SUPREME COURT OF QUEENSLAND

CITATION:	*Re APB, ex parte Sheehy* [2017] QSC 201
PARTIES:	An application by Peter J Sheehy pursuant to Part 2 (sections 21 to 28) of the *Succession Act* 1981 (Qld) for the authorisation of the making of a Will on behalf of APB
FILE NO:	1668 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	15 September 2017
DELIVERED AT:	Brisbane
HEARING DATE:	22, 23 and 24 August 2017 Supplementary Written Submissions 6 September 2017
JUDGE:	Applegarth J
ORDERS:	**1. Leave is granted to the applicant, Peter Sheehy, pursuant under s 22 of the *Succession Act* 1981 (Qld) to apply for an order authorising a will to be made on behalf of APB.** **2. Pursuant to s 21 of the *Succession Act* 1981 (Qld) a will be made for APB in the terms stated by the Court in a form of will to be submitted by the applicant.** **3. The applicant draft a form of will in accordance with these reasons, provide a copy of the draft will to the respondents to the application, and submit the same within five days for the purpose of the will being approved by the Court pursuant to s 21(2)(c) and then executed in accordance with s 26 of the Act.** **4. Liberty to apply as to the form of the will submitted in accordance with paragraph 3 prior to the execution of the will.** **5. The issue of costs be the subject of short written or oral submissions on a date to be fixed.** **6. Any copy of these reasons to be published on the judgment website or in any other publication made to, or accessible by, the general public or a section of the general public, be in an anonymised form.**

CATCHWORDS: SUCCESSION – MAKING OF A WILL – TESTAMENTARY CAPACITY – LOSS OR LACK OF CAPACITY AND STATUTORY WILLS – where a 91 year old man lacks testamentary capacity – where it is agreed that leave should be granted under s 22 of the *Succession Act* 1981 (Qld) for an order authorising a will to be made on his behalf – whether more weight should be given to statements of testamentary intention when he had capacity than after he lost capacity – whether provision should be made for his children, other family members, friends and charities

Succession Act 1981 (Qld) s 21, s 22, s 23, s 24, s 25, s 26

A Limited v J [2017] NSWSC 736, cited
Banks v Goodfellow (1870) LR 5 QB 549, cited
Frizzo v Frizzo [2011] QCA 308, cited
Frizzo v Frizzo [2011] QSC 107, cited
GAU v GAV [2014] QCA 308, followed
Lawrie v Hwang [2013] QSC 289, cited
McKay v McKay [2011] QSC 230, followed
Re D [2014] QSC 164, cited
Re Fenwick; Application of J.R. Fenwick & Re Charles (2009) 76 NSWLR 22; [2009] NSWSC 530, cited
Re JT [2014] QSC 163, cited
Re Matsis [2012] QSC 349, cited
Re Keane; *Mace v Malone* [2011] QSC 49, cited
R v J [2017] WASC 53, cited
Sadler v Eggmolesse [2013] QSC 40, cited
VMH v SEL [2016] QSC 148, cited

COUNSEL: R T Whiteford for the applicant
R M Treston QC for the respondents SPB, ENB and CRB
G J Radcliff for the respondent RO
I Erskine for the respondents HT and HRT
C A Brewer for the respondent IDN
R D Williams for the respondents CL, JHL, KLA and MSR
I Klevansky for the respondent GWC
G R Dickson for the respondent QIMR Berghofer
C G Curtis with R Kipps for the respondent Toc H Australia

SOLICITORS: Clayton Utz for the applicant
Paramount Legal for the respondents SPB, ENB and CRB
Saunders Downing Hely for the respondent CO
Tucker & Cowen for the respondents HT and HRT
McMahon Clarke for the respondent IDN
Merthyr Law for the respondents CL, JHL, KLA and MSR
Bennett & Philp for the respondent GWC
Mulcahy Lawyers for the respondents JW and AR
Thynne & Macartney for the respondent QIMR Berghofer
Harding Richards Lawyers for the respondent Toc H Australia

[1] APB is now aged 91 and lacks testamentary capacity. He has very substantial assets, including a shopping centre which is operated under a joint venture agreement with HRT. Mr Sheehy, the Litigation Guardian of APB, applies for leave under s 22 of the *Succession Act* 1981 (Qld) for an order authorising a will to be made on behalf of APB.

[2] The information required by s 23 has been given, and the applicant is an appropriate person to make the application.[1] Adequate steps have been taken to allow representation of all persons with a proper interest in the application.[2] There are reasonable grounds for believing that APB does not have testamentary capacity.[3] In fact, the evidence, including the evidence of an expert geriatrician, is that he lacks testamentary capacity.

[3] Doubts over his testamentary capacity in recent years, the circumstances in which he came to execute purported wills during that time and the need to ensure that APB's will does not breach the terms of a joint venture agreement with HRT, make it appropriate for an order to be made under s 21 in relation to APB.[4] The remaining issue under 24 of the Act is whether the proposed will "is or may be a will" that APB would make if he had testamentary capacity.[5] For the reasons which follow, the will proposed by the Litigation Guardian satisfies this requirement. The proposed will, which reflects matters which have arisen since the application was filed, including constructive comments by a number of respondents, is one which should be the subject of leave under s 22 because I am satisfied of the matters stated in s 24.

[4] Having regard to the information given to the Court under s 23 and the other information which has been given to me in the course of this proceeding, I intend to approve a will, on terms to be specified.

[5] There is no issue about the general form of the will and that it should facilitate the continuation of the joint venture. The will should be in the general form proposed, namely one which makes some pecuniary gifts and which creates a testamentary trust. The creation of a testamentary trust reflects APB's wishes, as recorded in wills made in 2007 and 2012. A testamentary trust which owns the interest in the joint venture, and distributes certain income from the joint venture, will facilitate the joint venture's continuation. APB's substantial liquid assets and his monthly income of more than $200,000 allow for a will in the form proposed, namely one which makes some pecuniary gifts.

[6] Matters about which there is no real dispute include:

1. That substantial provision be made for the benefit of APB's children (ENB, SPB and CRB).

2. That provision be made for the benefit of his grandchildren.

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1 *Succession Act* 1981 (Qld) ("the Act") s 24(a).
2 The Act s 24(b).
3 The Act s 24(c).
4 The Act s 24(e).
5 The Act s 24(d).

3. That provision be made for certain long-term friends.

4. That provision may be in the form of either pecuniary gifts or by making the person a beneficiary under a testamentary trust; or in some instances by the person receiving both a gift and being made a beneficiary.

5. That the children obtain substantial benefits as primary beneficiaries, and upon the winding up of the testamentary trust.

6. That two charities, QIMR Berghofer and Toc H, obtain substantial benefits (10 per cent each) as beneficiaries upon the winding up of the testamentary trust.

7. That the anticipated estate is sufficiently large, with substantial liquid assets, to provide for pecuniary gifts.

Issues to be resolved

[7] Matters which require resolution in the light of the parties' submissions may be summarised as follows:

1. Should provision be made for MSR, CL, JHL and/or KLA, who befriended APB in recent years?

2. What provision should be made for each of three long-term friends, GWC, JW and AR, either as a secondary beneficiary under the testamentary trust or as the recipient of a pecuniary gift?

3. What provision should be made for each of the children, by way of a pecuniary gift; distribution of income as a primary beneficiary under the testamentary trust; and distribution of capital on the winding up of the trust?

4. What provision should be made for a particular grandson, including the extent to which adjustments are made to the interests which would otherwise be enjoyed by his father, SPB, to address the improbability that SPB will, in accordance with APB's wishes, be responsible for providing for his own child following APB's death?

5. What provision should be made for the spouses of APB's children?

6. Should there be one or two testamentary trusts?

7. Who should be joint executor with IDN?

Essential facts

APB and his children

[8] APB was born in early 1926 and has three adult children: ENB born in 1963, SPB born in 1965 and CRB born in 1970. The children have had to make their way in the world, with hardly any financial assistance from their father.

