STATUTORY WILLS

A Lecture for the College of Law WEP3 Course

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THE LEGISLATION

The relevant provisions are set out in sections 18 to 26 of the Succession Act 2006 (NSW) ("the Act") (Section 26 relates to recognition of statutory wills made outside of NSW and is not relevant to the discussion in this lecture, so it is not set out below):

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.
(6) A will that is authorised to be made or altered by an order under this section must be deposited with the Registrar under Part 2.5.
(7) A failure to comply with subsection (6) does not affect the validity of the will.

19 Information required in support of application for leave

(1) A person must obtain the leave of the Court to make an application to the Court for an order under section 18.
(2) In applying for leave, the person must (unless the Court otherwise directs) give the Court the following information:

(a) a written statement of the general nature of the application and the reasons for making it,
(b) satisfactory evidence of the lack of testamentary capacity of the person in relation to whom an order under section 18 is sought,
(c) a reasonable estimate, formed from the evidence available to the applicant, of the size and character of the estate of the person in relation to whom an order under section 18 is sought,
(d) a draft of the proposed will, alteration or revocation for which the applicant is seeking the Court's approval,
(e) any evidence available to the applicant of the person's wishes,
(f) any evidence available to the applicant of the likelihood of the person acquiring or regaining testamentary capacity,
(g) any evidence available to the applicant of the terms of any will previously made by the person,
(h) any evidence available to the applicant, or that can be discovered with reasonable diligence, of any persons who might be entitled to claim on the intestacy of the person,

(i) any evidence available to the applicant of the likelihood of an application being made under Chapter 3 of this Act in respect of the property of the person,

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

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

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

20 Hearing of application for leave

(1) On hearing an application for leave the Court may:

(a) give leave and allow the application for leave to proceed as an application for an order under section 18, and

(b) if satisfied of the matters set out in section 22, make the order.

(2) Without limiting the action the Court may take in hearing an application for leave, the Court may revise the terms of any draft of the proposed will, alteration or revocation for which the Court's approval is sought.

21 Hearing an application for an order

In considering an application for an order under section 18, the Court:

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

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

(c) is not bound by the rules of evidence.

22 Court must be satisfied about certain matters

The Court must refuse leave to make an application for an order under section 18 unless the Court is satisfied that:

(a) there is reason to believe that the person in relation to whom the order is sought is, or is reasonably likely to be, incapable of making a will, and

(b) the proposed will, alteration or revocation is, or is reasonably likely to be, one that would have been made by the person if he or she had testamentary capacity, and

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

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

(e) adequate steps have been taken to allow representation of all persons with a legitimate interest in the application, including persons who have reason to expect a gift or benefit from the estate of the person in relation to whom the order is sought.

23 Execution of will made under order

(1) A will that is made or altered by an order under section 18 is properly executed if:

(a) it is in writing, and

(b) it is signed by the Registrar and sealed with the seal of the Court.

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

24 Retention of will

(1) Despite section 52 (Delivery of wills by Registrar), a will deposited with the Registrar in accordance with this Part may not be withdrawn from deposit with the Registrar by or on behalf of the person on whose behalf it was made unless:

(a) the Court has made an order under section 18 authorising the revocation of the whole of the will, or

(b) the person has acquired or regained testamentary capacity.

(2) On being presented with a copy of an order under section 18 authorising the revocation of the whole of a will, the Registrar must withdraw the will from deposit.

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.

COMMENCEMENT DATE

The provisions apply on or after commencement of the Succession Act on 1 March 2008 and, in the case of an order with respect to the alteration or total or partial revocation of a will, applies even if the will was made before that date (cl 3(5) of Schedule 1).

SUMMARY OF THE PROVISIONS

A convenient summary of the subject matter of each section is as follows.

Section 18 - power of the court to make an order.

Section 19 – leave to apply under section 18 is required. The section also sets out the information required to support the application for leave.

Section 20 - how the Court may deal with the hearing of the application for leave.

Section 21 – how the Court may deal with the hearing of the application for an order.

Section 22 - the matters on which the Court must be satisfied to make an order.

Section 23 - a will made pursuant to an order will be executed by a Registrar.

Section 24 - retention of statutory wills deposited with the Registrar.

Section 25 - separate representation in proceedings for the person lacking capacity.

RE FENWICK

The leading decision on the operation of the provisions was given by Justice Palmer in *Re Fenwick; Application of J.R. Fenwick & Re Charles* 76 NSWLR 22; [2009] NSWSC 530.

