GAV* [2014] QCA 308, the Queensland Court of Appeal allowed an appeal against refusal of leave to make an application for a statutory will which if made would have provided a degree of asset protection for the subject person's son (a beneficiary) who had separated from his wife.

38. The Court said, at paragraph [49], that it was not necessary for the Court to determine that the proposed will was appropriate, rather that it was sufficient for the Court to determine that the will "may be" appropriate (in accordance with the terms of the Queensland legislation). The Court also said, at paragraph [48], that the power to make a statutory will is a jurisdiction which is protective in nature and is informed by the protective jurisdiction historically exercised by the Court (referring to the judgment of Lindsay J in *Secretary, Department of Family & Community Services v K* [2014] NSWSC 1065).

39. In *Re RB*, Lindsay J said, on the question of the 'appropriateness' of making an order, stating at [41]:

> "…*what is "an appropriate case" must be measured against the purpose for which the jurisdiction exists and, more particularly, what is in the interests, and for the benefit, of the protected person*".

4.2 Evidence in support of the application for leave, the separate representative and the Court's power to suggest changes

40. The information required to be filed in support of an application for leave pursuant to section 19 of the Act is extensive. It includes:
    a. any evidence available to the applicant of the person's wishes;
    b. any evidence available to the applicant of the terms of any will previously made by the person,
    c. 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,
    d. 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,
    e. 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,
    f. 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,

41. Determination of whether leave should be granted for the making of a statutory will, and the terms of the statutory will if approved, are thus informed by evidence of expressions of testamentary wishes, prior wills, and consideration of whether the structure is likely to be upset by a Family Provision claim.

42. On the application for leave, the Court has the power pursuant to section 20(2) of the Act to revise the terms of any draft of the proposed will, alteration or revocation for which the Court's approval is sought. On the substantive application, the Court has the power pursuant to section 18(5) of the Act to "give any necessary related orders or directions"[4]

43. The process by which a conclusion is reached is informed by evidence filed by, and submissions made by, competing parties (noting the requirement in section 22(e) of the Act that the Court be satisfied that adequate steps have been taken to allow representation of all persons with a legitimate interest in the application), and/or by the appointment of a separate representative pursuant to section 25 of the Act.

[4] See *A Limited v J* [2017] NSWSC 736 at [53]

44. The extent to which the Court is prepared to embark on a process of feedback to parties in relation to aspects of the draft statutory will, or otherwise to rule on aspects of competing drafts, may be informed by considerations of the best interests of the subject person.

45. In *Re APB, ex parte Sheehy* [2017] QSC 201, the application was made by an independent solicitor as litigation guardian[5] of the subject person. He suggested the form of Will, and actively made submissions in relation to proposed changes. The Court granted leave for the making of the statutory will, but only after receiving evidence and submissions from the litigation guardian and eight other parties as to the gifts and certain aspects of the machinery of the will, and ruling on them.

46. In *A Limited v J* [2017] NSWSC 736, the Court made observations as to the difficulty in authorising a statutory will for a minor which excluded the child's father, where the application had been brought and considered urgently in a Duty List so that the father had not had a proper opportunity to put a case to the contrary. The application was briefly adjourned following which the parties presented a revised draft of the proposed statutory will, which contained certain blanks including as to the gift to be made to the father. The Court was then asked to determine that issue.

47. In *A Limited v J (No 2)* [2017] NSWSC 896, the Court authorised the making of a second statutory will (revoking the first) after ruling on certain aspects of competing drafts, and further submissions in relation to the gift to be made to the father.

48. On the other hand, the applications in both *Application of Mary-Anne Lukic* [2015] NSWSC 822 and in *Re CGB* [2017] QSC 128 were dismissed. In each case it was not accepted that it was in the subject person's best interests to grant leave for the applications to be made.

4.3 "Nil capacity" and "pre-emptive capacity" cases

49. In *Fenwick*, the Court said that determination of whether a will is, or is reasonably likely, to be one which the testator would have made if he or she had capacity, is

[5] The equivalent of a tutor.

necessarily objective[6], and in pre-emptive capacity cases there are both subjective and objective elements.

50. The concept of best interests aligns more closely with an objective test than a subjective test. In “lost capacity” cases the assessment must be subjective, and the best interests of the subject person may be considered to have been met by the Court facilitating the otherwise autonomous act of will-making[7].

4.4 Family settlements

51. In *W v H* [2014] NSWSC 1696 and in *Re RB, a protected estate family settlement* [2015] NSWSC 70, the Court granted leave for an application to be made for a statutory will, and made orders authorizing the making of a statutory will, as part of a broader settlement between family members which also included approval of family provision releases.

