EQUITY TRUSTEES LTD

SIR NINIAN STEPHEN LECTURE

The Honourable Justice Kate McMillan
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WILLS FOR MINORS

1 As a general proposition, the minimum age for the making of will is 18 years. For example, in Victoria, s 5 of the *Wills Act 1997* provides that a will made by a minor is not valid. Despite this provision, the *Wills Act 1997* provides that in certain circumstances, a minor who is married may make, alter or revoke a will and the Court may make an order authorising a minor to make a will in specific terms or revoke a will: ss 6, 20.

2 Applications usually arise in circumstances where the minor has acquired assets either through an inheritance or an award of damages and the minor's health is such that death may occur before attaining his or her majority and the intestacy provisions are not in accord with the minor's intentions.

3 A minor or a person on the minor's behalf, may apply to the Court for permission of the Court to authorise a minor to make a will or revoke a will: s 20(2). The Court's jurisdiction to authorise a will for a minor is such that the minor must possess testamentary capacity.

4 If a minor lacks testamentary capacity and it is thought necessary that the minor should have a will, application must be made pursuant to the Court's power to make a statutory will for that person.

5 If the application is made by the minor, it would be usual for the minor to make the application by way of a litigation guardian, pursuant to Order 15 of the *Supreme Court (General Civil Procedure) Rules 2015*. Under those rules, a litigation guardian must file a consent to act, together with a certificate from a solicitor certifying that the application is from the minor and the litigation guardian has no interest in the proceeding adverse to the minor.

6 Before making an order approving the terms of a will, pursuant to s 20(5), the Court must be satisfied that:

(a) the minor understands the nature and effect of the proposed will or revocation and the extent of the property disposed of it; and

(b) the proposed will or revocation accurately reflects the intentions of the minor; and

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

7 Order 17.03 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008* provides that an application is made by originating motion supported by an affidavit. A proposed will for which authorisation is sought must be exhibited to the affidavit. Where a person other than the minor makes the affidavit, the affidavit must account for the absence of an affidavit from the minor.

8 The affidavit should state whether the application is made on notice and, if so, to whom notice has been given or is proposed to be given. For example, if the making of the will removes rights of the persons taking on intestacy, notice may be required to be given to those affected. The affidavit should state the acts, facts, matters and circumstances relied upon to satisfy the Court of the matters set out in s 20(5) of the Act. The minor should attest to the intentions and reasons for making a will, the understanding of the nature of the will and the extent of his or her

property. The application would usually be accompanied by an affidavit of a legal practitioner attesting to having taken instructions about the minor's intentions, having explained the effect of the will and whether the minor understands the will.

9 The Court may make an order authorising the minor to make a will in specific terms and may impose any conditions on the authorisation that the Court thinks fit.

10 In addition to the requirements for the execution of a will specified in Part 2 of the Act, one of the witnesses to the making of a will under the section must be the Registrar of Probates: s26(6).

11 A will made under the section must be deposited with the Registrar of Probates under Part 1, Division 1A of the *Administration and Probate Act 1958* although a failure to comply does not affect the validity of the will: s 20(7), (9).

12 Despite s 5C of the *Administration and Probate Act 1958*, any will that has been deposited with the Registrar must not be withdrawn from deposit unless the Court has made an order under s 20 authorising the revocation of the will or the testator has attained 18 years of age or marries: s 20(8).

13 An Associate Judge may hear and determine an application under s 20 of the Act if there are funds in court for the minor.

Examples of wills for minors

14 Some guidelines in determining whether to make a will for a minor under the then New South Wales legislation are set out in *Application of M* where Young J (as he then was) said:

> It is to be noted that a minor who is married may make a will. Thus, the test that must be applied to a minor who is unmarried cannot be very high because a married minor may make a will without supervision.