[9] APB separated from his then wife in 1974. She raised their children as a single parent. He did not pay child maintenance. The children saw him regularly when he would visit them on the Gold Coast or they would visit him in Brisbane. APB was devoted to his work. When his children visited him in Brisbane they would go to his place of business, a motel, and would help him with tasks around the motel such as cleaning rooms and sweeping. When they stayed over his daughter was set to work early in the mornings to prepare guests' breakfasts.

[10] APB always has been frugal. He did not shower presents on his young children or even take them out to eat. Birthday gifts were modest. When each son turned 21 he was given about $1,500 or $1,800. The daughter did not receive any such gift when she turned 21. I will not detail in this brief summary the nature of the relationship between APB and each of his children over the decades.

[11] Importantly for present purposes, APB justified his lack of spending on his children by often telling them that he was working hard for them and that eventually he wanted to develop certain land. In many conversations over the decades, his children were told that the land was for them.

[12] When APB and the mother of his children divorced, she received very little. This again was because, as he told his children, the land was for them. The property settlement with his former wife took until 1985 to conclude.

[13] Over the years, APB's children, particularly his sons, were called upon by him to help with work required to maintain the land, which comprised about 50 acres. They built or fixed fences, and sprayed or pulled out noxious weeds. APB owned horses and the boys looked after the horses and the stables.

[14] APB instilled into his children a work ethic. Their work ethic has continued into later life. They are hard-working individuals of modest wealth, who earn average incomes. They have to service mortgages and have limited equity in their homes. The details of their financial positions need not be recorded at this point.

[15] By contrast, APB's present financial position is that he has:

(a) assets of approximately $70,000,000 ($62,700,000 of which is his interest in the joint venture); and

(b) a monthly income of between $210,000 and $225,000.

The grandson

[16] ENB and his wife have two dependent children.

[17] CRB and her husband have two dependent children.

[18] SPB is married. He has an ex-nuptial son who he has hardly ever met, and with whom he has no relationship.

[19] This grandson of APB did not even know his father's name until mid-June 2017, when he was contacted on the telephone by the solicitor acting for Mr Sheehy. At the time

the grandson was visiting his mother in hospital, where she is dying of cancer. The solicitor had been searching for the grandson for some time.

[20] The grandson is aged in his mid-20s. He was born as a result of a sexual encounter between SPB and a friend with whom SPB worked at the time. The friend was not SPB's partner or girlfriend. The child was raised by his mother, left school at the end of Grade 12 and has worked hard to make a living. He shares an apartment with a flatmate, and after paying rent and other expenses has very little money left each week. He has been trying to save for a house deposit, with the goal of buying a home in which he and his mother could live.

[21] The grandson has exhausted his annual leave, "purchased" leave from his employer by way of salary reduction and taken unpaid leave so that he can spend most of his time with his dying mother. He also has to care for his maternal grandmother, a task that his mother performed until she was too ill to do so.

[22] APB did not meet this grandson until 22 August 2017, when they met in the precincts of the Court. However, APB has long known of his grandson's existence. This is evidenced by a reference in a will dated 17 February 2005 to "any illegitimate child of [SPB]". That child was to be left five per cent of APB's estate.

[23] SPB originally disputed being the father, but a DNA test when the child was about 12 months old proved that he was. SPB was required by the Child Support Agency to provide child support. He stopped doing so when his son turned 18.

[24] SPB has never wanted children. When his son was very young he had very limited contact with him, and his lack of connection to his son must have been apparent to the child's mother, who apparently said that she could see that SPB "wasn't a fatherly type". She did not pursue SPB for a relationship and he did not seek a relationship with her.

[25] SPB last saw his son when the child was less than two years old.

[26] SPB, his brother and his sister can expect very substantial benefits under any form of statutory will. No party suggests otherwise. The draft wills which have been proposed in slightly different forms provide for them to receive a substantial pecuniary gift, a guaranteed income as primary beneficiaries under a testamentary trust and the lion's share (80 per cent) of the capital of that trust when it is wound up. The trust has a vesting date of no earlier than 2025. SPB can expect to become a multi-millionaire in the next decade.

[27] APB has expressed the strong wish that his children provide for their own children following his death. There is no reason to doubt that ENB and CRB will do so in respect of their children. By contrast, and contrary to APB's wishes, SPB has no intention of providing any financial support for his son, even after SPB obtains great benefits from APB's estate.

[28] The most SPB has promised his son is to give an undertaking that upon his own death his wife will inform his son of his demise. If such an undertaking is remembered and honoured when SPB eventually dies, possibly many decades from now, the notice might allow his son to bring an application for provision to be made for him from his father's

estate. There is no evidence that SPB intends to give his son anything during SPB's life, or leave anything to his son in his will.

[29] This failure to respect APB's wishes places the grandson in a different position to APB's other grandchildren. Whilst those other four grandchildren have no guarantee of sharing in the wealth that the will of APB will confer upon their parents, they can expect their parents to respect APB's wish that each of his children is responsible for providing for their own children following APB's death. SPB's son has no such expectation.

The land

[30] APB is the sole registered proprietor of the land, which is situated south of Brisbane. The land was acquired by APB in anticipation of its future development.

[31] In July 2004 APB entered into a Joint Venture Agreement with HRT. The JVA was to develop a complex which was to occupy about half the land. Significant borrowings were undertaken by HRT, secured against the land. APB holds a 60 per cent interest in the joint venture and HRT holds a 40 per cent interest. HRT is controlled by HT.

[32] The land was developed in accordance with the JVA and the shopping centre opened in August 2008. The existing centre has more than 60 tenants, including a number of major tenants, and is managed by a company related to HRT.

[33] The balance of the land, abutting the complex, is earmarked for further development in the coming years.

IDN

[34] IDN is an experienced solicitor. After HRT indicated that APB should engage a lawyer to assist with future negotiations regarding the joint venture, APB selected IDN from a number of capable solicitors and they met in early 2007. Their discussions included advice about the joint venture and estate planning. IDN's sister, JB, who was an accredited succession law specialist, became involved.

[35] On 11 May 2007 APB executed a new will which appointed IDN and JB as his executors.

[36] IDN came to understand the history of the joint venture and its commercial terms. At the time APB's interest in the joint venture was 50 per cent and IDN thought this was too generous to HRT. IDN represented APB in difficult negotiations with HT and solicitors who acted for HRT. This resulted in substantial amendments to the JVA in April and May 2007 to include a profit split of 60/40 in favour of APB.

[37] IDN and his sister were appointed by APB pursuant to an enduring power of attorney. IDN also obtained a general power of attorney and was appointed as the joint venture representative for APB's interests. His appointment as trustee under a testamentary trust was intended to facilitate the continued operation of the joint venture in the event of APB's death.

[38] Since 2007 IDN has done substantial work for the project as APB's attorney. This included the renegotiation of major leases in 2013, and negotiating with the joint

venturer to retain a substantial part of net rental proceeds as a security buffer and to spend on pre-development costs and capital improvements. IDN also negotiated various council approvals and was involved along with HRT in negotiations to refinance the existing debt facility. Those negotiations were finalised in November 2016 with an extension of the existing facility.

[39] In short, IDN provided valuable professional and commercial assistance to APB after 2007 as his trusted attorney. IDN was rewarded for his professional services. However, his advice and assistance to APB ensured the commercial success of the development, the stability and continuation of the joint venture and, as a result, a large increase in APB's wealth.

[40] IDN's roles as a trusted attorney and a personal friend were recognised by APB in 2007 and again in 2012 when he appointed IDN and his sister as his executors and as joint trustees under a testamentary trust. APB also made generous provision for them upon the termination of that trust. In 2007 IDN and his sister both advised APB that it was unnecessary for them to be included as beneficiaries. APB received independent advice and insisted that IDN and his sister be beneficiaries. Again in 2012, APB received independent advice about a new will, and still made substantial provision for IDN and his sister. Despite this, neither IDN nor his sister seek to be made beneficiaries under a statutory will.

