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Statutory Wills

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Craig has presented extensively in estate litigation seminars and was named as an Estate Litigation Leading Junior Counsel – New South Wales in the Doyle's Guide for 2019 and 2020.

Before being called to the Bar in 2017 he was a senior associate of the firm of Teece Hodgson & Ward, Sydney. As a solicitor he was an Accredited Specialist in Wills and Estates Law.

Acknowledgements

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. The late Richard Williams died in 2019. I acknowledge the work of Richard and Sam in this valuable resource.

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1. STATUTORY WILL LEGISLATION IN NEW SOUTH WALES

1.1. The power of the Court to authorise the making of a will for a person who lacks testamentary capacity, and for a minor, was introduced with the *Succession Act* 2006 (NSW) which commenced on 1 March 2008. I have set out the relevant parts of Chapter 2, Pt 2.2, Div 2 of the *Succession Act* 2006 (NSW) ("**the Act**") in Annexure "A" to this paper.

1.2. The focus of this paper is court authorised wills for persons who lack testamentary capacity (Part 2.2 Division 2 of the Act rather than Part 2.2 Division 1) rather than court authorised wills for minors. But it is important to note the key differences between the substantive requirements and the mechanics of execution for each, as follows:

Sn Act	**Requirement – minors**	**Sn Act**	**Requirement – persons lacking testamentary capacity**
16(4)(a)	The minor understands the nature and effect of the proposed will or alteration and the extent of property disposed of by it.	22(a)	There is reason to believe that the person is, or is reasonably likely to be, incapable of making a will.
16(4)(b)	The proposed will accurately reflects the intentions of the minor.	22(b)	The proposed will is, or is reasonably likely to be, one that would have been made by the person.
16(4)(c)	It is reasonable in all of the circumstances that the order should be made.	22(c)	It is or may be appropriate for the order to be made.
		22(d)	The applicant is the appropriate person to make the application.
		22(e)	Adequate steps have been taken to allow representation, as the Court considers appropriate, of persons with a legitimate interest.
16(5)	A will is not properly executed unless executed in accordance with Part 2.1 (of the Act); one of the witnesses is the Registrar; and any other conditions of the authorisation (if any) are complied with.	23(1)	A will is properly executed if it is in writing and signed by the Registrar and sealed with the seal of the Court

1.3. Part 2.2 Division 2 will apply where a minor lacks testamentary capacity (as a matter of fact, not just by reason of their minority)[1].

1.4. Section 19 of the Act provides that an applicant for an order authorising the making of a statutory will must obtain the leave of the Court. The information listed in s 19(2) of the Act must be provided for the purpose of the application for leave. Section 20 of the Act provides that on the hearing of the application for leave, the Court may grant leave and allow the application to proceed under section 18, and, if satisfied of the matters in section 22 of the Act, make the order.

1.5. Section 20(2) of the Act permits the Court to revise the terms of any draft of the proposed will. Section 21(b) of the Act permits the Court to inform itself of any other matter in any matter it sees fit. Section 21(c) of the Act provides that the Court is not bound by the rules of evidence.

1.6. 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
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> (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
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> (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
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> (e) adequate steps have been taken to allow representation, *as the Court considers appropriate*, of 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."

1.7. Section 23(2) of the *Succession Act* 2006 (NSW) (introduced with effect from 21 March 2018 with assent to the *Justice Legislation Amendment Act* 2018 (NSW)) now provides: "*A will may be signed by the Registrar for the purposes of* subsection *(1) (b) even after the death of the person in relation to whom the order was made*."

1.8. For the mechanism previously employed to address the issues arising where a will is authorized by the Court, but not executed, prior to the testator's death, see *Estate of Scott; Re Application for Probate* [2014] NSWSC 465.

[1] Section 18(4) of the Act

2. CAPACITY TO MAKE A WILL

2.1. Although s21(c) of the Act provides that the Court is not bound by the rules of evidence, the rules of admissibility may be relevant to the weight to be attached to evidence of capacity.

2.2. In *Fenwick, Re; Application of J.R. Fenwick & Re Charles* [2009] NSWSC 530, Palmer J said in respect of the evidence required in respect of a putative testator's testamentary capacity (paragraphs 130 – 135 cited in *Re MP's Statutory Will* [2019] NSWSC 331 at [50]):

> "[127] The best evidence will always be that of a specialist professional, e.g. a psychiatrist, consultant physician or clinical psychologist, who has recently examined the incapacitated person and who expresses an opinion in a report which complies with the expert witness rules of Court. The report should state the testing which has been carried out and should give a conclusion by express reference to each of the elements of testamentary capacity enunciated in *Banks v Goodfellow*. The latter requirement is unnecessary, of course, if it is a nil capacity case in which brain injury at an early age has rendered the patient incapable of ever developing adult cognitive faculties.
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> [128] The next best evidence – which will suffice if there is insufficient time for the report of a specialist – is that of the patient's treating general practitioner. Again, the report should explicitly refer to the elements of testamentary capacity enumerated in *Banks v Goodfellow*, except in the kind of nil capacity case to which I have referred.
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> [129] The least satisfactory evidence is that of lay persons who would benefit under the proposed statutory will or codicil and who endeavour to prove testamentary incapacity by giving examples of the person's erratic or demented behaviour. The Court will treat that kind of evidence, uncorroborated by expert professional evidence, with the utmost suspicion.
>
> [130]. It must always be remembered that it is a serious matter for the Court to appropriate to itself the will-making power of the citizen. People who are vulnerable by reason of age, illness, temperament or attachment, though still of testamentary capacity, may be manipulated by the unscrupulous who invoke the statutory will-making power for their own benefit. The level of satisfaction that a Court must feel as to the essential requirement of permanent testamentary incapacity must have regard to the gravity of the power being exercised and to its consequences: cf. *Briginshaw v Briginshaw* (1938) 60 CLR 336. If no more than the minimum level of proof of testamentary incapacity is demonstrated by an applicant at the leave stage, when better proof would be expected, the application may survive s 22(a) but may founder at s 22(c).
>
> [131]. 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.
>
> [132]. 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. It is for this reason that s 21 provides that, in hearing an application for an order under s 18 (as distinct from an application for leave under s 20(1)(a)), the Court may inform itself of any matter, in addition to the information provided under s 19, in any manner the Court sees fit. Further, in hearing an application, the Court is not bound by the rules of evidence.