3 categories of cases

His Honour divided the sorts of situations the legislation was directed at into three categories (at [23] to [28]):

1. Lost capacity cases – His Honour described these as cases in which a person, having made a will, loses testamentary capacity and cannot make a later will or codicil in order to deal with changed circumstances, such as the death of a sole or major beneficiary. In such a case, if there is no one who can make a successful claim under the family provision legislation to absorb the lapsed bequest, there must be total or partial intestacy. If there is no one to take on intestacy some, or even the whole, of the estate may go to the Crown as *bona vacantia*. Another such case is where a person having testamentary capacity loses it before making a will and a distribution

on intestacy would produce a result which the person could never have intended.

2. Nil capacity cases - cases involving persons who have never had testamentary capacity, usually because of mental infirmity from an early age. In some of these cases, the incapacitated person is possessed of considerable property. Often, there will be no "eligible person" who can make a claim under the family provision legislation on the death of such a person intestate, because none of the incapacitated person's family survives and he or she has never been able to form any relationship of a kind entitling a claim under the family provision legislation.

3. Pre-empted capacity cases - cases in which a person, though still a minor and therefore lacking testamentary capacity, was old enough to form relationships and to express reasonable wishes about property before losing testamentary capacity. A common example would be a person of seventeen years of age who suffers severe and permanent brain injury as a result of a motor vehicle accident and is subsequently awarded large damages.

Formal requirements

Section 22(b) of the Act requires the Courts to apply what his Honour described as a briefly stated, but critical, test for determining the appropriateness of a proposed statutory will. The test depends upon the ascertainment of actual or likely testamentary intention but the Act gives no express guidance as to how the Courts should apply the test (at [10]).

There are two stages in an application. Firstly, leave to bring the application is required under section 19 and if leave is granted the Court will proceed to deal with it. The leave application is *"a process by which to screen out baseless or unmeritorious applications and, in particular, baseless claims that a person lacks testamentary capacity" (Hoffmann v Waters* [2007] SASC 273, at [10]).

In order to save the parties expense and time, the Court will normally proceed to hear the application for a final order as soon as it grants leave under s 19(1) if it can be satisfied that the circumstances revealed in the evidence provided in order to satisfy the requirements of s 19(2) and s 22, is sufficient to justify the making of a final order and is unlikely to change in the foreseeable future (at [119]).

Section 19(2) provides a check list of the information required, unless the Court otherwise directs, on an application for leave. Section 22 sets out criteria that must be satisfied for leave to be granted.

There is a subtle difference between the tests required to be satisfied on the leave application versus the final application. In an application for leave, the Court must be satisfied that *"there is reason to believe that [the incapacitated person] is, or is reasonably likely to be, incapable of making a will"*: s 22(a). On the other hand, the Court can make a final order under s 18(1) only in respect of a person *"who lacks testamentary capacity"* (at [121]).

His Honour noted (at [126]) that the test for lack of testamentary capacity is the test enunciated long ago in *Banks v Goodfellow* [1870] LR 5QB549 at 565:

> "It is essential to the exercise of such a power that a testator (a) shall understand the nature of the act and its effects; (b) shall understand the extent of the property of which he is disposing; (c) shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, (d) 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."

His Honour also noted that the jurisdiction exercised by the Court in these matters is remedial and protective and is accordingly, not governed by the rules of adversarial litigation. 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 (at [132]).

Intention in a lost capacity case

His Honour divided these cases into 3 sub-categories (at [154] to [170]):

1. Where the incapacitated person is adult, has formed family and other personal relationships, has made a valid will before testamentary incapacity occurred, and is now said to have expressed some testamentary intention in relation to the circumstances sufficient to warrant an application for a statutory codicil or new will. The Court will look to evidence of the intention and may wish to see and hear the incapacitated person to verify the wish ascribed in the affidavit evidence. The Court asks: has the incapacitated person actually expressed the intention attributed; would the person have held that intention if possessed of testamentary capacity? Further, the Court will also be concerned as to whether the expressed intention is the product of the incapacitated person's free choice, or has some undue pressure or influence been applied?
2. Where an adult with established family or other personal relationships has made a valid will but, since losing testamentary capacity, has not expressed, or is incapable of expressing, any testamentary intention to deal with changed circumstances, such as, the birth of a child or the death of a beneficiary under the existing will. The Court may be satisfied as to what the incapacitated person is *"reasonably likely"* to have done, in the light of what is known of his or her relationships, history, personality and the size of the estate. The previous will may give a very good indication of the incapacitated person's testamentary choices and preferences such as to provide evidence of what it is likely he or she would now do in the changed circumstances.
3. Where the incapacitated person has never made a will. The first question is: can the Court be satisfied that it is reasonably likely that the person would have made any will at all if testamentary capacity had not been lost?