[41] IDN's past performance as attorney, the trust he earned in serving the interests of a difficult client over several years, his personal care for APB (not limited to an emergency hospitalisation on 22 March 2013 which probably saved APB's life) and his appointment by APB as an executor in his 2007 and 2012 wills make IDN an appropriate person to be a joint executor under a statutory will. The draft will proposed by the Litigation Guardian so provides.

Old friends

[42] In various wills over the years APB made provision for friends. For example, his 5 October 1998 will gave specific percentages of the residue of his estate to certain friends. In more recent wills certain old friends were included as discretionary income beneficiaries under a testamentary trust.

[43] GWC and APB have been friends for over 55 years, and GWC continues to contact APB on a weekly basis. Over the years, APB has considered GWC to be his "little brother". GWC is a pensioner with limited resources. Throughout their friendship APB has said on a number of occasions that he intended to benefit GWC from his estate upon his death.

[44] Other long-term friends include JW and AR. Each of these individuals developed a friendship with APB and each of them was employed by APB in the late 1960s and early 1970s. Their social interactions continued over the years and each of them is referred to as a "friend" by APB in different wills that he made.

[45] JW is a 75 year old retiree who, with his wife, is in receipt of an aged pension. This is his sole source of income. He and his wife own the home in which they live.

[46] AR is aged 69 and is a retiree. He lives with his wife and is in receipt of an aged pension which is paid to him and his wife. They own their own home.

New friends

[47] In mid-2012 a real estate agent, CL, who was trying to obtain a tenancy at the centre, approached APB about her plans. A friendship developed with CL and also with her husband, JHL. In early 2013 APB met their neighbour, a retired doctor, KLA, and they became friends.

[48] MSR is a Gold Coast solicitor, who lived in the same suburb as CL and JHL, and acted for CL. He came to meet APB when CL was seeking to have her agency appointed as manager of the centre. MSR saw APB at social occasions at the home of CL and JHL in 2013 and thereafter. MSR and APB became friends.

Hospitalisation on 22 March 2013

[49] Between 2010 and 2013 IDN became aware that APB was generally in declining health. In March 2013 IDN noticed that APB was becoming very short of breath and was complaining about the way he was feeling. This was unusual for APB who did not seek sympathy from anybody. IDN offered to drive to APB's house and take him to hospital on the evening of 21 March 2013, but APB declined the offer.

[50] On the morning of 22 March 2013 APB called IDN to tell him that he was unwell and he thought he should go to hospital. IDN drove to APB's home and when he arrived there he observed that APB looked gravely ill.

[51] IDN spoke by phone to a world-renowned heart specialist, who is director of the Critical Care Research Group at the Prince Charles Hospital. IDN asked whether he should take APB to a certain hospital on the Gold Coast, and was told that it would be best to take APB to St Andrew's Hospital in Brisbane.

[52] Upon his arrival at St Andrew's APB received emergency treatment and was transferred to a ward. On 4 April 2013 he was transferred from the cardiac ward to the rehabilitation ward.

The events of 17 April 2013

[53] On 17 April 2013 APB left the hospital with the assistance of CL, JHL and MSR. They did not consult medical or nursing staff at the hospital. They received no advice about APB's condition. APB wished to be discharged from the hospital, partly because he had been misinformed that the treating doctors wanted to put him in a nursing home.

[54] Rather than take APB to a doctor who could assess his condition, or admit APB to another hospital, CL, JHL and MSR took him to a solicitor with a view to having APB revoke the power of attorney which had been granted to IDN.

[55] The hospital staff and treating doctors did not know where APB was. Nor did IDN. He called CL but she did not return his calls. Eventually APB's whereabouts was ascertained.

[56] IDN attended at the solicitor's office and there was a verbal confrontation between him and MSR. Unsurprisingly, IDN accused MSR of unprofessional conduct and foreshadowed a complaint to authorities regulating the legal profession.

Purported revocation of power of attorney and the making of a new will on 18 April 2013

[57] The attempt to have APB revoke his power of attorney in the presence of a Brisbane-based solicitor on 17 April 2013 having been interrupted, APB was taken by CL to a firm on the Gold Coast on 18 April 2013. He purported to revoke his power of attorney and a new will was made.

Court and tribunal hearings

[58] On 19 April 2013 IDN filed an application in this Court seeking a declaration that APB lacked capacity to revoke the power of attorney and lacked capacity to make personal, health and financial decisions. An injunction was granted pending the determination of APB's capacity to revoke the power of attorney, and the matter was transferred to QCAT.

[59] QCAT obtained substantial evidence, including medical and hospital records, reports from doctors and affidavits.

[60] In August 2013 Mr Sheehy was appointed APB's litigation guardian.

[61] On 6 September 2013 QCAT:

(a) found that APB did not have capacity to revoke the general power of attorney;

(b) revoked IDN's enduring power of attorney;

(c) appointed the Public Trustee as administrator for APB for all financial matters except those matters relating to or connected with the joint venture, the land and arrangements between APB and HRT; and

(d) appointed IDN as administrator for those matters: this appointment replaced the general power of attorney which IDN previously had.

[62] Guardianship hearings followed in late 2013, and guardianship orders were made appointing the Adult Guardian for a number of personal matters.

Medical evidence

[63] The medical evidence strongly supports the conclusion that APB lacks testamentary capacity, and that he lacked testamentary capacity when he made wills in 2013 and 2014.

[64] The medical evidence that APB currently lacks testamentary capacity includes an expert report directed to the Court by a Consultant Geriatrician, Dr Colin Kennett, dated 7 April 2016. Dr Kennett is a highly qualified specialist with special interests in cognition, capacity and frailty. He was briefed with substantial materials and asked to give an opinion about APB's testamentary capacity. He conducted an assessment of APB on

6 April 2016. For the reasons more fully discussed in his report, Dr Kennett concluded that APB does not have capacity to change his will. Dr Kennett's summary of his findings is as follows:

> "(1) He has cognitive impairment of uncertain aetiology. It is unlikely that he has a significant dementing process given the stability of his standardised screening tests over the last three years. His impairment is probably a consequence of advanced age and accumulated vascular damage. At this stage it would most accurately be described as amnestic mild cognitive impairment.
>
> (2) He does not have the capacity to change his Will despite having a good general understanding of a Will, his estate and those who might make a claim on it. My reasoning is that, despite the above:
>
> a. He has difficulty retaining new information making it difficult for him to adapt to new information that may be relevant.
>
> b. He has an inaccurate recollection of past events which he is unwilling to reconsider even when presented with documented facts. In particular, these inaccurate memories appear to have influenced his judgement with respect to the distribution of his assets in a way that may be counter to his expressed desire to see his property developments continue after his death.
>
> c. He lacks insight into his deficits preferring to believe that things he does not recall are 'details' which he can employ someone to manage.
>
> (3) He is physically quite well at the present time despite significant cardiac disease."

[65] In a supplementary report dated 16 February 2017, Dr Kennett reported that it is unlikely that APB will regain testamentary capacity.

[66] Other medical evidence supports Dr Kennett's opinion.

[67] There is some dispute about whether APB suffered a stroke before being admitted to hospital on 22 March 2013. APB has informed Mr Sheehy that he was taken to hospital by IDN after suffering a fall as a result of being pushed by one of his horses. He also told Mr Sheehy that during his hospitalisation, treating doctors formed the view that he had not been taking prescribed medication and that he suffered a stroke: a view which APB contests.