[133]. For example, the Court may have reservations about the impartiality of an expert medical witness, even though there is no other party to the proceedings who wishes to contest testamentary incapacity. The Court may, in such a case, insist on seeing and hearing the patient for itself. It may require a report from a Court appointed expert. Indeed, the Court is more likely to feel the need to use the investigative power expressly conferred on it by s 21(b) in a case where there is no apparent opposition to the application than in a case where the application is opposed by a party legally represented and able to adduce contradictory evidence.

[134]. I acknowledge that some Judges will, by training and disposition, hesitate to step outside the conventional role of the Judge as referee in adversarial litigation. However, to give the Court the power of informing itself in any manner it sees fit in order to decide an application for a statutory will imposes on the Judge a heavy responsibility; it is to do, as far as possible, what is best for those affected by the decision rather than to give a result which is dictated solely by the passive reception of whatever evidence is placed before the Court by the parties.

[135]. It goes without saying, however, that the powers given by s 21(b) and (c) must be exercised only when clearly necessary. Needless expense, delay and anguish may be caused to the parties by the Court's insistence on receiving further material which is not directed to issues which will decide the application one way or another. Further, the powers must be exercised judicially. If the application is contested, the matters upon which the Court requires further information and the results of the enquiry must all be exposed in Court in the presence of the parties and the parties must have the opportunity to respond by evidence and submission."

3. WHETHER THE PROPOSED WILL IS, OR IS REASONABLY LIKELY TO BE, ONE THAT WOULD HAVE BEEN MADE BY THE TESTATOR

3.1. 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."

3.2. In *Re Fenwick*, Palmer J said in respect of a "nil capacity" 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]

3.3. However, in *A Limited v J* [2017] NSWSC 736, Ward CJ in Eq said, with reference to the three judgments of Palmer J in *AB v CB* [2009] NSWSC 680, *Re Estate of Crawley* [2010] NSWSC 618 and *Re Sultana* [2010] NSWSC 915 at [77]:

> "When these decisions are considered carefully, however, in my view it becomes clear that Palmer J did not approach the question of whether the Court should authorise the making of a statutory will on the basis that there was a rule that the Court should do so if the proposed will was one that it was reasonably likely, in an objective sense, that the incapacitated person would have made if that person had testamentary capacity. The better explanation of the approach adopted by Palmer J is that the cases that he decided were relatively uncontroversial, and a consideration of whether or not it was reasonably likely that the incapacitated person would have made a will in terms of the proposed will was a satisfactory proxy for all the considerations that in theory may arise when the Court exercises its power in s 18 of the Act to authorise the making of a statutory will."

3.4. The best interests of the putative willmaker make, or may make, objective considerations, relevant: see for example the statements of principle in *W v H* [2014] NSWSC 1696 at [72] and in *Re RB, a protected estate family settlement* [2015] NSWSC 70 at [59], and examples of the benefit to be gained from resolving potential later proceedings (under the relevant provisions of the

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

Succession Act 1981 (Qld) - *Re APB; ex parte Sheehy* [2017] QSC 201 and under the *Succession Act* 2006 (NSW) - *Re M's Codicil* [2018] NSWSC 936.

4. WHETHER IT IS OR MAY BE APPROPRIATE FOR THE ORDER TO BE MADE AND WHETHER THE APPLICANT IS THE APPROPRIATE PERSON TO MAKE THE APPLICATION

4.1. The legislation does not give guidance as to what "appropriate" means or requires.

4.2. *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 (as his Honour then was) 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."

4.3. *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.

4.4. 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.

4.5. 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).

4.6. 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. See *W v H* at [72] and *Re RB* at [59].

4.7. 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".

4.8. In *Re MP's statutory will* [2019] NSWSC 331 at [24] and [40] – [52] his Honour drew parallel to two interwoven strands of authority in the exercise of the general protective jurisdiction – an application by family for payment of an allowance out of the estate of an incapable person, and payments on account of past gratuitous care in the Court's inherent jurisdiction. In *Small v Phillips (No 2)* [2019] NSWCA 268 at [121] – [125] (which was the appeal from *Re MP's statutory will*) the NSW Court of Appeal referred to his Honour's statements on the nature of statutory will proceedings and said that it had no reason to doubt the correctness of his Honour's conclusions (and no party to the appeal argued to the contrary).

4.9. 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]

4.10. In, *Re RB*, 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…"

[3] cited in *GAU v GAV* [2014] QCA 308 at [48]; *Small v Phillips (No 2)* [2019] NSWCA 268 at [124]

5. ADEQUATE STEPS HAVE BEEN TAKEN TO ALLOW REPRESENTATION OF ALL PERSONS WITH A LEGITIMATE INTEREST

5.1. The *Justice Legislation Amendment Act (No 2)* 2018 (NSW) amended s22(e) of the *Succession Act* 2006 (NSW) to read:

> "The Court must refuse leave to make an application for an order under section 18 unless the Court is satisfied that:
>
> (…)
>
> (e) adequate steps have been taken to ~~allow representation of all persons~~ allow representation, as the Court considers appropriate, of 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."