52. In *W v H*, the Court noted the following safeguards in an application for approval of a family settlement:

    (a) *first, an endeavour should be made to ensure that all persons with a present, or prospective, interest in the estate are joined as parties in the proceedings or at least (by analogy with the principle identified in Osborne v Smith (1960) 105 CLR 153 at 158-159, explained in Estate Kouvakas; Lucas v Konakas [2014] NSWSC 786 at [134]-[144] and [258]) that they have been given notice of the proceedings and allowed an opportunity to intervene.*

    (b) *secondly, all participants in proceedings involving an exercise of protective jurisdiction must be reminded that the jurisdiction is not a "consent jurisdiction" in which orders of the Court can be procured by the consent of parties (PB v BB [2013] NSWSC 1223 at [27]-[30], [34], [38] and [56]; M v M [2013] NSWSC 1495 at [50](a) - (d); Ability One Financial Management Pty Limited and Anor v JB by his tutor AB [2014] NSWSC 245 at [143]-[149] and [151]-[154]). The Court is bound to exercise an independent judgement, informed by established principles, in making any decision affecting a protected person or his or her estate.*

    (c) *thirdly, the focal point for all decisions to be made by the Court affecting the person or property of a person in need of protection (not merely a person formally declared to be incapable of self-management) must be defined by reference to criteria, however expressed, grounded in primacy being given to the welfare, interests and benefit of the person in need of protection.*

    (d) *fourthly, in making decisions affecting the estate of a person who (by reason of incapacity or death) is not present and able to advance his or her own case, the Court must strive to make an objective judgment, taking into account all material circumstances*

[6] *Fenwick, Re: Application of J.R. Fenwick & Re Charles* [2009] NSWSC 530 at [172]
[7] See the discussion in Croucher, Rosalind F --- "An Interventionist, Paternalistic Jurisdication?' The Place of Statutory Wills in Australian Succession Law" [2009] UNSWLawJl 36; (2009) 32(3) University of New South Wales Law Journal 674

(including those subjective to the absent person), which objectivity is variously described by reference to principles designed to give effect to a protected person's probable judgement (Ex parte Whitbread(1816) 2 Mer 99; 35 ER 878); considerations of wisdom and justice, informed by knowledge of all the circumstances of the case (Pontifical Society for the Propagation of the Faith v Scales (1962) 107 CLR 9 at 19-20); contemporary community standards (Andrew v Andrew (2012) 81 NSWLR 656); and the presumed intention of an incapacitated person (Re Fenwick (2009) 76 NSWLR 22 at [170]-[176]; Secretary, Department of Family and Community Services v K [2014] NSWSC 1065 at [75]-[81]).

(e) fifthly, taking notice of traditional concerns about the disposition of property of lunatics who might recover sanity, the Court should be slow to approve any "family settlement" involving a disposition of the property of a protected person able to express a personal view about disposition of his or her estate or possessed of a prospect of recovery of his or her capacity.

(f) sixthly, although the jurisdiction to be exercised by the Court is not a "consent jurisdiction", the Court should be slow to sanction a "family settlement" to the extent that there is, or may be, a person interested, or prospectively interested, in a protected estate who has not consensually bound himself or herself to the terms of the proposed settlement.

(g) seventhly, whether by deed or another formal record of their agreement, the parties to a family settlement should record the intended effect of the settlement, taking into account the contingency that death might intervene so as to terminate management of the protected estate, bringing into direct operation the law governing administration of a deceased estate.

(h) eighthly, although the Court may be willing to entertain a proposal for approval of a family settlement, it must be vigilant against the possibility that such a proposal may be an attempt to circumvent a judicial determination of questions which should, in the public interest, be determined in the course of ordinary litigation.

(i) ninthly, ordinarily, the Court's assessment of a claim on the estate of a protected person will be assisted by an independent report by the NSW Trustee or another professional.

(j) tenthly, in the event that provision is ordered to be made out of a protected person's estate for his or her family, consideration should be given to whether an order for provision can, and should, be subject to terms. An allowance out of an estate may be made, for example, on condition that it be brought into account against the respective shares to which recipients may become entitled out of the protected person's deceased estate: Theobold, p 466. Or, by way of another example, it may be appropriate that provision be made on terms securing its repayment to the protected person in particular circumstances: Theobold, p 464."