> Thus there is no public policy reason why an unmarried minor may not also make a will if he or she is fully aware of what the consequences of making a will are.
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> Accordingly, there must be evidence as to what is the understanding of the minor involved. The Court must be satisfied that the minor understands the nature of making a will and also that what is in the proposed will (under s 6A the terms of the will must be disclosed to the Court) is a free and voluntary disposition and not, on the evidence before the Court, unduly influenced by the beneficiaries or those who have guardianship of the minor.
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> The Court should not lightly make an order under s 6A. There should ordinarily be a reason put forward as to why a particular minor should make a will. This point will not often arise as, ordinarily, people do not spend money on an application to the Court unless there is a good reason for doing so. There may be some situations where the Court will make an order under s 6A where there is no particular reason for doing so, but that will be a rarity. In the case referred to in the Australian Law Journal, some grounds were shown for making an order. In the present case there are also grounds for making an order. The minor has substantial property and if the property passes under intestacy, there will be an undeserved windfall to the minor's biological parents to the detriment of what is his real family. [1]

15 In that case, the minor was aged 17 years. He had benefited under his grandmother's will and under the intestacy rules his assets would pass to his parents should he die before attaining his majority. He had never known his father and had intermittent contact with his mother. His main carers had been his grandparents. Young J found strong grounds for granting the leave, as the applicant's biological parents would receive an underserved windfall to the detriment of the applicant's family with whom he had been raised should he die before attaining 18 years. Leave was granted for the making of a will that left a legacy to his mother and the residue to his cousins.

16 In a later New South Wales decision, a 14 year old applicant sought to make a will as he did not want his property to pass to his parents according to the intestacy provisions, but to his siblings.[2] Young CJ in

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1 [2000] NSWSC 1239 (11 December 2000), [9]-[11].

2 *Re Pitts* [2005] NSWSC 887 (30 August 2005).

Eq stated that he understood the reasons for the applicant's decision. His Honour was prepared to grant the appropriate leave, however, the draft will failed to set out what the applicant intended. The application was stood over for a re-drafted will to be provided in accordance with the Court's guidance in order to achieve the intentions of the applicant.

17 In an unreported New South Wales decision in 1993, leave was granted to a 17 year old street kid suffering from a rare illness requiring immediate surgery. Her proposed will benefited a friend who had helped care for her in the squat in which she was living.[3]

Victoria

18 In an unreported decision in 2013 in Victoria, a 17 year old minor made an application that she be authorised to make a will. The applicant's parents had divorced and the plaintiff and her siblings remained in the care of their mother. The mother died when the applicant was 15 years old. The father arranged for the applicant and her two older adult siblings to remain living in the mother's home with his support and other family members.

19 The mother's estate comprised the family home, which was mortgaged, and some superannuation. An uncle of the applicant paid out the mortgage, by way of gift to the three children, in order to secure the family home for them.

20 Agreement was reached between the children and their father to enable the mother's estate to be finalised on the basis that the mother's assets were divided equally between the three children.

21 At the time of the application, the father was due to remarry and the applicant had suffered two episodes where she collapsed for unknown

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[3] Justice Powell, 'Recent Developments in New South Wales in the Law Relating to Wills' (1993) 67 *Australian Law Journal* 25, 27.

reasons. Her doctors were unable to explain the reasons for these episodes and the applicant was continuing to undergo tests to investigate their cause.

22 If the applicant died without a will, her father would receive the plaintiff's estate on intestacy and if he then dies, his estate would probably pass to his then spouse. The applicant wanted to ensure that her estate would pass to her siblings in equal shares. This was also said to be what her mother would have wanted and what her uncle would want as the purpose of his gift was to ensure that the children would continue to have a secure home.

23 The applicant, her instructing solicitor, her older sibling and her father all deposed to the applicant's understanding of the nature and effect of the proposed will, the extent of the property of the applicant and the applicant's testamentary intentions. All interested persons, including the father, consented to the Court authorising the applicant to make the proposed will.

24 The Court was satisfied that the applicant understood the nature and effect of the will she proposed to make and the extent of the property disposed of by it; that the proposed will accurately reflected her intentions and it was reasonable in all the circumstances that an order should be made, pursuant to s 20 of the *Wills Act 1997,* authorising the applicant to make a will in the terms of the proposed will.

25 The Court made the order that the applicant be authorised to make a will in the terms of the proposed will and further ordered and directed:

(a) that one of the witnesses to the making of the plaintiff's will must be the Registrar of Probates;

(b) that the will when made be deposited with the Registrar of Probates under Part 1, Division 1A of the *Administration and Probate Act 1958*;

(c) that the will when made and deposited with the Registrar of Probates as aforesaid must not be withdrawn from deposit unless the Court has made an order under s 20(8) of the *Wills Act 1997* authorising the revocation of the will, or unless the plaintiff shall have attained 18 years or have married.