[68] In any case, after his admission to hospital, and when he was receiving treatment in the cardiology ward, APB experienced a visual field disturbance and mild right hand weakness. This suggested to treating doctors that APB had suffered "a transient ischaemic attack or mini-stroke with right homonymous hemianopia".

[69] Dr Lu is a Geriatrician and Consultant Physician, and a Visiting Medical Officer at St Andrew's Hospital, Greenslopes Hospital and Wesley Hospital. He is also a director of Geriatric Medicine at Canossa Hospital. Dr Lu was APB's treating geriatrician

during the period of his admission to St Andrew's Hospital between 22 March and 17 April 2013.

[70] Testing demonstrated APB was suffering mild cognitive impairment, disorientation to place and time and poor recall. He continued to have problems with short term memory and orientation.

[71] Dr Lu expressed the opinion that APB suffered from moderately severe cognitive impairment/dementia which greatly affected his ability to make decisions.

[72] When seen by Dr Lu on 1 April 2013, APB consented to geriatric rehabilitation under Dr Lu's care but by 2 April nursing staff were recording him as very anxious, expressing a desire to get in a taxi and walk out.

[73] When seen by Dr Lu on the same day, he could not recall the name of his general practitioner who had been treating him for many years.

[74] On 3 April 2013 cognitive testing demonstrated severe cognitive impairment in attention, recent orientation, temporal awareness, auditory recall and complex problem solving.

[75] I should mention that in his evidence KLA, who is a retired anaesthetist, doubted whether APB suffered a stroke whilst in hospital. KLA was not purporting to give evidence as an expert. However, I attribute weight to his opinion, even though it was given briefly and without reference to all of the hospital and other medical records which suggest that APB suffered a mild stroke on 25 March 2013.

[76] The debate over whether APB suffered a "mini-stroke" whilst in hospital on 25 March 2013 does not affect the substance of Dr Kennett's expert opinion about APB's cognitive impairment and lack of testamentary capacity. Dr Kennett was not required for cross-examination and his opinions do not depend upon whether or not APB had a mild stroke on 25 March 2013.

[77] I also have had regard to the unchallenged evidence of APB's long-term general practitioner, Dr VM, who began treating APB in 2003.

[78] In a report dated 1 July 2013, which Dr VM was asked to prepare for QCAT, he reported that APB:

> "has always presented as an eccentric, garrulous and dishevelled man, who suffered from long term emotional disturbance, predominantly depression, but also PTSD …"
>
> "He has always tended to ramble a great deal and be very difficult to obtain an accurate history from, but he has deteriorated significantly over the last two to three years in terms of his recall, and general awareness."

[79] APB saw Dr VM on 4 July 2013, and Dr VM remarked that APB should consider living more independently. The next day Dr VM bumped into SJ, a registered nurse who had been engaged to provide care for APB. SJ was introduced to APB by CL. On 5 July 2013 SJ spoke to Dr VM about APB's wellbeing and the circumstances in which APB found himself.

[80] Dr VM formed the view that CL and JHL did not have APB's best interests at heart and that he was being "brain-washed by them". Dr VM was so concerned for APB that he decided to telephone a solicitor in Brisbane with whom he had spoken previously. This solicitor was the only point of contact that Dr VM had for someone who knew APB and who Dr VM could trust.

[81] In mid-July 2013 Dr VM arranged for an appointment to see APB and to raise the prospect of APB obtaining alternative accommodation. An appointment was scheduled for 19 July 2013. However, that appointment was cancelled, and Dr VM was told on the morning of 19 July 2013 that he was no longer APB's general practitioner. The impetus for the termination of this therapeutic relationship appears to have been CL, who apprehended that Dr VM was on the side of IDN.

[82] Dr VM's affidavit dated 13 August 2013 is in evidence and he was not required for cross-examination. I accept the contents of that affidavit and his report to QCAT dated 1 July 2013 as reliable evidence of a deterioration in APB's cognition in the few years prior to 1 July 2013. Dr VM's affidavit reports that in 2012 he noticed that APB was starting to have episodes of amnesia, and had increasingly poor recall and awareness of his recent activities.

Testamentary capacity

[83] The expert opinion of Dr Kennett, provided to this Court for the purpose of this proceeding is informative, and Dr Kennett was not required by any party for cross-examination in relation to his opinions. His opinion, whilst important and helpful, does not determine the issue of testamentary capacity. That is for the Court to decide.

[84] No party who made submissions disputes that APB lacks testamentary capacity and that a statutory will should be made on his behalf. However, APB, who was keen to address me in person, strongly contests that he lacks testamentary capacity and I have had regard to what he has said to me and what he has said to others about that matter.

[85] I take care not to conflate the question of capacity which QCAT was required to decide in late 2013 in the context of deciding whether APB lacked capacity to revoke a power of attorney, with the question of testamentary capacity which I must decide. Each concerns different capacities and involves different legal tests.

[86] The legal test for testamentary capacity is well-established.[6] In essence, to have testamentary capacity:

1. the testator must be aware, and appreciate the significance, of the act in the law upon which he is about to embark;

2. the testator must be aware, at least in general terms, of the nature, extent and value of the estate over which he has a disposing power;

3. the testator must be aware of those who may reasonably be thought to have a claim upon his testamentary bounty, and the basis for, and nature of, the claims of such persons;

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[6] *Frizzo v Frizzo* [2011] QCA 308 at [24] adopting *Frizzo v Frizzo* [2011] QSC 107 at [21] – [25].

4. the testator must have the ability to evaluate, and discriminate between, the respective strengths of the claims of such persons.[7]

[87] The classic test of testamentary capacity in *Banks v Goodfellow*[8] must be brought to bear on existing circumstances of modern life.[9] The Court does not require a person to know precisely the value of his or her individual assets, or even of certain classes of assets. This particularly applies as one moves up the scale in terms of size and complexity.[10] However, the complexity of APB's affairs, including his legal relationship with HRT, is relevant to the level of cognitive function required to make a will. In general, the more complex the testator's affairs, the more cognitive function is required.

[88] The Litigation Guardian submits that the evidence, particularly the independent medical evidence of Dr Kennett as well as APB's apparently irrational beliefs about some matters, establish that he does not have, and is unlikely to ever recover, testamentary capacity. I have discussed the medical evidence. As to what are described as irrational delusions, the Litigation Guardian points to APB's Statement of Wishes dated 19 July 2016 which is submitted to contain apparently irrational beliefs. For example, APB asserts that his three children "pigeon-holed me waiting for me to die" and that they and IDN "have united and conspired to bring about my death by unnatural means at an earlier death rate than I could expect". He accuses his children of having been complicit in having him "imprisoned, cold-stored, shelved, whatever for my remaining lifespan, for their enrichment". He purports to disinherit them and to disown them.

[89] I take account of the natural distress which APB suffers as a result of the orders which were made by QCAT. However, QCAT was required to assess APB's condition and to make appropriate orders within its jurisdiction. The medical and other evidence, including the concerns of APB's long-standing general practitioner, compelled it to reach the decisions which it did.

[90] The evidence before me provides no grounds to suppose that his children misconducted themselves in the way APB alleged in his 19 July 2016 statement. Their evidence, which was not the subject of cross-examination, shows that they attempted to contact their father. Other friends attempted to contact him, without success.

[91] APB's statement of 19 July 2016 refers to the financial gifts given to him from "the carers who were the people named in my present Will". I take this to be a reference to, amongst others, CL. He says that it was these people who assisted him "to fight the isolation imposed upon me". The unfortunate truth is that it was these people, and CL in particular, who isolated APB from his family and friends.

[92] I find that in 2016 and 2017 APB has expressed irrational beliefs about his children and IDN. In purporting to disinherit and disown his children, APB disregarded the fact that his children have a legitimate claim upon his testamentary bounty.