5.2. This amendment took effect on 1 December 2018.

Who has a legitimate interest?

5.3. By virtue of s19(2)(g) – (k) of the Act, the applicant for leave must give the Court the following information (to the extent available):

(a) evidence of the terms of any will previously made by the person,

(b) evidence of persons who might be entitled to claim on the intestacy of the person,

(c) evidence of the likelihood of an application being made under Chapter 3 of the Act,

(d) evidence of the circumstances of any person for whom provision might reasonably be expected to have been made by the person,

(e) evidence of a gift for a charitable or other purpose that the person might reasonably be expected to make by will.

5.4. In *Re the Will of Bridget* [2018] NSWSC 1509 at [126] – [127], Hallen J approved the following observations of Millett J in Re B (Court of Protection: Notice of Proceedings) [1987] 1 WLR 552 at 556-557:

> "In my judgment, laudable though the Receiver's object may be, there are two overriding considerations. First the court must be satisfied before it exercises a judicial discretion that it has all the relevant material before it and that it has heard all the arguments which can properly be canvassed and which are directed to the question to be determined. Second *all persons materially affected should be given every opportunity of putting their cases forward*. Of course there will be *exceptional cases* in which it will be right to exclude a party from the proceedings, notwithstanding the fact that he is a party interested. Plainly delay, cost, embarrassment and the exacerbation of family dissensions are all relevant matters. But only in the most exceptional circumstances should the consideration to which I have referred be overridden …. I approach this matter on the basis that the court has a general discretion concerning

> notification, but that it is one which must be exercised in relation to the facts of each particular case. In the ordinary case, and in the absence of emergency or need to act with great speed or of some other compelling reason, all persons who may be materially and adversely affected should be notified."

5.5. In *Re MP's Statutory Will* [2019] NSWSC 331 at [32] – [33], Lindsay J agreed that guidance about how to approach s 22(e) of the Act might be had from the above observations, but said that the word "materially" in s 22(e) begs the question, and referred also to the approach of Lord Eldon in *Ex parte Whitbread in the matter of Hinde, a lunatic* (1816) 35 ER 878 (in respect of the power to make gifts and allowances out of a protected estate):

> "The Lord Chancellor [Eldon]. For a long series of years the Court has been in the habit, in questions relating to the property of a Lunatic, to call in the assistance of those who are nearest in blood, not on account of any actual interest, but because they are most likely to be able to give information to the Court respecting the situation of the property, and are concerned in its good administration. It has, however, become too much the practice that, instead of such persons confining themselves to the duty of assisting the Court with their advice and management, there is a constant struggle among them to reduce the amount of the allowance made for the Lunatic, and thereby enlarge the fund which, it is probable, may one day devolve upon themselves. Nevertheless, the Court, in making the allowance, *has nothing to consider but the situation of the Lunatic himself, always looking to the probability of his recovery, and never regarding the interest of the next of kin.* With this view only, in cases where the estate is considerable, and the persons who will probably be entitled to it hereafter are otherwise unprovided for, the Court, looking at what is likely the Lunatic himself would do, if he were in a capacity to act, will make some provision out of the estate for those persons. So, where a large property devolves upon an elder son, who is a Lunatic, as heir at law, and his brothers and sisters are slenderly or not at all provided for, the Court will make an allowance to the latter for the sake of the former; upon the principle that it would naturally be more agreeable to the lunatic, and more for his advantage, that they should receive an education and maintenance suitable to his condition, than that they should be sent into the world to disgrace him as beggars. So also, where the father of a family becomes a lunatic, the Court does not look at the mere legal demands which his wife and children may have upon him, and which amount, perhaps, to no more than may keep them from being a burthen on the parish, - but, considering what the Lunatic would probably do, and what it would be beneficial to him should be done, makes an allowance for them proportioned to his circumstances. But the Court does not do this because, if the Lunatic were to die to-morrow, they would be entitled to the entire distribution of his estate, nor necessarily to the extent of giving them the whole surplus beyond the allowance made for the personal use of the Lunatic.
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> The Court does nothing wantonly or unnecessarily to alter the Lunatic's property, but on the contrary takes care, for his sake, that, if he recovers, he shall find his estate as nearly as possible in the same condition as he left it, applying the property in the meantime in such manner as the Court thinks it would have been wise and prudent in the Lunatic himself to apply it, in case he had been capable.
>
> The difficulty I have had was as to the extent of relationship to which an allowance ought to be granted. I have found instances in which the Court has, in its allowances to the relations of the Lunatic, gone to a further distance than grand-children - to brothers and other collateral kindred; and if we get to the principle, we find that it is not because the parties are next of kin to the Lunatic, or, as such, have any right to an allowance, but because the Court will not

> refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic himself would have done.
>
> [No Order was made upon the Petition.]"