53. In *re RB*, the Court at [59] set out the ways in which the settlement was in the best interests of the subject person, as follows:

"(a) A timely resolution of all simmering questions in dispute between members of the defendant's family was calculated to bring peace to the task of management of his affairs during the indefinite, but decidedly finite, span of life still left to him. Absent a statutory will, duly made, the defendant's family was, manifestly, a multi-party family provision case waiting to happen.

(b) The family settlement was calculated by the parties, with the benefit of legal advice, to bring certainty to the lives of those who ostensibly have a call on his bounty, in life or death. Such certainty was sought by the terms of the parties' deed, including their agreement: (i) subject to court approval under the Succession Act, section 95, to release all rights to apply for family provision relief; and (ii) to invite the Court to order that the plaintiff be released from any claims that could otherwise have been made against her

arising out of her management of the defendant's affairs before management of his estate was brought under the NSW Trustee and Guardian Acton 17 December 2014.

(c) *If the defendant had been allowed to die substantially intestate, the daughter of his deceased daughter (his grandchild) would have been be left without any provision from his estate, and without an entitlement to apply for family provision relief, notwithstanding the probability that, if capable of managing his own affairs, he would have made equal provision for the respective families of all five of his children. By means of a statutory will, provision could be made for a grandchild prospectively without standing to apply for family provision relief; provision could be made for the next generation of the defendant's family on the "equal terms" he probably would have insisted upon had he been capable of self-management; and the amount of provision made for family members could be defined without reference to the vagaries of an award of discretionary family provision relief. All this could be done on terms designed to ensure that reasonable provision will be made for all members of the defendant's family (including, importantly, the plaintiff as his wife) and, within the reasonable and the practical, that an opportunity has been allowed for family members, generally, to participate in estate planning decision making.*

(d) *Proceedings for the approval of a family settlement, within the context of an exercise of protective jurisdiction (including that relating to authorisation of a statutory will) can be (as these proceedings have been) dealt with summarily, informally and without the constraints of rules of evidence that may constrain the conduct of family provision proceedings, with costs consequences for the estate of the defendant and those who have a call on his bounty.*

(e) *Because proceedings upon exercise of protective jurisdiction are governed by the purposive character of the jurisdiction, and the usual criterion for the making of costs orders in protective cases is that the Court makes such orders as "in all circumstances seem proper (CCR v PS (No 2) (1986) 6 NSWLR 622 at 640; CAC v Secretary, Department of Family and Community Services [2014] NSWSC 1855 at [129]-[130]), no party has a presumptive right to costs out of the estate of the defendant, with the consequence that the Court may be better placed to limit any prospective costs burden on the estate."*

5. The 2017 cases: adding degrees of complexity

5.1 Early determination of a probate suit?

54. In *Re APB, ex parte Sheehy* [2017] QSC 201, Applegarth J considered an application for a statutory will of a 91 year old man with an estate valued at about $70,000,000. APB had made wills in 1998, 2005, 2007, 2013 and 2014. The medical evidence suggested that APB did not have testamentary capacity when he made the 2013 and 2014 wills, and the Court found that he did not have testamentary capacity at the time of hearing.

55. The 2014 Will provided that the testator's new friends whom he had known for 2 years: CL (a real estate agent) was to receive 16 per cent of the residue, JHL (CL's husband) 16 per cent, MSR (a solicitor) 16 per cent and KLA (CL's neighbor) 10 per cent.

56. It seems to have not really been in dispute that a statutory will should be made, in view of the need to ensure that APB's will did not breach the terms of a joint venture

agreement which he had made with HRT to develop certain land, the doubt as to capacity at the time of making the last Will and the circumstances surrounding its creation. Because there was no real dispute, *APB* should not be regarded as authority of general proposition that a dispute as to the validity of the last will *alone* is sufficient to justify an application for a statutory will.

57. The Court considered the provision to be made for APB's children, grandchildren, old friends and new friends, as follows:

    a. A real estate agent, CL, who met APB in 2012. The Court found that she was strongly motivated by self-interest, she isolated APB from those who had a genuine concern for his welfare, and was responsible for poisoning his professional and personal relationship with long time advisor and power of attorney IDN. No gift was made for him or her husband JHL.

    b. MSR, a Gold Coast solicitor, who met APB in 2013. The Court found that MSR sought to integrate himself with APB to advance the business and financial interests of himself and CL, and that he acted improperly in doing so[8]. No gift was made for him.

    c. CL's neighbour, KLA, a retired doctor. The Court found that he was not motivated by self-interest. A gift of $20,000 was to be made for him[9].