[93] Years earlier, when APB was more rational and not isolated from his family and old friends, he had recognised that his children had a legitimate claim on his testamentary

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7 *Frizzo v Frizzo* [2011] QSC 107 at [21] and the cases cited therein.
8 (1870) LR 5 QB 549.
9 *Frizzo v Frizzo* [2011] QSC 107 at [22].
10 Ibid.

bounty. He recognised this by making provision for them and his grandchildren in different ways in different wills.

[94] Even after the distressing events surrounding APB's departure from St Andrew's Hospital on 17 April 2013, he made substantial provision for them (30 per cent each) and his good friend GWC (10 per cent) in the will he made on 18 April 2013. That will is deficient in many respects. For example, it has no regard to the need to comply with the JVA and contains no testamentary trust. Those things were important to APB in November 2012, since they advanced his intentions about the continued development of the centre after his death. It is remarkable that he had forgotten those things in April 2013. He had not forgotten, however, about his children and their expectation of enjoying, after he died, some of the material wealth he had accumulated.

[95] A few days after leaving the hospital, APB spoke by phone to his son SPB and explained what his intentions had always been:

> "So my whole life, no matter what I've got now, has been focused on having a better deal for my children so that when my children have children they are better, so you should be better than me, and your children should be better than you. So that's been a concept of what I'm thinking that has, uh, stayed with me for a long time, well before I was married and bought you people into the world you know.
>
> So whatever is right or wrong about it, all my efforts have been toward making life for my children, that's the three of you, better. You know, so, from doing that, I haven't had, I've saved money and reinvested money, I haven't taken world trips and holidays to here and there and everywhere, I have piled a lot of money into a project so that one day, you can stand there and look and say 'look what we've inherited' and 'look what our children have to look forward to' 'we'll be somebody, we won't be shit kickers like grandfather was' do you understand that?"

SPB responded that he did.

[96] SPB tried to speak to APB in the following days, but his calls were not answered. Eventually he spoke to CL, with whom APB was staying, and he heard her tell APB that SPB was with IDN at the time: something that was not true.

[97] This kind of misinformation led to a breakdown in APB's relationship with his children. CL effectively controlled contact by APB's family and old friends like GWC for the period APB was living with her and her husband.

[98] Over time, and due to APB's cognitive impairments and the influence of CL and others, he came to believe that his children and IDN had conspired to imprison him and to shorten his life. This was an irrational belief.

[99] APB's cognitive impairment, as reported upon by Dr Kennett and by other medical practitioners, combined with his delusions about his children and their alleged conspiracy with IDN, lead me to conclude that he does not have the ability to evaluate, and discriminate between, the respective strengths of the claims of persons who may reasonably be thought to have a claim upon his testamentary bounty.

[100] I find that APB lacks testamentary capacity.[11]

APB's intentions

[101] An important source of information about APB's intentions are the wills which he made when he had testamentary capacity. In short, he made substantial provision for his children and certain old friends in wills made in 1998 and 2005. In 2007 and 2012 he made wills which also benefited his children in a substantial way: either as primary beneficiaries under a testamentary trust or by gifts of $250,000 each in addition to being primary beneficiaries under a testamentary trust. He also provided for some old friends, as well as two charities, to be beneficiaries under a testamentary trust. The 9 November 2012 will made substantial provision for IDN and IDN's sister, JB, who under that will would obtain 60 per cent and 10 per cent respectively of the distribution of capital on the termination of the trust. The children were to share 20 per cent of the capital, while the charities QIMR and Toc H were each to take five per cent.

[102] In different ways in different wills and in other statements of his intentions, APB has wished his grandson, RO, to benefit directly or indirectly from his estate.

[103] APB's testamentary intentions when he had testamentary capacity several years ago are relevant to whether the proposed statutory will "is or may be a will" that he would now make if he had testamentary capacity. They record, among other things, an intention to make substantial provision for his children and smaller provision for long-term friends. In considering earlier wills when APB had capacity as a guide to the kind of will which he would make today if he had capacity, account must be taken of the date and circumstances under which the earlier will was made. Things have changed, particularly since 1998. This includes the value of his assets, and his relationships with family and old friends. Many of his old friends have died over the last two decades.

[104] As a general proposition, the wishes of a person who does not have capacity do not carry the same weight as those of someone who does.[12] The weight to be given to any statement of intention depends on the circumstances under which it came to be made. Substantial weight may be given to a statement of actual intention if the extent of incapacity is slight.[13] By contrast, a statement of intention by a party who lacks capacity may warrant very little weight if the incapacity leads the person to be mistaken about the truth or even deluded "about the natural objects of his or her testamentary bounty – a not infrequent symptom of testamentary incapacity".[14] It also may warrant very little weight if the person was vulnerable to suggestion, improper influence or bad advice, being a vulnerability which the person would not have experienced if he or she had testamentary capacity.

[105] These considerations assume importance in the case. I have concluded that APB was misled and manipulated by certain new found friends, particularly CL and MSR. Their self-interest prompted them to mislead APB on matters of business and about who he should trust. They sought to poison his relations with IDN, and succeeded in doing so.

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[11] The Act s 21(2)(a).
[12] *VMH v SEL* [2016] QSC 148 at [132].
[13] *Re Fenwick; Application of J.R. Fenwick & Re Charles* (2009) 76 NSWLR 22 at 55 [157]; [2009] NSWSC 530 ("*Re Fenwick*").
[14] Ibid.

They did so in order that CL's business interests could be advanced. MSR behaved improperly as a solicitor and as a supposed friend in giving APB bad advice. He did so in order to be appointed as APB's lawyer.

[106] The purported wills APB made when he lacked testamentary capacity and was under the influence of CL are not reliable sources of information about what APB's testamentary intentions would be if he had testamentary capacity. A more reliable source is his earlier wills.

Statutory wills – agreed legal principles

[107] There is no real contest over the relevant legal principles. It is unnecessary to set out in full the relevant statutory provisions. A number of parties helpfully prepared an outline of legal principles which I adopt and set out in the following nine paragraphs.

[108] Statutory wills were introduced into the Act by amendments in April 2006.[15] The scheme of the Act requires a person who seeks an order under s 21 of the Act to first apply for leave under s 22.

[109] Only after an order for leave is made does the Court proceed to hear the substantive application going to whether the proposed will or codicil is or may be a will that the testator would make were they to have testamentary capacity.

[110] On the hearing of an application for leave, the applicant must give the Court certain information[16] which includes:

(a) evidence of the lack of testamentary capacity and the likelihood of the person ever regaining capacity;

(b) the size and character of the estate;

(c) a draft proposed will;

(d) any evidence of the person's wishes;

(e) evidence of any previous will;

(f) evidence pertaining to the likelihood of a Family Provision Application;

(g) evidence relevant to gifts which the person might have given to charities or otherwise;

(h) evidence as to whom the person might have been expected to provide for under their will;

(i) evidence of any persons who might be entitled to claim on intestacy;

(j) other relevant facts.

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15 *Succession Amendment Act* 2006 (No 1 of 2006).

16 Prescribed in s 23.

[111] The Court *may only* give leave if it is satisfied that:[17]

(a) the applicant for leave is an appropriate person to make the application;

(b) adequate steps have been taken to allow representation of all persons with a proper interest in the application;

(c) there are reasonable grounds for believing that the person does not have testamentary capacity;

(d) the proposed will, alteration or revocation is or may be a will, alteration or revocation that the person would make if the person were to have testamentary capacity; and

(e) it is or may be appropriate for an order to be made under s 21 in relation to the person.

[112] On the hearing of an application for leave, the Court:[18]

(a) may have regard to any information given to the Court under s 23; and

(b) may inform itself of any other matter relating to the application in any way it considers appropriate; and

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

[113] On the hearing of the application, the focus of the enquiry ought to be on the words of the section, regarding whether the will "is or may be" a will the person "would make".[19] That is a question of fact.