Examples of the making of orders absent the opportunity for representation by affected persons

5.6. In *Re LS* [2017] NSWSC 1667, Rein J granted leave for the making of a statutory will, and authorized the making of a statutory will, in circumstances where:

a. LS, 54 years old, had suffered an aneurysm and a stroke earlier that month. She was unconscious and on life support with no prospect of recovery. Doctors planned to terminate LS's life support the following Monday.

b. The application was made by LS' de facto partner since 1997. They lived together with the plaintiff's two children.

c. Earlier in the year LS told the plaintiff discussed their testamentary wishes. LS said that she would like the plaintiff to obtain LS' half interest in a property on the South Coast and the residue of her NSW assets (with an estimated value of $500,000), and her mother and her sister were to receive all of her assets in New Zealand (with an estimated value of $800,000).

d. The plaintiff proposed that a statutory will be made to reflect these intentions.

e. LS' sisters and her mother had not been informed of the application. LS' sisters expected to arrive in Sydney on Monday from New Zealand, and LS' mother did not want to attend the hospital, and was not in a position to receive information about the proposed will.

f. The plaintiff was likely to receive LS' entire estate on intestacy.

5.7. The Court granted leave for the making of the application notwithstanding that LS' sisters and mother had not been informed of the making of the application. In the circumstances of the case (particularly the time pressure), the Court was satisfied that adequate steps had been taken in relation to representation of their interests notwithstanding that they had not been informed. The Court said that it was of crucial significance that the interests of LS' mother and sisters were advanced by the application rather than adversely affected: see further

paragraphs [17] – [18] of the Judgment.

5.8. In *A Limited v J* [2017] NSWSC 736, 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.

5.9. 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.

5.10. 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.

5.11. 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.

5.12. 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.

5.13. 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.

5.14. 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%.

5.15. 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.

5.16. In *A Limited v J (No 2)* [2017] NSWSC 896, 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[4].

5.17. In *Re K's Statutory Will* [2017] NSWSC 1711, 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.

5.18. In *Re the Will of Alexa* [2020] NSWSC 560, orders were made authorising the making of a statutory will for Alexa (a pseudonym), a person under a financial management. Perpetual Trustee Company Limited as the financial manager. A senior trust manager had sworn an affidavit in the proceedings but Perpetual were not parties to the proceedings. Alexa was not a party to the proceedings, no order was sought that she be separately represented. The Court was satisfied that the role played by Perpetual, as the subject person's financial manager, satisfied the Court that her interests were more than adequately protected.

5.19. In *Re the Statutory Will of Rolf Huenerjaeger* [2020] NSWSC 1190, in the absence of a statutory will there was a risk that Rolf would die intestate. The Court said at [74] – [78] that, usually, close family members of the person said to lack capacity are likely to have an interest in being notified that an application has been made to the Court concerning the person, but that the presumption may be

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

displaced where the applicant is aware of circumstances which reasonably indicate that members of the family should not be notified, but that others should be notified instead. The Court was satisfied that no person, other than the Plaintiff, had reason to expect a gift or benefit from the estate of Rolf. The Court was satisfied that it was not necessary to join Rolf as a separate party to the proceedings, even though there was no named contradictor.

6. COSTS IN STATUTORY WILL APPLICATIONS

6.1. 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[5].

6.2. 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.

6.3. In *Re MP's Statutory Will* [2019] NSWSC 331, MP was a protected person within the meaning of section 38 of the *NSW Trustee & Guardian Act* 2009 (NSW). The plaintiff was MP's grandson, the son of MP's only surviving daughter who was the first defendant. The second defendant was MP's only son. MP's son and daughter were separately joined as third defendants in their capacity as joint managers of MP's protected estate. MP herself, represented by a tutor, was the fourth defendant. The NSW Trustee & Guardian appeared to assist the Court, and the parties, in discharge of its obligation under the *NSW Trustee & Guardian Act* 2009 (NSW).

6.4. MP's estate had an estimated value of about $100million. She was at the time of the application 90 years of age. MP suffered a stroke on 13 April 2018. It was common ground, supported by objective evidence, that she lacked testamentary capacity following her stroke. Prior to April 2018 MP was engaged in an estate planning exercise which did not reach a conclusion, A draft will (dated 22 May 2017) was prepared, but MP refused to sign it. MP's more recently expressed testamentary intention was to die intestate. MP's last known will (dated 2 November 2001) did not favour her family as much as more recent expressions of testamentary intentions. There were reasonable grounds for suspecting that the will (the original of which could not be found) had been revoked by

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

destruction.

6.5. The Court said:

a. At [9], a consideration of what is in the interests, and for the benefit, of an incapacitated person may inform an assessment of his or her actual, or presumed, testamentary intentions.

6.6. The Court ordered the plaintiff to pay part of the costs of the defendants following dismissal of the plaintiff's application: *Re MP's Statutory Will* (No 2) [2019] NSWSC 491. An appeal from both the primary judgment and the costs judgment was successful. The costs of all parties were ordered to be paid from the estate of Mrs Phillips (referred to as the pseudonym MP in the first instance judgment), those of the successful plaintiff/appellant and Mrs Phillips' tutor on the indemnity basis*: Small v Phillips (No 3)* [2020] NSWCA 24.

7. RECENT CASE #1 - RE THE STATUTORY WILL OF ROLF HUENERJAEGER [2020] NSWSC 1190

7.1 This application concerned the will of Rolf Huenerjaeger. He was born in December 1942 in Germany. He was 77 years of age at the time of hearing.

7.2 The plaintiff was Rolf's long term friend and partner. He was born in September 1929 and was 91 years old at the time of hearing.

7.3 Rolf and the plaintiff lived together since 1965 and, since April 2019, had resided together in an aged care facility. They had rented a flat together since 1963, purchased a unit in Waverton in 1966 and a townhouse in Waverton in 1976.

7.4 The plaintiff gave evidence that their shared financial resources were regarded as joint property, that they shared the repayment of debts secured on the properties by mortgages and the running expenses of both properties.