STATUTORY WILLS

26 In Victoria, an application for a statutory will is made pursuant to s 21 of the Wills *Act 1997*.[4] Any person may make an application for an order authorising a will to be made in specific terms approved by the Court or revoked on behalf of a person who does not have testamentary capacity: ss 21(1)&(2).

27 The Court may make an order on behalf of a minor who does not have testamentary capacity, but must not make an order on behalf of a person who is deceased at the time the order is made: s 21(3).

28 Order 17.05 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008* provides that an application is made by originating motion supported by an affidavit. The affidavit should state the acts, facts, matters and circumstances relied upon to satisfy the Court of the matters set out in ss 21A and 21B of the Act.

29 Section 21A of the Act provides a comprehensive list of the information that an applicant, if required by the Court, must provide in the affidavit. This information is also referred to in Rule 17.05(3) and includes matters such as the general nature of the application, a reasonable estimate of the size and character of the estate, a proposed will for which authorisation is sought or a copy of the will that an applicant is seeking to have revoked, as the case may be, the available evidence to each of the matters set out in s 21A (d) to (k) of the Act and any other relevant evidence to the application.

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[4] The *Wills Act 1997* repealed the *Wills Act 1958*. The relevant part for applications for statutory wills is contained in Part 3, Division 2 entitled 'Court authorised wills for persons who do not have testamentary capacity'. All states and territories in Australia have a statutory regime contained in their respective wills legislation that enables a court to make wills for a person who lacks testamentary capacity. The history of the legislation in Australia is set out in *Re Fenwick* (2009) 76 NSWLR 22; [2009] NSWSC 530 (12 June 2009), [33]-[117].

30 The affidavit should state whether the application is made upon notice and, if so, to whom notice has been given or is proposed to be given: Rule 17.05(4).

31 Section 21C sets out the persons who are entitled to appear and be heard on the hearing of an application and includes the person on whose behalf the will is to be made, an Australian legal practitioner representing that person, an attorney appointed by that person under an enduring power of attorney, any guardian or administrator of the person and any other person who has, in the opinion of the Court, a genuine interest in the matter.

Appointment of representative for the person on whose behalf a will is proposed to be made

32 Where the Court considers it appropriate, it may order that a person on whose behalf of a will is proposed to be made or revoked be separately represented and may make an order it considers necessary to secure that representation: s 21D(1). Such an order may be made on the Court's own motion or on the application of any person entitled to be heard in the proceeding: s 21D(2).

33 In *Bailey v Richardson,*[5] the Court appointed an independent legal practitioner to represent the person on whose behalf a will was proposed to be made. At trial, the independent legal representative raised the issue of his position in the event of the application being opposed and he was required to attend for the purpose of cross examination. He sought guidance as to whether, in those circumstances, he should retain his own counsel at the trial. The Court referred to Rule

5 [2015] VSC 255 (5 June 2015) (McMillan J).

13.4 of the then applicable *Solicitors' Professional Conduct and Practice Rules 2005*[6] and stated:

> A purpose of Rule 13 is to prevent a practitioner from being in a position of apparent conflict between the duty to advance the interests of the client and the duty to the court to give impartial evidence. …
>
> Mr Hughes' appointment by the Court to represent Ms Evans is for the specific purpose of informing the court of the matters set out in s 21B of the Act. It is a special role allowed for under s 21 of the Act. He is not acting for Ms Evans as a client but the purpose behind the Rule informs his position. If his evidence were to become an issue 'material to the determination of any contest of the issues in the proceeding', then it would be appropriate, in my view, for him to seek the determination of the Court as to his position and whether 'exceptional circumstances warrant otherwise' as prescribed by Rule 13.4.[7]

The three requirements to be satisfied before making an order authorising the making of a proposed will

34 Section 21B of the Act provides that before making an order the Court must be satisfied that:

(a) the person on whose behalf the will is to be made or revoked does not have testamentary capacity; and

(b) the proposed will or revocation reflects what the intentions of the person would be likely to be, or what the intentions of the person might reasonably be expected to be, if the person had testamentary capacity; and

(c) it is reasonable in all the circumstances for the Court, by order, to authorise the making of the will for the person.

Testamentary capacity – s 21B(a)

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6 13.4 A practitioner must not unless exceptional circumstances warrant otherwise in the practitioner's considered opinion:
13.4.1 appear for a client at any hearing, or
13.4.2 continue to act for a client,
in a case in which it is known, or becomes apparent, that the practitioner will be required to give evidence material to the determination of contested issues before the court.