[114] However, satisfaction of that test does not give rise to the making of an order as a matter of right. The Court may only give leave to make the application if it is satisfied of all the aspects of s 24, which imposes a substantial constraint upon the exercise of the discretionary power to grant leave. Unless so satisfied as to each of the five matters listed in s 24, the Court may not grant leave.[20]

[115] The guiding principle is that whatever is done, or not done, must be for the benefit of the incapacitated person.[21]

[116] Even though the wishes of the proposed testator are relevant, the wishes of a person who does not have capacity do not carry the same weight as those of someone who does.[22]

Statutory wills – some additional observations

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17 Pursuant to s 24.
18 Pursuant to s 25.
19 *McKay v McKay* [2011] QSC 230; *Sadler v Eggmolesse* [2013] QSC 40.
20 *GAU v GAV* [2014] QCA 308 at [46].
21 *GAU* (supra) at [48].
22 *VMH v SEL* [2016] QSC 148 per Jackson J at [132].

[117] No party opposes leave being granted, and the hearing before me proceeded on the basis that the issues for determination were the final form of the will. The fact that leave is not opposed does not justify blurring the distinction between the two stages of a proceeding of this kind.

[118] The statute makes clear that there are two distinct stages in a proceeding of this kind. The distinction between the two stages was emphasised by the Court of Appeal in *GAU v GAV*.[23] The discretionary power to grant leave is exercised in accordance with the provisions of the Act. Section 24 imposes "a substantial constraint upon the exercise of the discretionary power to grant leave".[24] The requirement for leave does more than filter out vexatious or clearly unmeritorious applications for a statutory will. The discretionary power to grant leave is distinctly separate from the discretionary power conferred under s 21 to authorise a will to be made or altered in the terms stated by the Court.[25]

[119] Whilst the issues for my determination may give the appearance of issues in dispute between parties to adversarial litigation, this proceeding is not governed by the rules of adversarial litigation. Although the resolution of those issues will affect interested parties in a very material way, this is not a dispute between the parties, particularly those parties who stand to benefit under any statutory will. As noted earlier in relation to the agreed principles, the guiding principle is that whatever is done, or not done, must be for the benefit of the incapacitated person. In discussing the comparable provisions of the New South Wales Act, Palmer J in *Re Fenwick*[26] stated:

> "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."

[120] As to the prerequisite for leave stated in s 24(d),[27] different approaches have been adopted in some authorities. The approach adopted by Megarry V-C in *Re D(J)*[28] has been applied in one instance by this Court.[29] The submissions of the Litigation Guardian cite this authority. However, a different approach which focuses on the words of the section is favoured by most judges[30] and I respectfully adopt that approach. As Ann Lyons J stated in *McKay v McKay*:

> "[I]n the current circumstances I propose to simply focus on the words of the section. I simply need to ascertain whether the proposed will is one that

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23 [2016] 1 Qd R 1; [2014] QCA 308 ("*GAU*").
24 *GAU* at [46].
25 *GAU* at [47].
26 (2009) 76 NSWLR 22; [2009] NSWSC 530.
27 "The proposed will, alteration or revocation is or may be a will, alteration or revocation that the person would make if the person were to have testamentary capacity".
28 [1982] Ch 237.
29 *Re Keane*; *Mace v Malone* [2011] QSC 49 at [73].
30 *McKay v McKay* [2011] QSC 230 at [79]; *Re Matsis; Charalambous v Charalambous* [2012] QSC 349 at [24]; *Sadler v Eggmolesse* [2013] QSC 40 at p 13; *Lawrie v Hwang* [2013] QSC 289 at [47]; *Re JT* [2014] QSC 163 at [32]; *Re D* [2014] QSC 164 at [24].

> Mrs McKay would or may make if she were to have testamentary capacity. I consider that the present case can be clearly distinguished from *Re Keane; Mace v Malone* where the Court was asked to approve a proposed will which was completely different to the will which had in fact been previously executed. I am not convinced that the approach by Megarry V-C in *Re D(J)* is necessarily the appropriate approach in the circumstances of this case and also note the criticisms of the approach by Palmer J in *Re Fenwick* who considered the approach as artificial, counter-factual and involving mental gymnastics."[31]

[121] Before granting leave the Court must be satisfied, in terms of s 24(d), that the proposed will "is or may be" a will that the person would make if the person were to have testamentary capacity. The words "may be" and the scheme of the Act make it possible to imagine cases in which there is more than one possible will which would satisfy the terms of s 24(d). The will proposed by the applicant for leave may be one. Wills in a different form, proposed by other parties, also "may be" a will that the person would make if he or she had testamentary capacity. The differences between them may be slight or substantial.

[122] Section 24(d) does not require that the will proposed by the applicant be the one that is most likely that the incapacitated person would have made.[32] The will proposed by the applicant in seeking leave may require amendment in the light of evidence which emerges, draft wills proposed by other parties and suggestions by parties and the Court.

[123] If the proposed will satisfies the requirement of s 24(d) and the other requirements of s 24, and leave is granted, this does not mean that the proposed will necessarily will be approved. Approval depends on the exercise of a separate discretion.

[124] If leave is granted to make the application, then an order authorising a will to be made on behalf of the person requires proof that the person lacks testamentary capacity. If that and the other requirements of s 21 are satisfied then the Court exercises a broad and flexible jurisdiction,[33] and the Court may make the order on the conditions the Court considers appropriate.[34]

[125] The discretion at the second stage is not constrained by express statutory criteria. Instead, the discretion should be exercised in the particular circumstances and having regard to the purpose of the legislation. Having regard to the beneficial purpose of the legislation and the protective nature of the jurisdiction, an important consideration in the exercise of the discretion under s 21 is the will the person probably would have made if he or she had testamentary capacity. Other considerations will apply in the particular circumstances, and the legislature having not listed factors, it is inappropriate and unhelpful to articulate the factors which might influence a discretion of the kind conferred by s 21.

[126] An application for leave and an application for an order under s 21 may be heard together or the application for an order under s 21 may be heard immediately after the

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31 [2011] QSC 230 at [79].

32 See *A Limited v J* [2017] NSWSC 736 at [82] in relation to the comparable provision of the New South Wales legislation.

33 *GAU* at [48].

34 The Act s 21(4).

application for leave.[35] The hearings may be on separate dates. In any event, the proposed will in respect of which leave is granted may require some modification before an order is made under s 21.

Matters not in dispute

[127] Against that background, and emphasising that this is not a proceeding which is governed by the rules of adversarial litigation, I proceed to identify substantial matters which are not in dispute and matters which require my determination.

[128] As noted, there is no real dispute about the general form of the will and that it should facilitate the continuation of the joint venture. A will which gave specified shares of APB's estate to various individuals, and, in effect, required the land to be sold so that the proceeds of sale were distributed would be inappropriate. It would not reflect the intention of APB when he made a will on 9 November 2012, being an intention which I conclude he would have today if he had testamentary capacity. That will created a trust which limited the ability of his primary beneficiaries to access the income and capital of the trust. In a Memorandum of Wishes signed the same day, APB explained his reasons for this:

> "(a) I have spent a large part of my life planning for and anticipating the development of [the land]. Above anything else, it is my wish that my death does not mean the development needs to be sold. My preference is the project is completed regardless of whether or not I am living. For that reason, I have entered into various agreements with a joint venture partner that are binding on my Executors, Trustees and beneficiaries. This means the land must be held on trust by the Trustees and cannot be sold unless it is in accordance with those agreements. My Trustees are to work with the joint venture partners to ensure the project is either completed, sold in accordance with the terms of the joint venture, or if they deem it appropriate, held as an investment to generate an income for the benefit of the beneficiaries of the Trust.
>
> (b) I want to provide my Primary Beneficiaries with an ongoing income stream from the Trust that will allow them to receive a lasting benefit from the assets I have built up during my life. However, I do not want them to receive a large lump sum benefit that can be depleted by unexpected events such as divorce or bankruptcy or from being defrauded, from life shortening stresses incurred by bad business deals, market and real estate collapses and the decisions, often punishing, that must be made.
>
> (c) It is my wish that as a general rule only 40 percent of the Trust's income each Accounting Period be distributed each year and the balance 60 percent be available to build the capital of the Trust."