7.5 Rolf's assets were estimated to have a value of $6,640,100, comprising the two properties at Waverton, a third property at Chatswood, a refundable accommodation deposit and other investments and cash holdings.

7.6 Rolf had never been married. He did not have any children.

7.7 Rolf's mother Herma Balinski died in about 2000. She had another son Uwe, with whom Rolf neither had a relationship nor any contact. Rolf's mother's sister, Christa, died some years ago leaving no children.

7.8 Rolf's father, Alfred Huenerjeaeger married Henny Mummenbrauer at age 24 and later immigrated from Germany to Australia. There were no children of the marriage. Rolf was adopted by Alfred and Henny in about 1958 but they later fell out. The plaintiff gave evidence that Rolf maintained no ongoing relationship with either of them. Alfred died aged 80 years in January 1990. The evidence did not disclose whether Henny was alive or dead at the time of hearing.

7.9 Rolf and the plaintiff had the same friends. The plaintiff's cousin John, moved into the home unit in Waverton in 1997. There was evidence that Rolf and John were close friends. There was evidence from John in which he said that he looked upon Rolf as family. John married Maggie in 1999 and they lived in the Waverton unit with their two children, Anastasia (16 years old at the time of hearing) and Jonathan (11 years old at the time of hearing).

7.10 The plaintiff gave evidence that he "rarely discussed making Wills" with Rolf save for him mentioning on occasion that "his estate could be a problem if (he) died first…the Probate people would be searching back in Germany, looking for relatives in the prescribed order". The plaintiff's evidence was that Rolf "managed to avoid this subject".

7.11 A copy of Rolf's Will dated 15 November 1967 was in evidence. Under that Will, Rolf appointed the Public Trustee (now the NSW Trustee and Guardian) to be executor, gave the unit in Waverton to the plaintiff, and gave the residue of his estate to his mother and to the plaintiff in equal shares.

7.12 At the time of hearing, it appeared as though the original of the 1967 Will could not be found. If Rolf died, the presumption of destruction *animo revocandi* would have applied. As the subject person's mother predeceased him (and s 42(2) of the *Succession Act* 2006 (NSW) did not apply as the Will had been made prior to the commencement of that section), if a copy of the 1967 Will were admitted to Probate, there would be a partial intestacy as to one half of the estate because his mother predeceased him.

7.13 However, if that Will had been revoked, it is likely that the plaintiff would be entitled on intestacy to apply for a Grant of Letters of Administration and to receive the whole of the estate.

7.14 The plaintiff gave evidence at paragraph 24 of his affidavit as follows:

> "I firmly believe that if I predeceased Rolf, he would not want his Estate to go to his half-brother Uwe (if he is still alive) or to Uwe's family, with whom he

> had has no real relationship or contact of any kind. Rolf and I rarely discussed making Wills. We both, subconsciously, thought our Wills were suitable. In recent times, I occasionally mentioned to Rolf that his estate could be a problem if I died first. I told him the Probate people would be searching back in Germany, looking for relatives in the prescribed order. He always managed to avoid the subject. Nevertheless, I believe that if I predecease Rolf he would have wanted to leave his Estate to be left to my [cousin John] and his family as he regarded them as family as well. I also believe that if Rolf predeceased me, he would have wanted to leave the whole of his Estate to me."

7.15 The Court said that the plaintiff's evidence at paragraph 24 was of limited weight as it did not constitute representations of fact. The Court said it was inconsistent with evidence which referred to Rolf not taking up the plaintiff's entreaties that he should make a new Will. The Court found that the plaintiff was "realistically and reasonably the only natural object of the bounty of (Rolf)".

7.16 A Dr Liu said, after referring to an MMSE score of 17/30 "…(Rolf) has moderate dementia with poor cognition and executive functions. Based on this assessment, he may still have capacity appointing (sic) Power of Attorney, but has no capacity making a Will and managing his financial affairs". The Court referred to the Court's awareness that dementia is a neurodegenerative disorder for which there is currently no cure and that Rolf was unlikely to regain capacity.

7.17 The Court was satisfied that:

a) the plaintiff had given the Court the available information required by s 19 of the Act.

b) There was reason to believe that Rolf is, or was reasonably likely to be, incapable of making a Will.

c) The plaintiff was an appropriate person to make the application.

d) Adequate steps had been taken to allow representation of persons with a legitimate interest in the application (noting that, apart from the plaintiff, there were none).

7.18 The Court was not satisfied that the Will proposed by the plaintiff, which appointed him as executor (with John as substitute executor), gave the whole of the estate to him and, should the plaintiff predecease Rolf, gave the whole of the estate to John.

7.19 Instead, the Court amended the proposed Will so that there was no substitute beneficiary. The Court said that there was insufficient evidence of any expression of an intention by Rolf to confer any testamentary benefit on John.

The Court also said that there was no evidence that Rolf, when he had capacity, made any gifts to John or that he had considered him, otherwise, to be an object of testamentary bounty.

8. RECENT CASE #2 - RE THE WILL OF ALEXA [2020] NSWSC 560

8.1 Alexa (a pseudonym) was a protected person within the meaning of s 38 of the *NSW Trustee and Guardian Act* 2009 (NSW). By order of the Supreme Court of NSW made on 14 July 2005, Perpetual Trustee Company Limited was appointed as the financial manager of Alexa's estate and it continued to manage Alexa's estate at the time of hearing.

8.2 An application was filed by Alexa's mother for leave to make an application and for an order authorising a statutory will for Alexa.