    d. A friend of 50 years, GWC. He was to be given a legacy of $500,000. He was also to be a discretionary object of a testamentary trust.

    e. Other old friends, JW and AR, each received a legacy of $50,000.

    f. ENB, one of the deceased's sons. He had his wife had two children. He was to receive a legacy of $500,000, a share of income from the testamentary trust, and 26 2/3 % of the capital on the winding up of the testamentary trust.

    g. CRB, one of the deceased's daughters. She and her husband had two children. She was to receive a legacy of $500,000, a share of income from the testamentary trust, and 26 2/3 % of the capital on the winding up of the testamentary trust.

    h. SPB, one of the deceased's sons. He had an ex-nuptial child who he had hardly met. SPB was married, but he did not have other children. He was to receive a legacy of $500,000, a share of income from the testamentary trust, and 16 2/3 % of the capital on the winding up of the testamentary trust.

    i. The grandson, being the son of SPB. He was to receive a legacy of $300,000, and a 5% share of the capital on the winding up of the testamentary trust.

    j. SPB's wife YG. She was to receive a legacy of $300,000 and a 5% share of the capital on the winding up of the testamentary trust.

[8] *Re APB, ex parte Sheehy* [2017] QSC 201 at [172]
[9] *Re APB, ex parte Sheehy* [2017] QSC 201 at [196] – [202]

5.2 Testamentary trusts

58. In *A Limited v J (No 2)* [2017] NSWSC 896, Ward CJ in Eq received evidence from a specialist succession lawyer as to the asset protection and taxation benefits of testamentary trusts, and where they might be employed: in the case of a large estate, or where the beneficiaries are vulnerable[10]. The Court authorized the making of a will which included the testamentary discretionary trusts.

59. In *Re APB, ex Parte Sheehy* [2017] QSC 201, there was perhaps a stronger justification for a testamentary trust: the estate assets included a share in a joint venture development, which included a shopping centre with 60 tenants and land earmarked for future development. The profitability and workability of the future management of the development required there to be a testamentary trust in place.

60. The Court was called upon to rule on questions of:

    a. Whether there should be two trustees or one;

    b. Whether there should be a power of appointment or another mechanism requiring the trustee(s) to report and/or obtain consent from another person for major decisions.

    c. Whether there should be two trusts or one;

    d. Whether trust income was permitted to accumulate, or otherwise whether distribution of a percentage of income should be mandatory.

61. In contrast, in *Re K's Statutory Will* [2017] NSWSC 1711, the Court declined to authorize the making of a statutory will containing testamentary trusts. Lindsay J said:

    32 "One should not lose sight of the fact that, whatever artificiality there may be in attribution of a testamentary intention to a person lacking capacity to form any such intention, a will approved by the Court takes effect as a will and must be able to be justified (perhaps, more accurately, rationalised) as an expression of an intention reasonably and appropriately attributed to a real live person in need of protection.

    33 A will providing for the establishment of one or more testamentary trusts for the benefit of an object beyond the immediate comprehension, or orbit, of an incapacitated person by its nature might be thought to look primarily to the conferral of future benefits upon, and the future enjoyment of property by, persons other than the incapacitated person.

    34 If such a will is to be approved (particularly on behalf of an incapacitated person in a "nil capacity case") there needs to be some basis upon which it can reasonably be said that the terms of the will are for the benefit, and in the interests, of the incapacitated person during his or her lifetime.

[10] *A Limited v J (No 2)* [73] – [77]

35 The more remote a proposed will is from the personal circumstances of an incapacitated person, the less likely it is to be able to be justified as an exercise of jurisdiction protective of that person."

5.3 The revision of statutory wills

62. In *A Limited v J*, the minor, referred to as "N", was 13 years old. He had, from birth, suffered from a significant number of extreme physical disabilities caused by the circumstances of his birth. The plaintiff, A Limited, was appointed to manage N's estate following settlement of a personal injury claim against the hospital in which N was born. N had assets of approximately $8.788m at the time of the application, including the home in which he lived with his mother and 2 siblings (acquired for $1.5m) and $5.5m which was held in a superannuation fund.

63. There was evidence that the procedure which N was to undergo the following day carried with it a risk that N might die. N's mother had separated from N's father in 2010. She filed evidence to the effect that N's father had never taken any interest in N's welfare, and that he left the entire responsibility of caring for him to her.