[129] These wishes support a will in a similar general form, namely one which makes some pecuniary gifts and which creates a testamentary trust. The possibility that the centre

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[35] The Act s 22(3).

and the land which remains to be developed might be sold in the coming months is not a sufficient reason to not include a testamentary trust. All the respondents who made submissions, save for MSR, CL, JHL and KLA, favoured this form of will.

[130] I have identified in [6] matters about which there is no real dispute.

Matters to be resolved

[131] As noted in [7], matters which require resolution in the light of the parties' submissions may be summarised as follows:

1. Should provision be made for MSR, CL, JHL and/or KLA?

2. What provision should be made for each of the long-term friends GWC, JW and AR, either as a secondary beneficiary under the testamentary trust or as the recipient of a pecuniary gift?

3. What provision should be made for each of the children by way of a pecuniary gift; distribution of income as a primary beneficiary under the testamentary trust; and distribution of capital on the winding up of the trust?

4. What provision should be made for the grandson, including the extent to which adjustments are made to the interests which would otherwise be enjoyed by his father, SPB, to address the improbability that SPB will, in accordance with APB's wishes, be responsible for providing for his own child following APB's death?

5. What provision should be made for the spouses of APB's children?

6. Should there be one or two testamentary trusts?

7. Who should be joint executor with IDN?

The grant of leave

[132] Lest I appear to blur the two stages of the application which were heard conveniently at the same hearing, I should summarise at this point my reasons for granting leave under s 22. The information required by s 23 has been given. This includes APB's wishes, evidence of potential beneficiaries' circumstances and evidence of charitable intentions. As APB is divorced and has no de facto spouse, his children are the only persons entitled to share his estate on intestacy.[36] Unless adequate provision is made for them, each of APB's children will make family provision claims against his estate after his death.[37]

[133] As I observed at the start of these reasons, the mandatory requirements of s 24 are satisfied. The proposed will "is or may be" a will that APB would make if he had testamentary capacity. It is appropriate for an order to be made under s 21 in relation to APB because of:

(a) doubts about the validity of the wills made by him after 2007;

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[36] Section 23(k).
[37] Section 23(h).

(b) uncertainty about when he first lost testamentary capacity;

(c) the cost and complexity of litigation over his testamentary capacity, and consequential litigation if the will which was upheld made inadequate provision for his children;

(d) changes in the size and nature of his assets since 2007;

(e) the need to ensure that any will complies with the joint venture agreement.

[134] No party opposed leave being granted under s 22. I intend to grant leave.

Should provision be made for MSR, CL, JHL and/or KLA?

[135] While these individuals have broadly aligned interests, have the same legal representatives and made identical submissions, their individual circumstances, conduct and relationships with APB differ. As a result, it is possible that provision should be made for all, some or none of them. It is convenient to identify the issues that emerge from the parties' submissions.

The "friends'" submissions

[136] Like all other parties, the "friends" submit that the protective jurisdiction should be exercised to authorise a will to be made for APB to resolve the uncertainty about the validity of his recent wills, and to lessen the likelihood of litigation concerning his estate after his death.

[137] The "friends" concede that APB may be, by reason of his cognitive decline, vulnerable and easily influenced. However, they strongly refute any suggestion that they have been involved in bringing any improper pressure or influence to bear on him in respect of his testamentary affairs. In final oral submissions, counsel for the "friends" fairly conceded that it would be open for me to make various adverse findings of fact arising from their oral evidence. However, he submitted it was not necessary to do so. Irrespective of some of their motives and mixed motives, it is undoubted that there was a friendship between each of those four people and APB which continued for a number of years.

[138] None of the parties dispute that APB lacks testamentary capacity. The "friends" submit that this does not mean, however, that his expressed wishes during the period that he has lacked testamentary capacity should be disregarded. Instead, they acknowledge that they should be treated with caution.

[139] Having regard to APB's history of will-making at a time when he had testamentary capacity, the "friends" point out that he was prepared to make significant changes to his will, from time to time, rather than make merely minor adjustments. This included making very generous gifts to people whom he perceived to be close to him at the time. This includes:

(a) his 2005 will which contained a gift of 25 per cent to his joint venture partner, HT (a gift which is not replicated in any later will);

(b) his 2007 will which provided a very generous gift to IDN and his sister JB of 20 per cent of the capital upon the winding up of the testamentary trust; and

(c) his 2012 will in which those percentages were increased to 60 per cent for IDN and 10 per cent for his sister.

[140] Against that background the "friends" submit that it is not surprising that APB chose to confer a substantial benefit on them in his 2014 will, notwithstanding that he had known them for only a few years. Their final submissions propose that each of them be awarded two per cent of the estate or approximately $1,400,000 each as a pecuniary gift.

The Litigation Guardian's submissions

[141] The Litigation Guardian submits that if APB had capacity today and was aware of the facts as they emerged during the hearing, he would make no provision for MSR who:

(a) sought to ingratiate himself with APB to advance the business and financial interests of himself and CL;

(b) did so improperly;

(c) stood by and allowed APB to be taken from St Andrew's Hospital without informing medical staff, despite having been informed by IDN that he considered APB was "particularly vulnerable", had suffered a stroke and that his "impaired decision-making capacity" was being assessed.

[142] The Litigation Guardian further submits that the clearest example of MSR's motive of financial benefit is that, despite the exposure of his wrongdoing during his cross-examination, he said in re-examination that he nonetheless would accept any provision made for him in the statutory will.

[143] As for CL, the Litigation Guardian submits that if APB had capacity today and was aware of the facts that emerged during the hearing he would make no provision for CL or her husband, JHL. According to the Litigation Guardian, APB would conclude that CL sought to ingratiate herself with the predominant intention of advancing her business and financial interests. The Litigation Guardian makes several substantial submissions in this regard. They include the fact that after APB made a will on 18 April 2013, he told CL "I just want you guys to have it". This was a reference to her and APB's other new friends, and she understood that they were substantial beneficiaries under that will. Yet, it seems that after she discovered at the QCAT hearing in March 2014 that she was not a beneficiary under that will, arrangements were soon made by MSR for APB to see a new solicitor to make a will under which CL and the other new friends became substantial beneficiaries.

[144] As for JHL, the Litigation Guardian notes his and CL's flagrant disregard of the Public Guardian's decisions forbidding or restricting contact with APB. JHL, like his wife, asserted that their conduct throughout was motivated solely by genuine friendship with APB and a concern for his welfare. The Litigation Guardian contends that their conduct was not so motivated and that the maintenance of contact in breach of decisions forbidding or restricting contact was motivated by a desire to ingratiate themselves for financial gain.

[145] As for KLA, the Litigation Guardian acknowledges that he does not appear to have been motivated by self-interest. He became a friend of APB in 2013 and does not assert that he needs provision from APB's estate. KLA appears to have actively promoted (without any evidence) the idea that IDN and "his medical friends" were intent on certifying APB as mentally incompetent so that they would have control of him. In this and other respects, KLA is said to have encouraged, rather than reality tested, APB's deluded beliefs. Ultimately, the Litigation Guardian submits that if APB had capacity today and an appreciation of the facts as they are now known, he would not make provision for KLA. Alternatively, it is possible that he would give KLA a legacy not exceeding $50,000.

The children's submissions

[146] The children submit that the Court should not make any provision for the "friends" because none of them claims to have an interest in a gift under his will, and none of them is a person to whom APB owes a duty to provide. None have any demonstrable need. The children note that none of the "friends" were known to APB prior to late 2012, a time at which his capacity was already in decline. His relationship with each of them was very short and formed at a time when he was vulnerable to suggestion.