> Experience shows that some people with testamentary capacity deliberately choose to die intestate, for a variety of reasons. The Court should not start with a presumed intention against intestacy. The Court must be satisfied by the evidence that it is *"reasonably likely"* – in the sense of "a fairly good chance" – that the person would have made a will at some time or other, had not testamentary incapacity supervened. If there is insufficient evidence for the Court to form any view one way or the other, then the applicant will have failed to discharge the burden of proof which he or she bears under s 22(b) and the application must be dismissed.

Intention in a nil capacity case

His Honour dealt with this category at [171] to [176]. In his view, 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. 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.

"Is there a fairly good chance that a reasonable person, faced with the circumstances of the incapacitated minor, would make such a testamentary provision?" In a nil capacity case, as distinct from a lost capacity case, this is the question which the words "reasonably likely" in s 22(b) require the Court to answer. The considerations involved in the question are entirely objective.

Intention in a pre-empted capacity case

In this category the incapacitated person is still a minor but has lost testamentary capacity at an age at which he or she had formed relationships and had, or could reasonably be expected to have had, a fairly good understanding of will-making, intestacy and their consequences. It is possible that they will have expressed some sort of testamentary intention before becoming incapacitated but this will probably be rare. As in a lost capacity case the Court should scrutinise evidence of such an intention carefully.

In most cases however, the application will be made on the ground that, although the minor has never expressed a testamentary intention, the proposed will is reasonably likely to have been one which he or she would have made. The Court is concerned under s 22(b) with a question which involves both subjective and objective considerations: given what is known about the minor's relationships and history, is there a fairly good chance that a reasonable person, weighing up those circumstances, would have made the proposed statutory will (at [177] to [188])?

Whether the statutory will is appropriate

This requirement is contained in section 22(c). The section 19(2) circumstances are relevant here. Further, the Court should consider whether the proposed will would accommodate a person who would have a successful family provision claim – "it would produce needless and wasteful litigation to authorise a statutory will which was bound to provoke a successful claim under the family provision legislation." This consideration gives rise to complications relating to the circumstances existing at the time of the application whereas a family provision claim is dealt with on the basis of circumstances at the date of the hearing of such a claim (at [189] to [199]).

PRACTICAL CONSIDERATIONS

The summary above is necessarily brief. When you receive instructions that make you start thinking of the possibility of a statutory will (or codicil) a close reading of *Re Fenwick* will highlight what is needed to proceed with the application. Some general thoughts on practical considerations for applications are:

1. Section 18(1) provides that the application may be brought by any person. Section 22(d) provides that the Court must be satisfied that "the applicant for leave is an appropriate person to bring the application." The range of likely applicants is therefore open and may include people such as relatives, guardians, attorneys and persons entitled under prior wills.

2. If necessary the application will be dealt with on an urgent basis and appropriate allowances with respect to evidence and procedure will be

made by the Court (see eg. Peter Leslie Kelso [2010] NSWSC 357 a case involving the interesting factual situation of a person who was in a coma in hospital and whose life support system had been turned off. Had she died intestate the evidence pointed strongly to the only person who would become entitled on intestacy being a person who had committed acts of domestic violence on her).

3. Whilst costs are likely to be paid out of incapable person's estate, do not assume that the costs of an unsuccessful application will be paid out of it. For a summary of the considerations relevant to costs and an unsuccessful applicant see the decision of Hallen AsJ (as he then was) in *Re Will of Jane (No 2)* [2011] NSWSC 883.

4. Take care in drafting the proposed will. Again, a close reading of *Re Fenwick* will provide some guidance on what the will should say and do.

5. Related to the last point, in broken or partially estranged families, whilst the Court will not look to make findings that apportion blame, the extent of and nature of the relationship between the incapable person and family members is very relevant to what division of assets is appropriate (see eg. *"A LTD" v "J"* [2017] NSWSC 896).

6. You may confront a situation where a client's instructions are that a statutory will is needed for an incapable relative to prevent another relative or person from bringing a claim on the estate after the incapable person has passed away. Don't fall into the trap of thinking that a statutory will can make it less likely that a potential family provision claimant may bring a claim. Because the Court will look at potential claimants when dealing with the matter, you will need to consider making adequate provision for the potential claimant in the proposed will.

7. Look at whether you can rely on pre-existing medical evidence. You will need fresh medical evidence unless, for example, the incapable person is brain damaged as a result of an accident or a disability from birth to

such an extent that there can be no controversy that capacity was lost irretrievably or never existed.

8. A contested hearing may not be required. In *Re Fenwick* his Honour referred (at [262] to [265]) to the possibility of straightforward matters being dealt with in chambers. However, to open that possibility up care should be taken in putting the evidence and the proposed will together.

9. Give consideration to whether the incapacitated person should be separately represented, although you can in your application ask the Court for directions on this and who should be given notice of the application or joined.

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