8.3 Neither Alexa nor Perpetual were parties to the proceedings, but a Senior Trust Manager of Perpetual swore an affidavit in support of the application and Perpetual had been served with copies of the evidence and proposed statutory Will in the proceedings.

8.4 Alexa was the daughter of the plaintiff (CBP) and PHCC. She was 28 years old at the time of hearing. Alexa suffered severe brain damage during her birth and during her hospitalisation in the post-natal period.

8.5 PHCC was born in May 1962 and was almost 58 years of age at the time of hearing. CBP was born in April 1965 and was 55 years of age at the time of hearing.

8.6 CBP and PHCC married in April 1985, separated in August 1993 or 1994 and were divorced in May 1999.

8.7 CBP married AP in January 2001 and they had two children, JP born October 1997 (22 years of age at the time of hearing) and FP who was born in June 2002 (18 years at the time of hearing).

8.8 PHCC also remarried, to C, and they had two children GCC and VCC each of whom were an adult.

8.9 Alexa had no spouse or issue.

8.10 Her estate was estimated to have a value of about $3,170,000. It appears to have been generated from damages of $2,750,000 awarded on 20 December 2004 for

her benefit following proceedings against South Eastern Sydney Area Health Service, the Central Sydney Area Health Service and a doctor.

8.11 Alexa lived with CBP and her family between 2001 and February 2010. When she turned 18 years of age, she was offered a permanent full time residential placement in group housing provided by Aging Disability and Home Care (now part of the Department of Communities and Justice). At the time of hearing Alexa continued to live in a group home which specifically caters for her needs.

8.12 There was evidence that CBP, her husband and their children assisted with Alexa's care, with administering medication, personal care needs and settling her amongst other things. CBP continued to manage all of Alexa's medical and health issues including NDIS requirements, group home requirements, medical and specialist appointments and management of her care.

8.13 PHCC acknowledged that CBP "has always had the primary care of Alexa". He sid that whilst he has kept in contact with Alexa, he visited her approximately 4 times per year. GCC and VCC "up until they left school, visited Alexa with (him) on at least 2 to 4 occasions each year".

8.14 The proposed statutory will was described in the judgment at paragraph 98 as including the following:

(a) A standard revocation Clause: Clause 1.

(b) The appointment of CBP and a named solicitor, SB, as executors and trustees, and in the event that SB is unwilling or unable to act, the Managing Partner or his or her nominee as executors and trustees: Clause 2.

(c) For the estate to be divided, with CBP to receive 65 per cent thereof; with PHCC to receive 5 per cent thereof; AP to receive 15 per cent thereof; JP to receive 5 per cent thereof; FP to receive 5 per cent thereof; GCC to receive 2.5 per cent thereof; and VCC to receive 2.5 per cent thereof, as tenants in common: Clause 3.

(d) In the event that CBP does not survive Alexa by 30 days, then JP and FP, who survive by 30 days, are to share, equally, that part of the estate that would have passed to CBP had she survived: Clause 4.

(e) In the event that PHCC does not survive Alexa by 30 days, then GCC and VCC, who survive by 30 days, are to share, equally, that part of the estate that would have passed to PHCC had he survived: Clause 5.

(f) If either of JP or FP does not survive Alexa by 30 days, but leaves a child or children who survive Alexa, that child or children who so survive by 30 days shall take the share of Alexa's estate which would have passed to that deceased brother, had he survived Alexa by 30 days: Clause 6.

(g) In addition to all powers given to them by law, Clause 7 provides for additional powers to the trustees.

(h) Clause 8 provides for payment of fees to a trustee who practices a profession or who conducts a business.

(i) Clause 10 provides a series of definitions (which it is not necessary to repeat), other than to note that "Estate" is defined.

8.15 No objection to the proposed statutory will was made by Perpetual, GHCC or any other of the family members.

8.16 The Court was satisfied of the matters required by the Act, granted leave for the plaintiff to make the application and made an order authorising the making of the statutory will in the terms proposed.

9. RECENT CASE #3 - SMALL V PHILIPS (NO. 2) [2019] NSWCA 268; SMALL V PHILLIPS (NO 2) [2019] NSWCA 268 (04 NOVEMBER 2019) (BRERETON JA; MCCALLUM JA; EMMETT AJA)

9.1 This was an Appeal from a first instance judgment dismissing an application for a statutory will in respect of Mrs Millie Phillips: *re MP's Statutory Will* [2019] NSWSC 331; *re MP Statutory Will (No. 2)* [2019] NSWSC 491.

9.2 The person subject of the application was Mrs Millie Phillips who was represented by a tutor in the proceedings. The application had been brought by her grandson, Mr Anthony Small. The other parties to the proceedings were Mrs Phillips' daughter Sharonne Phillips (first defendant) and her son Robert Phillips (second defendant). Sharonne and Robert as financial managers of the estate of Mrs Phillips were the third defendant.

9.3 Mrs Phillips was a wealthy 90 year old woman, long divorced from her husband who had predeceased her. In addition to Sharonne and Robert, she had another daughter who had died in tragic circumstances sometime previously. Sharonne had one child, Anthony and Robert had five children (not parties to the proceedings).

9.4 Mrs Phillips had an estate valued at between $62,000,000 and $109,000,000. Her estate which included, relevantly:

a) A company which owned property at Kurrajong Heights known as "Northfield" which was a large property of about 25 acres with a small, old, well appointed 3-bedroom cottage on it. There were about 10 acres of garden which represented a botanical garden with a magnificent selection of trees and plants.

b) Another company Milstern Health Care Pty Ltd which had acquired a property in Bathurst (the Bunnings Property) for approximately $25.5m in November 2016. That property had an income of about $1.3m per hear.