7 *Bailey v Richardson* [2015] VSC 255 (5 June 2015), [187]-[189] (McMillan J).

35 Testamentary capacity is not defined in the Act. For a person to have testamentary capacity, he or she must: have sufficient mental capacity to comprehend the nature and effects of a will; be able to realise the extent and character of his or her estate; and be able to weigh the claims that may be made on his or her estate.

36 Expert professionals, such as a treating specialist physician, psychiatrist or psychologist, usually provide the best evidence of a lack of testamentary capacity. Sometimes evidence from the person's general practitioner may assist but it is preferable that specialist evidence be relied upon on the application. Any expert evidence must comply with the expert evidence rules. Evidence of lay witnesses, especially those who benefit under the proposed will or revocation must be treated with caution for obvious reasons.

Testamentary intentions of the person on whose behalf the will is to be made or revoked – s 21B(b)

37 The second matter of which the Court must be satisfied is that the proposed will or revocation reflects what the intentions of the person would be likely to be, or what the intentions of the person might reasonably be expected to be, if the person had testamentary capacity. In *Re Application of Fenwick*, Palmer J stated that these two matters involve a combination of objective and subjective considerations.[8] In *Re Will of Jane,* Hallen AsJ (as he then was) also stated that it involved:

> … 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 … In other words, more is required than mere assertion, suspicion, or conjecture. [9]

8 [2009] NSWSC 530, [185]
9 [2011] NSWSC 624, [81].

38 Before the amendments to the *Wills Act 1997* made in 2007, the legislation required that the proposed will would accurately reflect the likely intentions of the person if she or he had testamentary capacity. This condition presented difficulties as these words were to be applied in widely different situations. In *State Trustees v Do and Nguyen,* Bell J explained the effect of the legislative changes as follows:

> The significance of the amendment is that the court is no longer required to be satisfied that the proposed will would 'accurately' reflect the person's likely intentions. It is sufficient for the court to be satisfied that it would reflect their 'likely' or 'reasonably ... expected' intentions. In that regard, the nature of the specified information illuminates the scope of the court's function. A broad-brush approach is required, for otherwise the beneficial purpose of the function might be defeated. [10]

First limb of s 21B(b)

39 The first limb of s 21B(b) focuses on what will the person would be likely to make, if he or she had testamentary capacity. If the person has never made a will, there is no yardstick as to what his or her testamentary intentions were when he or she had capacity.

40 Where there is a paucity of evidence, the Court cannot be satisfied of what the intentions of the person would be likely to be if he or she had testamentary capacity.

41 Where previous wills are in existence and it is not disputed that the person had testamentary capacity when those wills were executed, those wills provide evidence of what the person's testamentary intentions prior to losing testamentary capacity. This assists a court to identify a mind with an intention that would usually assist the Court in determining what the person's intentions would be likely to be, or what

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10 [2011] VSC 45 (23 February 2011), [11].

his or her intentions might reasonably be expected to be, if he or she had testamentary capacity.[11]

Second limb of s 21B(b)

42 Under this limb, the Court may be satisfied that the proposed will reflects what the intentions of the person might reasonably be expected to be, if the person had testamentary capacity. The nature of this limb is that various forms of a proposed will may meet the test.

43 The second limb to s 21B(b) will be met if the Court is satisfied on the balance of probabilities that the proposed will reflects what the person's intentions would be likely to be, or what his or her intentions might reasonably be expected to be, or that there was a fairly good chance that it reflected what his or her intentions might be, or that some reasonable people could think that it reflected what might be his or her intentions, or that some reasonable people could think that there was a fairly good chance that it reflected what might be his or her intentions, if he or she had testamentary capacity. [12]

Reasonable in all the circumstances – s 21B(c)

44 Under this heading, the Court must be satisfied it is reasonable in, all the circumstances, for the Court to authorise the making of the will for the person. Satisfaction of the first two conditions of s 21B does not necessarily mean that the Court will authorise the proposed will. The third condition invokes the Court's discretion.[13] An instance where a court has elected not to proceed to authorise a statutory will was where the proposed will was drawn to defeat a creditor by substituting the wife

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11 Ibid [12]; *Re Gillam* [2016] VSC 5 (21 January 2017), [25] (McMillan J).

12 *Saunders v Pedemont* [2012] VSC 574, [97] (28 November 2017); *Bailey v Richardson* [2015] VSC 255, [169] (5 June 2015) (McMillan J). .

