Statutory Wills

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1. Statutory Wills (or Court-authorised Wills) have been available in New South Wales since the commencement of the *Succession Act 2006* on 1 March 2008. They are therefore, in legal terms, a relatively "*new*" addition to the power of the Court to provide relief within its protective jurisdiction.

2. The relevant provisions are contained within Division 2 of Part 2.2 of the Act.

3. The provisions mandate a two-step process. Under that two-step process, a person seeking an order under section 18 of the Act must first apply for leave under section 19 of the Act, which provides as follows:

> ***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.

4. Leave under section 19 of the Act may only be given if the Court is satisfied of the five matters that are set out in section 22 which states as follows:

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.

5. If the matters under section 22 are satisfied and the Court otherwise exercises its discretion to give leave under section 19, the provisions of the substantive provision, section 18, allowing the Court to authorise a Will to be made, altered or revoked come into play. Section 18 provides in full as follows:

> ***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.*
>
> ***Note :*** *A person may only make an application for an order if the person has obtained the leave of the Court-see section 19.*
>
> *(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.

6. In considering the function of the leave requirement under similar provisions in the Queensland Legislation, the Queensland Court of Appeal in *GAU v GAV*[1] found as follows:

- the leave requirement is a composite of the requirement for leave in section 22(1) [NSW: section 19(1)] and the constraint on granting leave in section 24 [NSW: section 22][2];

- there is nothing in the text or context of section 24 [NSW: section 22] that limits its role to screening out vexatious or unmeritorious claims[3];

- power to grant leave is given to the Court to be exercised, or not exercised, at its discretion, but in accordance with the provisions of the Act. Section 24 [NSW: section 22] imposes a substantial constraint upon the exercise of the discretionary power to grant leave. The Court may exercise the power to grant leave only if it is satisfied of the five matters listed in the section. Unless so satisfied as to each of them, the Court may not grant leave[4];

- the discretionary power to grant leave is distinctly separate from the discretionary power conferred under section 21 [NSW: section 18][5];

- both discretionary powers are contained within subdivision 3. That subdivision:

> "*...confers a jurisdiction which is protective in nature and is informed by the protective jurisdiction historically exercised by the Court over persons without testamentary capacity. As Lindsay J ... observed recently in Secretary, Department of Family and Community Services v K [2014] NSWSC 1065 at [60]-[61], that jurisdiction is purposive; the purpose being, at its highest level of abstraction, protection of a person in need of protection. So grounded, the jurisdiction is broad in scope and flexible in nature. Its guiding principle is that whatever is done, or not done, for or on behalf of the person in need of protection must be for the benefit, and in the interests, of that person.*

[1] [2016] 1Qd R 1
[2] at [39]
[3] at [45]
[4] at [46]
[5] at [47]

> *The scope of operation of clause 24(e) is to be discerned against that background and by reference to the words of the provision itself. It is clear from those words that the Court need be satisfied that an order under section 21 is, or may be, appropriate, and no more. The Court need not be satisfied that such an order is appropriate; satisfaction that it may be appropriate will suffice. The nature and extent of the enquiry the Court need undertake is so informed: the enquiry need only be one that is sufficient for the Court to be satisfied as to the appropriateness of making an order under section 21, at either level. Where the Court is not satisfied at either level, it may not give leave.*
>
> *The Court undertakes the enquiry with regard to the information provided to it pursuant to section 23. As Lindsay J also observed (at [73]) that information is designed to allow the Court to be placed in the position to make broad evaluative judgments about the personal, and family, circumstances of the person alteration of whose Will is sought.*
>
> *...Thus, the assessment at the leave stage of appropriateness of making an order under section 21 is made objectively with reference to the matters given to the Court pursuant to section 23 and such other matters as the Court considers relevant.*
>
> *Importantly, it is undertaken with conscious regard for the fact that making an order under section 21 is an exercise of a jurisdiction which is protective nature and informed by what is for the benefit, and in the interests, of the person who requires protection"*[6]

7. On the hearing of the substantive application under section 18 (but not on the hearing of the application under section 19), the rules of evidence are relaxed pursuant to section 21, which provides as follows:

> ***21 Hearing an application for an order***
>
> *In considering an application for an order under section 18, the Court:*
>
> *(a)* *may have regard to any information given to the Court in support of the application under section 19, and*
>
> *(b)* *may inform itself of any other matter in any manner it sees fit, and*
>
> *(c)* *is not bound* by the rules of evidence.