9.5 Mrs Phillips had made at least two Wills. The first, made on 13 June 1972 with Codicils made on 5 December 1973 and 13 July 1978. The second was made on 2 November 2001 which revoked the previous testamentary documents.

9.6 There was evidence that Mrs Phillips had said on a number of occasions after the date of the 2001 Will that she did not have a Will. If it were the case that she had revoked the 2001 Will, then, in the absence of a later Will, she would have died intestate and Sharonne and Robert would be entitled to share in her intestate estate.

9.7 A draft Will prepared after Mrs Phillips consulted with various advisors prepared on 22 May 2017 provided as follows:

(a) Mr Peter Philippsohn and Mr Steven Gross appointed as executors;

(b) Legacies to:

(i) Sharonne of $5,000,000;

(ii) Robert's five children of $1,000,000 each;

(iii) Mrs Phillips's sister, Ruth Wine, of $500,000; and

(iv) the Housekeeper of $250,000.

(c) A gift of the Northfield Property to Sharonne and Anthony as joint tenants;

(d) A gift of art works, *objets d'art* and personal effects to Sharonne and Anthony;

(e) A gift of the Bunnings Property to Anthony;

(f) Honouring donations and pledges previously made by Mrs Phillips;

(g) A gift of $1 million to the Sydney Jewish Museum; and

(h) A gift of the residue of the estate to a proposed charitable trust to be known as the "Millie Phillips Jewish Fund".

9.8 Although the Northfield property and the Bunnings property were held by a corporate entity, the draft Will provided a mechanism whereby the properties would be able to be acquired by Sharonne and Anthony without cost to them. The statutory will proposed by the plaintiff largely reflected the draft Will, although some other alternatives were also suggested.

9.9 One issue in the first instance proceedings concerned subpoenas and notices to produce addressed to legal and financial advisors and parties who would be likely

to have in their custody, notes, memoranda or documents regarding the expression of testamentary wishes by Mrs Phillips.

9.10 The Court at first instance had ordered that there be no access to any of the material produced without the leave of the Court. The Court later granted general access to the legal representatives for the tutor for Mrs Phillips and the financial managers of Mrs Phillips and directed that the tutor for Mrs Phillips deliver to the Court and to the NSW Trustee, a confidential report to be prepared by Senior Counsel retained by the tutor, with the benefit of such consultations as considered appropriate with Senior Counsel for the managers, reporting upon the nature and scope of the material produced to the Court, whether any such material was of a character that might properly be characterised as the subject of legal professional privilege or of confidentiality on the part of Mrs Phillips and a recommendation as to whether any such material should or should not be disclosed to the plaintiff or to any other party to the proceedings. The tutor's report and a chronology was produced and served on the other parties to the proceedings by their legal representatives.

9.11 The plaintiff thereafter applied for general access to the documents which had been produced on subpoena and notice to produce which the Primary Judge declined. The Primary Judge's reasons are summarised in paragraph 26 of the Court of Appeal's Judgment as including that all of the material in question related to the personal affairs of Mrs Phillips, for whose benefit alone the proceedings must be determined, that the plaintiff had no proper proprietary interest in the assets of Mrs Phillips and, to the extent that the plaintiff may have an expectation of being consulted in relation to the affairs of Mrs Phillips, the material in question had been the subject of the tutor's report. The Court observed that the plaintiff's case was addressed by substantial evidence that had been placed before the Court, noted the need for expedition and referred to the principles in s 56 of the *Civil Procedure Act* 2005 (NSW).

9.12 The chronology of Mrs Phillips consultation with advisors and family members in relation to the preparation of a new Will between 2015 and 2018 and steps taken in furtherance of those discussions is summarised at paragraphs 31 to 115 of the Court of Appeal's judgment.

9.13 The Primary Judge considered that, objectively, Mrs Phillips deliberately refrained from signing a Will, apparently content to embrace or risk an intestacy. His Honour found that Mrs Phillips' testamentary intentions were unsettled, noting her

disavowal of the draft Will, her disinclination to sign any alternative form of Will, her apparent acceptance that absent a newly executed Will she would die intestate and her contemporaneous pledge to charity operated, objectively, as impediments to the Court being satisfied that a particular proposed Will was or was reasonably likely to be one that would have been made by her if she had capacity.

9.14 The Court also had noted the doubts expressed by Mrs Phillips about whether conferral of substantial benefits on Anthony, beyond the assistance she had provided him up to that time was wise.

9.15 The Primary Judge also considered that it was not appropriate for an order to be made given that further light might be shun upon the status of the 2001 Will and the evidence lacked clarity about the composition and value of Mrs Phillips estate.

9.16 The Court was not satisfied that any Will proposed was reasonably likely to be one that would be made by Mrs Phillips if she had testamentary capacity or that it was or may be, appropriate for an order authorising a Will to be made.

9.17 The grounds of Appeal included:

a) that the Primary Judge erred in finding that there was no testamentary intention attributable to Mrs Phillips that was, or was reasonably likely to be, more attributable to her than any other testamentary intention.

b) that the plaintiff was denied procedural fairness in so far as he was refused access to the materials produced on subpoena and the notice to produce.