13 *Boulton v Sanders* (2004) 9 VR 495; [2004] VSCA 112 {13] (Dodds Streeton JA); *Re Will of Jane* [2011] NSWSC 624 (20 July 2011) [85], [96] (Hallen AsJ); *Secretary, Department of Family and Community Services v K* [2014] NSWSC 1065 (8 August 2014) [14] (Lindsay J).

of a beneficiary so that she could provide for the original beneficiary indirectly and prevent his creditors from being paid the debts due to them.[14] Another instance was where the proposed will sought to avoid the son's inheritance pending his divorce proceeding.[15] In addition to these types of policy issues, the discretionary judgment of the Court will also be affected by the statutory factors listed in the relevant legislation.

Execution of the will by the Registrar of Probates and storage of the executed will

45 A will or revocation of a will made under an order pursuant to s 21 is not valid unless it is in writing, signed by the Registrar sealed with the seal of the Court: s 25(1) and (2).

46 Any will and any document which this section applies must be deposited with the Registrar under Part 1, Division 1A of the *Administration and Probate Act 1958*: s 25(3). Despite s 5C of the *Administration and Probate Act 1958*, any will and any document to which this section applies, which has been deposited with the Registrar, must not be withdrawn from the deposit unless the Court has made an order under this section revoking the will; or the person on whose behalf the will has been made has acquired or regained testamentary capacity: s 25(4). A failure to comply with subsection (3) does not affect the validity of the will: s25(5).

Form of order made where the Court is satisfied that an order should be made authorising the proposed will for the person on whose behalf the application is made.

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14 *Hausfield v Hausfield* [2012] NSWSC 989 (30 August 2012) [13].
15 *ADT v LRT* [2014] QSC 169 (6 August 2014).

47 In making an order, the type of order that the Court would make is to record under 'Other Matters' of the order as follows:

(a) The Court is satisfied that [name], the person on whose behalf a will is to be made, does not have testamentary capacity;

(b) The Court is satisfied the proposed will reflects what the intentions of [name] would be likely to be, or what her intentions might reasonably be expected to be, if she had testamentary capacity; and

(c) The Court is satisfied that it is reasonable in all the circumstances to make an order authorising the making of the proposed will for [name].

48 If there is a defendant to the application, the Court also records under 'Other Matters' on what basis that person would be entitled to participate in the distribution of the estate of [name] on either intestacy or existing will and whether or not the application was opposed by that defendant.

49 By way of example, the form of orders made by the Court would be:

1. The Court authorises the making of a will, in the terms of the draft will annexed to this order, on behalf of [name], she being a person who does not have testamentary capacity.

2. The said will be signed by the Registrar of Probates and sealed with the seal of the Court.

3. The executed will be deposited with the Registrar of Probates pursuant to s 5A of the *Administration and Probate Act 1958*.

4. There is no order as to the costs of the plaintiffs or the defendant in this proceeding.

5. The costs of [independent person appointed by the Court], as the representative of [name], are paid from the assets of [name] on an indemnity basis.

Examples of statutory wills authorised by the Court in Victoria

50 In *State Trustees v Do and Nguyen*[16] the medical evidence established that Mrs Aukland lacked testamentary capacity. The administrator of the person lacking testamentary capacity brought the application. Mrs Aukland was a widow with no children.

51 The applicable legislation was that made under the *Wills Amendment Act 2007* which came in to operation on 15 August 2007 and the leave requirement still existed.

52 Mrs Aukland had made eight wills since 1989. Bell J found the earlier wills were of doubtful validity and the latter ones were of undoubted invalidity. His Honour found that even with these difficulties, Mrs Aukland's likely or reasonable expected intentions were best revealed by her previous wills as it was possible to identity a mind with an intention at work in the wills. Taken together with the relationship evidence, the wills showed Mrs Aukland to be focussed on her family, her godson and her two neighbours. Apart from two modest legacies to two charities, his Honour authorised a will whereby the neighbours were left 12.5 per cent of the estate, her godson was left 12.5 per cent, her surviving sister was left 12.5 per cent and the balance of 62.5 per cent was left to Mrs Aukland's surviving siblings or the issue of her non-surviving siblings.