8. The reason for the relaxation of the rules of evidence was expressed by Palmer J in the leading authority of *Re Fenwick*[7] as follows:

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[6] *At [48] – [50] and [51]*
[7] *Re Fenwick; Application of J.R. Fenwick & Re Charles* (2009) 76 NSWLR 22; [2009] NSWSC 530

> "*The best interests of an incapacitated person and of those having a proper claim on his or her testamentary boundary are the objects of the jurisdiction which the Court exercises under part 2.2 Div 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".*

9. As a procedural matter, if the Court makes an order under section 18 authorising the making or alteration of a Will, it must be executed in accordance with section 23 which requires that it be signed by the Registrar and sealed with the seal of the Court.

10. Part 2.2 applies not where it is sought to make w Will for a person lacking legal capacity generally but only where the person for whom a Will is proposed to be made lacks testamentary capacity as determined by the traditional test set out in *Banks v Goodfellow*[8]:

> *"It is essential to the exercise off such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."*

11. While Div 2 of Part 2.2 may apply to the making of a Will for a person lacking testamentary capacity generally, for example to a minor, there are separate provisions in Div 1 that deal with the making of a Will for a minor where the minor otherwise possesses testamentary capacity.

12. Of particular significance in obtaining an order under section 18 is the requirement under section 22(b) that the proposed Will "*is, or is reasonably likely to be, one that would have been made by the person*" in respect of whom the order is sought if that person had testamentary capacity. The requirement is not that the Will be "*the Will*"

[8] (1870) LR 5 QB 594 at 565

that the person would have made, but only that it be one that is reasonably likely to be a Will that the person would have made.

13. The meaning of this was discussed by Hallen AsJ (as his Honour then was) in *Re Will of Jane*[9] as follows:

> "*81. Whether the proposed statutory Will is 'reasonably likely' must be derived from all relevant evidence and information as may be available concerning the actual intentions, attitudes and predispositions of the person in the past, by reference to what is known of his, or her, relationships, history, personality and the size of the estate. Thus, it seems, what is required is to establish the chance of an event occurring (the proposed Will is one that is, or would have been reasonably likely to have been, made by the incapable person, if he, or she, had testamentary capacity) that is above mere possibility, but not so high as to be more likely than not. In other words, more is required than mere assertion, suspicion or conjecture.*
>
> *82. If the actual, or reasonably likely, testamentary intentions are established, the next question is whether those intentions would have been carried into testamentary effect by the person 'if he or she had testamentary capacity'? A previous Will, or Wills, may give a clear indication of the person's testamentary choices and preferences such as to provide evidence of what it is reasonably likely he, or she, would do if he, or she, had testamentary capacity.*
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> *83. The question is not whether he, or she, would likely have preferred the proposed statutory Will to intestacy, or to his or her prior Will. Nor is it whether the proposed statutory Will is one of a number of possible proposed Wills, all of which might be equally likely to be one that he, or she, may have made if he, or she, had testamentary capacity. If the proposed statutory Will does no more than reflect one of a number of other possible dispositions, in my view, the requirements of section 22(b) will not be satisfied since it would not be 'reasonably likely' to be a Will that he, or she, would have made had he, or she, had testamentary capacity.*
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> *84. Clearly, in determining the answer to the question raised by section 22(b), the Court must be cautious, mindful of the consequences of a decision under section 18. It is a serious matter for the Court to appropriate to itself the Will-making power of the citizen: Re Fenwick at [130]. It will never be an easy task because of the condition of the person in circumstances where his, or her, actual last words on the topic were formally made, in this case, a long time ago, or where they may never have been formally articulated".*

14. The provisions of section 19(2) set out above detail the information that must be provided to the Court on an application for leave to make an application under

section 18. These provisions deal with the nature of the estate, "*satisfactory*" evidence of the lack of testamentary capacity, a draft of the proposed Will, alteration or revocation for which approval is sought, any evidence available as to the person's wishes, details of any person who might have a claim on the intestacy of the person and any evidence available to the Applicant of the likelihood of an application being made under chapter 3 of the Act (Family Provision Claims).

15. If leave is granted under section 19, then on the hearing of the substantive application under section 18, the Court may have regard to the information provided in support of the application under section 19.

16. Whilst the provisions are dealt with under the Court's protective jurisdiction and are therefore not adversarial, the provisions of section 22(e) provide for representation for persons with a legitimate interest in the application, which includes persons who have reason to expect a gift or benefit from the estate of the person. This creates an obvious tension.

17. While the provisions of part 2.2 Div 2 seem most clearly designed to provide for the making of a will for a person who has lost the capacity to make a Will through a decline in mental capacity due to dementia or the like, there are many other circumstances in which the provisions may be appropriate, including the case of a person who has never had testamentary capacity. The legislation therefore provides a useful addition to the possible courses of action available for those advising clients as to the making of Wills and in particular, in advising how to deal with the estates of persons who do not have Will-making capacity so as to ensure that their estate is dealt with in an appropriate fashion.

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[9] [2011] NSWSC 624 at [81]-[84]