64. The application was served on N's father the day before it was made, and there was little time to prepare evidence or submissions. Consistent with the power under s 21(b) of the Act to inform itself of any matter in any manner it sees fit, the Court asked Counsel for N's father to inform the Court of the substance of the evidence that he would give if given the opportunity. The substance of that evidence was that N's father said that N's mother understated his contributions, and that he was not able to contribute more due to the breakdown in the marital relationship.

65. Initially the plaintiff proposed a will which provided for one half of N's estate to be given to N's mother, and one half to be shared between his siblings.

66. N's mother supported the will proposed by the plaintiff, but in the alternative suggested that the residue of the estate be held on testamentary discretionary trusts. Time did not permit consideration of a statutory will containing testamentary trusts.

67. After comments from the Bench as to the form of the Will, the plaintiff and N's father submitted to the Court that the father and mother should receive one third of the residue, and that the remaining third should be shared between N's siblings. N's mother submitted that N's father should receive 5% of the estate, and that N's mother

and N's siblings should share the balance equally.

68. The Court authorized the making of a statutory will, with N's mother to receive 42.5% of the residue, N's father to receive 15% and the siblings to share the remaining 42.5%.

69. With the orders authorizing the making of the statutory will, the Court also noted that the orders did not exhaust the claim by the plaintiff and that the parties will have the opportunity to seek or defend the relief sought as if the orders made were of an interlocutory nature.

70. In *A Limited v J (No 2)*, the Court further considered N's statutory will with the benefit of further evidence filed by N's father. The Court said that it was not necessary, or appropriate, to make a finding as to whether the truth lay with respect to the breakdown in relationship between N's father and his children, but that it was not disputed that N's mother was the primary care giver with the most significant role in the child's life. N's mother proposed that the Will provide that she receive 42.5% of the residue, and that N's father and N's siblings share the balance of the residue (ie, 8.21% each). The Court accepted this submission[11].

71. In *Re K's Statutory Will*, a consequential order was made, subject to further order, that the manager of K's protected estate provide to the Court, no later than 6 months after K attains the age of 18 years or the death of his mother, whichever first occurs, a report as to consideration, if any, given to whether the statutory will should be revised.

5.4 Superannuation

72. In *A Limited v J*, a substantial part of N's assets were held in a superannuation fund. The statutory will which was authorized included an additional term which gave the executor a discretion, if the trustee of the superannuation fund exercised its own discretion to pay assets in the superannuation fund directly to the mother or the father, to reduce the share of the estate received by the mother and father, as fully as was possible to ensure that the mother and the father received the amounts that they would receive by operation of the will.

[11] A Limited v J (No 2) [2017] NSWSC 896 [58] – [60]; [68] – [72]

73. A further statutory will, with a revised clause requiring the executor to adjust the shares of residue to take into account of superannuation, life insurance and death benefits that may be paid to one or other of the beneficiaries, was made for N in *A Limited v J (No 2*). It was submitted in support of the change that the clause in the previous will might require a change that was not arithmetically possible. The Court was asked to decide between a clause permitting a discretion to make an adjustment, and one which required it.

6 Costs

74. The question as to the appropriate costs order in an application for a statutory will is the same as for other protective matters: what order is proper to be made[12].

75. In *A Limited v J (No 3)* [2017] NSWSC 931, taking into account the size of N's estate, the circumstances of urgency in which the original application was brought, the need to accord procedural fairness to N's father, and the fact that neither party adopted an unreasonable position, the Court ordered that the costs of all parties be paid out of N's estate on the indemnity basis.

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[12] *Snelgrove v Swindells* [2007] NSWSC 868 at [25].

APPENDIX A – EXTRACTS OF SUCCESSION ACT 2006 (NSW)

Division 1 Wills by minors

16 Court may authorise minor to make, alter or revoke a will

(1) The Court may make an order authorising a minor:

(a) to make or alter a will in the specific terms approved by the Court, or

(b) to revoke a will or part of a will.

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

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

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

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

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

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

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

(a) in the case of the making or alteration of a will (in whole or in part)-the will or alteration is executed in accordance with the requirements of Part 2. 1, and

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

(i) if made by a will-the will is executed in accordance with the requirements of Part 2. 1, and

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

(c) in addition to the requirements of Part 2. 1, one of the witnesses to the making or alteration of the will under this section is the Registrar, and

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

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

(7) A failure to comply with subsecti6n (6) does not affect the validity of the will.

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

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

(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:

(c) 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

(d) 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 p; 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 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,

(k) any other facts of which the applicant is aware that are relevant to the

application.

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.

25 Separate representation of person lacking testamentary capacity

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