53 Since the 2014 amendments to the Act (under which the leave requirement was deleted and the appointment of an independent person be appointed for the person on whose behalf the will was to be made was included), two decisions have been published: *Bailey v Richardson*[17] and *Re Gillam.*[18]

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16 [2011] VSC 45 (23 February 2011).
17 [2015] VSC 255 (5 June 2015) (McMillan J).
18 [2016] VSC 5 (21 January 2016) (McMillan J).

54 In *Bailey v Richardson*, the plaintiffs were sisters and the joint administrators for the person on whose behalf the will was to be made, Mrs Evans. The plaintiffs were close friends of Mrs Evans. Their proposed will appointed them as the executors of the estate and left the whole of the estate to them. The defendant was the next of kin of Mrs Evans and in the event of an intestacy, the estate would pass to her. Ultimately, the defendant did not oppose the plaintiffs' application as they had reached an agreement between themselves. In this proceeding, the Court appointed an independent legal practitioner to represent Mrs Evans. The Court authorised a will that appointed the plaintiffs as executors and trustees of her estate and left the residue of the estate to them in equal shares

55 In *Re Gillam*, the applicant was the son of the person on whose behalf the will was to be made and he was also her attorney. The defendant was Mrs Gillam's second husband. The plaintiff proposed a statutory will on the basis that the defendant received no benefit under the will and after provision for the payment of legacies to grandchildren, a step daughter and step grandchildren, the residue would pass to her two sons. The defendant opposed the application.

56 In 2015 Mrs Gillam and the defendant had negotiated a property settlement whereby their financial relationship was finalised and they were separated financially. The financial settlement resulted in a division of the matrimonial assets on the basis of 53.47 per cent in favour of Mrs Gillam.

57 The three previous wills of Mrs Gillam were in evidence. These wills were made when she had capacity and they established that she did not ever leave the defendant a substantial part of her estate or anything equivalent to what he received under the financial settlement.

58 The Court authorised the making of a will in the terms proposed in the draft will whereby after payment of the legacies to family members, the residue of her estate was left to her two sons.

Other examples of statutory wills made as a matter of urgency

59 Applications for statutory wills have also been heard as a matter of urgency or by consent of the parties and three examples are now set out.

First example

60 One of two daughters made an application for a statutory will for her father, whose affairs were managed by an administrator. The administrator did not oppose the application.

61 The other daughter was notified of the application. That daughter had utilised substantial funds of the father when she was his attorney. The administrator of the person had issued proceedings against this daughter, her husband and a trustee company that was formerly controlled by the father but was subsequently controlled by the daughter who was the attorney and her husband. It was unlikely that those funds of $1.6 million would ever be recovered. Judgment had been delivered by the Court in respect of some of the claims against them at the time the application was made by the daughter.

62 When the father had testamentary capacity, he had treated his two daughters equally in his previous wills. Where the daughter had taken $1.6 million of his money, equality between the two daughters could not be achieved and his existing will no longer represented his likely testamentary intentions.

63 The proposed will provided the applicant with a legacy of $1.6 million with the residue of the estate divided equally between the applicant and the children of the daughter who had utilised the applicant's funds.

Second example

64 The person on whose behalf a will was to be made was a widow with no children. The person had a close relationship with her late husband's two cousins, who were the applicants for the statutory will. The defendant represented the person's intestacy beneficiaries, most of whom live in Scotland but remained in reasonably close communication with the person over the years. The Court also appointed an independent legal representative to represent the person.

65 The evidence by the plaintiffs was to the effect that the person had informed them over the years that she wished her home to pass to them in equal shares. The Court was also provided with the will of her husband that provided for certain legacies and a gift of the husband's photography equipment to some of his cousins in the event that his wife predeceased him. The husband's will left all of his estate to the person as she survived her husband.

66 At the time the application was issued, the person was in reasonable health. Her health deteriorated quickly and the application was heard as a matter of urgency as it was not expected that the person would survive the day.

67 There was sufficient time for the independent representative to see the person a number of times and he was satisfied that she lacked testamentary capacity.

68 The defendant had obtained the details of the proposed evidence from the intestacy beneficiaries in Scotland but the sudden deterioration of the person's health meant that affidavits were unable to be sworn and filed when the application was heard. In those circumstances, the Court requested counsel for the defendant to set out what the evidence would have been had there been sufficient time to prepare the affidavits.