9.18 In relation to procedural fairness, the Court of Appeal said:

a) At paragraph 148: “In normal adversarial litigation it would be exceptional for one party to be given access to material and to be permitted to deploy some of that material at a hearing while other parties will refuse the opportunity of inspecting the material…”

b) At paragraph 149: “…While it is important for the Court to be satisfied that it has had access to all relevant material for the purpose of deciding whether to authorise an application and, if so, to authorise making of a statutory Will, it does not necessarily follow that the various parties to such proceedings have precisely the same right to procedural fairness that would be applicable in adversarial litigation”.

c) At paragraph 150: "…The procedure and rules should serve the relevant purpose and not thwart it. If the application of rules requiring procedural fairness would frustrate the purpose for which the jurisdiction is conferred, the application of those principles must be qualified…"

d) At paragraph 153: "Under s 21(b) (of the *Succession Act* 2006 (NSW)), the Court may inform itself of any matter in any manner it sees fit and under s 21(c), the Court is not bound by the rules of evidence… However, such powers to dispense with the rules of evidence do not authorise dispensing of the rules of procedural fairness. Although the proceedings may not be ordinary adversarial proceedings, they still have an adversarial impact, in that the Court does not proceed in the inquisitorial manner but relies on the parties to adduce and test relevant evidence".

e) At paragraph 154: "to deprive the party of the ability to adduce relevant evidence and only deprives the party of the opportunity properly and fairly to be heard, but also potentially deprives the Court of relevant evidence…. There was no absence of legitimate forensic purpose, no claim for privilege was propounded and there was and could have been no objection on the grounds of relevance".

f) At paragraph 155: "…However, the conclusion that the appellant succeeds on other grounds renders it unnecessary to decide the ground of procedural fairness".

9.19 In relation to "reasonable likelihood" the Court of Appeal said:

a) At paragraph 157: "…Having had regard to the gifts made by the 2001 Will, the gifts proposed by the draft Will and the gifts foreshadowed in (Mrs Phillips' later discussions with a Mrs Deagan solicitor), the Court concluded that the draft Will reflected, to a very considerable extent Mrs Phillips' wishes as to the disposition of her estate…"

b) At paragraph 158: "Section 22(b) draws a distinction between a Will that would have been made by an incapable person, on the one hand, and a Will that is reasonably likely to be a Will that would have been made by incapable person on the other… Clearly enough, one can envisage a situation where a person evidenced a clear intention and desire to make a Will in a finalised form, but, because of intervening events, leading to incapacity, was unable to execute the Will may well lead to a conclusion

that the Will is one that ***would*** have been made by the incapable person… The introduction of 'reasonably' introduces an element of uncertainty over and above 'likelihood'. Thus, there is a degree of latitude or margin for judgment in considering the intentions of the incapacitated party".

c) At paragraph 160: "On three occasions, 29 May 2017, 15 August 2017 and 3 April 2018, Mrs Phillips disclaimed the draft Wills. She was told on at least 3 specific occasions, 25 April 2016, May 2017 and 8 October 2017, that if she were to die without making a Will, her estate would pass to her surviving children. Further, Mrs Phillips was uncertain about the appointment of executors and, on 8 October 2017 and in November 2017 she expressed reservations to Ms Deagan about her plans to give the Bunnings property to Anthony".

d) At paragraph 166: the "disavowal" of the proposed will by Mrs Phillips involved complaints as to the provisions of the draft Will for the creation of the proposed charitable foundation and that her advisors were taking instructions directly from other advisors rather than from her directly.

e) At paragraph 167: "…The notes made by Ms Deagan at her meeting with Mrs Phillips in October 2017 demonstrate an intention on the party of Mrs Phillips to make gifts very close to, if not identical to, those provided for in the draft Will. The notes are consistent with a Will having an overall structure substantially similar to the draft Will with almost identical legacies and gifts to family and friends. In addition, the residue was to go to a foundation to support causes associated with Jewish Religion and culture as provided for in the draft Will.

f) At paragraph 170: "the material before the Primary Judge indicates that Mrs Phillips did not deliberately refrain from making any Will and was not content to embrace intestacy…"

g) Paragraph 174: "It is much more likely that not, that while Mrs Phillips was clearly disenchanted with aspects of the draft Will and her advisors, she did not intend that her very substantial estate would be shared between Robert and Sharrone to the exclusion of the other objects described in the draft Will".

9.20 In relation to appropriateness, the parties to the Appeal accepted that the Primary Judge's first reason for lack of satisfaction of appropriateness, namely that time

might shed further light on the status of the 2001 Will may not be a strong reason for declining an order under s 18.

9.21 The Court of Appeal further found at paragraph 177 that the complexity of the estate, was not a reason for concluding that the draft Will is not appropriate.

9.22 The Court of Appeal considered the clauses of the proposed draft Will at paragraphs 181 to 190 of the judgment (which was also reflected in earlier, summary reasons (*Small v Phillips* [2019] NSWCA 222)).

9.23 The Court made orders setting aside the Primary Judge's order, granting leave for the making of the application and an order authorising the making of the Statutory Will largely in accordance with the draft Will.

9.24 The Primary Judge had made orders for costs (*re MP Statutory Will* (No 2) [2019] NSWSC 491) including that the plaintiff pay some part of the costs of some of the defendants. Those costs orders were set aside. The Court of Appeal made orders that the costs of all parties be paid out of the estate of Mrs Phillips, the costs of the Appellant, the Financial Managers and the Tutor on the indemnity basis and the costs of the other parties on the ordinary basis (*Small v Phillips (No 3)* [2020] NSWCA 24).

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"A"

10. 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 subsection (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:

(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.

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, as the Court considers appropriate, of 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 be signed by the Registrar for the purposes of subsection (1) (b) even after the death of the person in relation to whom the order was made.

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.