69 The Court authorised a statutory will providing for the photograph equipment being given to the husband's cousin, for the plaintiffs to be left the person's home subject to paying three legacies of $20,000 each to a number of the husband's cousins and the residue of the estate being distributed in accordance with the intestacy provisions. The costs of the independent representative were paid out of the assets of the person and otherwise the plaintiffs and the defendant paid their own costs.

Third example

70 The third example was where the applicant was the only child of the person on whose behalf a will was to be made. The existing will of the person provided that the whole of the estate pass to the applicant in his personal capacity with the wish that the applicant's two children ultimately benefit from the estate, that is, the grandchildren of the person on whose behalf a will was to be made. The two grandchildren consented to the application. The proposed will re-structured the general intention of the person by providing for a testamentary trust in the proposed will. At the time she made her existing will, the person had not been advised as to a testamentary trust structure. It was unnecessary to appoint an independent representative given the general effect of the person's last wishes were upheld in the proposed will.

71 The proposed will upheld the person's last wishes as contained in her existing will and a statutory will was authorised by the Court.

Recent decisions in New South Wales and Queensland

72 The legislation in New South Wales and Queensland for statutory wills is slightly different to the Victorian legislation. As stated in *State Trustees v Do and Nguyen*, the Victorian legislation provides more scope for the Court to authorise the making of a statutory will, with the 2007

amendments allowing a 'broad brush' approach so that the beneficial purpose of the legislation is not defeated.

New South Wales

73 The decision of *A Limited v J*[19] concerned an application made on behalf of a minor who lacked testamentary capacity and was severely disabled. As in Victoria, the New South Wales legislation requires that in these circumstances, the application must be made pursuant to the Court's power to make a statutory will for that person.

74 In *A Limited v J,* the minor was aged 13 years and had received a substantial settlement of many millions of dollars in proceedings taken on his behalf against the owner of the hospital where he had been born. The defendants were the minor's mother and father. The minor was at a constant risk of death due to his condition. The reason for the urgency of the application was that the minor was due to undergo a medical procedure the day after the application provided that he was stable enough to undergo the procedure. The purpose of the procedure was to prevent certain bleeding that incurred but it included a significant risk that death could occur. The Court was satisfied that there was a real risk that the minor might die.

75 The minor's mother supported the application. His father was notified of the application and had little time to provide adequate instructions. The mother and father had separated and, according to the mother, the father had never taken any interest in the minor and the mother provided to the extreme care needs for the minor. As time was of the essence, the Court allowed time for counsel to confer with the father and for counsel to inform the Court of the substance of the evidence that the father would have given had he a proper opportunity to do so.

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19 [2017] NSWSC 736 (7 June 2017).

The father did not contest the general thrust of the mother's evidence but said the mother had overstated to some degree the reality of the father's alleged abandonment of the minor.

76 The minor has six older siblings. The plaintiff proposed a will that provided for the house in the name of the minor and certain other property be left to the mother and the residue be divided as to one half to the mother and the remaining half between the six siblings equally.

77 The mother proposed a will that contained the same dispositions as in the plaintiff's will but provided for the residue being held on testamentary discretionary trusts. The Court decided that the consequences of creating testamentary discretionary trusts were too complicated for the Court to consider in the time available.

78 Ultimately, after the parties were provided with time for further discussion, the Court determined that the father should receive 15 per cent of the residue, the mother should receive 42.5 per cent and the siblings would share the remaining 42.5 per cent.

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79 The recent decision of *Re APB, ex parte Sheehy* [20] provides interesting reading on a number of grounds, in particular, the vulnerability of elderly wealthy individuals.

80 The applicant was the litigation guardian of APB, who was aged 91 years and lacked testamentary capacity. Representation was allowed for all persons with a proper interest in the application. Those persons included his children, his grandson (an ex-nuptial child of one of APB's son with whom the father had no relationship), his long term solicitor,

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20 [2017] QSC 201 (15 September 2017).

who was also his attorney, and the solicitor's sister, who was an accredited succession lawyer. Both of the solicitor and his sister had assisted APB over many years with valuable professional and commercial advice. They were trusted by APB and were beneficiaries in some of his wills. Other old friends of APB also benefited under some of his existing wills. Some new friends were also represented, namely, a real estate agent and a Gold Coast solicitor, of dubious character. Ultimately, these two individuals were not included in the will authorised by the Court.

81 The Court granted leave to the applicant to apply for an order authorising a will to be made in behalf of APB and a will was made in the form submitted by the applicant.