[147] The children submit that CL had a direct financial interest in pursuing a "friendship" with APB and pursued that financial interest with vigour. MSR ingratiated himself with APB, acted improperly and, along with CL and JHL "opportunistically took advantage of APB's vulnerabilities, almost certainly for financial gain". APB was vulnerable to suggestions by CL and JHL that APB was going to be placed in a home and IDN would take control of all of his assets.

[148] According to the children, the "friends" had, and have, no expectation of a gift from APB. The children submit that the position of each of the "friends" involves self-interest in the face of almost certain knowledge that APB did not possess testamentary capacity in March 2014 when APB made a will which gave them collectively 58 per cent of his estate.

IDN's submissions

[149] IDN also submits that the "friends" should not receive anything under the statutory will and that the evidence enables the Court to conclude that they only befriended APB, and maintained that connection, for ulterior motives. IDN otherwise adopts the submissions on behalf of the Litigation Guardian in relation to MSR, CL and JHL, and the submissions of the children in relation to all four new friends.

Resolution of disputed questions of fact

[150] In earlier summarising the evidence, I have referred to the circumstances under which APB left St Andrew's Hospital on 17 April 2013, the making of a new will on 18 April 2013 and CL's conduct, in particular, in respect of communications by family and friends with APB when APB was residing with CL and her husband. I have also mentioned the steps taken to terminate APB's long-standing relationship with his general practitioner. CL allowed APB to wrongly believe that IDN and doctors wished to confine him in a nursing home and that IDN was acting contrary to APB's interests. A number of the findings which I have made earlier in these reasons depend upon evidence which was not challenged by the "friends" and which commands acceptance.

[151] To address the submissions which have been made in the present context, it is appropriate to relate some additional facts about the circumstances in which CL came to befriend APB and, at the same time, advance her business interests. The narrative also involves MSR who, for the reasons which follow, conducted himself improperly as a solicitor and in a manner designed to advance CL's interests and his own personal interests. MSR was an active party in causing APB to distrust IDN without justification. In fact, CL and MSR succeeded in poisoning the professional and personal relationships which had existed between APB and IDN. This was contrary to APB's interests.

The narrative

[152] APB became acquainted with CL around November 2012. CL, a real estate agent, was seeking a tenancy in the shopping complex. CL contacted APB directly regarding the tenancy (which no tenant had done before) and after that initial contact established a friendship. CL's husband, JHL, is also involved in the real estate agency.

[153] In December 2012, APB first informed IDN that he wanted CL's agency to take over the property management of the shopping complex. This was an idea put forward by CL, and was pursued by her. IDN was hesitant, given CL's lack of experience in large-scale property management, but agreed to address the issue in early 2013.

[154] On 6 March 2013 APB was introduced to MSR, the lawyer for, and friend of, CL and JHL. MSR's first meeting with APB was to discuss CL's agency becoming manager of the complex. IDN was not present. MSR knew that APB was legally represented at the time. The following day, MSR wrote a letter to APB, on legal letterhead, which was personal in nature. In addition to discussing personal details, including their shared experiences and upbringing, the letter stated that MSR believed APB was being taken advantage of and was not being given correct and independent legal advice. He made unfounded insinuations about the competence of APB's trusted attorney. In cross-examination, MSR agreed that sending such a letter was inappropriate and unusual conduct.

[155] The letter, sent to APB via CL, was marked "Private and Confidential". The opening sentences of the letter give a sense of its tone and intent:

> "When you were driving around the Centre last night looking for lights out – 3.00am – I was lying in bed thinking about the meeting!!! This letter is probably unusual for a Lawyer to be writing, but as it unravels hopefully you will see where I am coming from. I am writing this in the first person as I think this is important to our relationship.
>
> I shook your hand yesterday and within minutes read your most humbling thoughts on your dealings with your joint venture partner, […]. As you told your story – it seemed to me that on a number of occasions you had been taken advantage of and maybe not given correct and independent advice. This in no way, of course, belittles your ability to transact business – rather the opposite – but you have relied on parties to, as it were, do the right thing and this may not have happened."

[156] In sending such a letter, MSR ingratiated himself into APB's affections. The letter was clearly intended to influence APB and turn him against his lawyer. The letter had a veneer of friendship and professed a concern for APB's interests. In fact, MSR was acting in the interest of CL and his own self-interest. In a letter dated 12 March 2013, MSR promised APB legal services equal to or better than another lawyer. How MSR could make this claim, not knowing the quality of the legal services IDN had provided to APB, is interesting. In any event, MSR was encouraging the other party in a commercial transaction to act contrary to their own legal advice. IDN's advice was protective of APB's interest. MSR's advice was not.

[157] Nonetheless, at APB's persistent urgings and in good faith, IDN actively sought to substitute CL's agency for the current complex managers in early 2013. A meeting was arranged with the ANZ Bank, which had to approve any change in management. On 18 March ANZ advised IDN that it would not approve the change in management due to CL's lack of experience.

[158] As explained earlier, on 22 March 2013 IDN took a gravely ill APB to St Andrew's Hospital. The doctor who treated APB that day said APB "was about as close to death

as you can be without actually dying". APB stayed in the hospital until 17 April 2013. During this time, CL continued to pursue a change in the centre's management. MSR sent a letter dated 10 April 2013 to IDN saying that he should contest in court ANZ's decision not to approve a change of management. Late on 16 April 2013 IDN responded to MSR's letter, and indicated that contesting the bank's decision was would be reckless. This was sound advice. Suing the ANZ without a proper basis to do so was hardly in APB's interest, and would sour relations between the joint venture and the bank which financed the development.

[159] IDN's letter to MSR also outlined APB's current condition and stated that no further discussions of property management should take place with APB until he had recovered:

> "As you know, [APB] has been hospitalised since 22 March 2013 with a very serious heart condition. In addition, on 25 March 2013, whilst hospitalised, [APB] suffered a stroke. Given his medical condition and his age, [APB] is in a particularly vulnerable position. His doctors are currently trying to assess whether or not [APB] has impaired decision making capacity. Until those assessments are complete we ask that both you and your client no longer engage with [APB] in any discussions about the appointment of your client as property manager…"

[160] Despite knowing about this letter and its contents, on 17 April 2013, CL, JHL and MSR visited APB in hospital and helped him leave without speaking to hospital staff. They knew little, if anything, about APB's true state of health or the care and medication which he required. APB's desire to return to his own home was understandable. However, it could hardly have been in his best interests to allow him to do so without first checking with medical and hospital staff.

[161] They took APB to a nearby solicitor's firm to assist in revoking IDN's power of attorney. During their time at the office, CL received numerous telephone calls and messages from people, including the hospital, IDN and APB's children, all inquiring about APB's whereabouts and voicing their concerns for his wellbeing. Most of these went unanswered.

[162] Eventually, after being contacted by the solicitor who had been engaged, IDN arrived at the solicitor's office. IDN encouraged APB to return to the hospital, but APB left with CL and JHL. The power of attorney had not been revoked.

[163] That evening APB stayed alone in his house. The next day he commenced living at CL and JHL's house. On that day, 18 April 2013, he was taken by CL to another solicitor's office. On this occasion, he signed a revocation of a power of attorney. A new will was drafted and signed. After leaving the solicitor's office, APB told CL that "I just want you guys to have it". CL understood "you guys" to mean herself, her husband, KLA and MSR. Over the course of 2013 APB was said to make similar statements to the friends that he intended to benefit them under his will, including saying "[the shopping complex] will be yours."

[164] As noted at [58] – [62], on 19 April 2013 IDN began proceedings about APB's capacity, and there were various QCAT hearings in 2013. In the course of these events APB came to believe that his children had "sided" with IDN and were acting contrary to

his wishes. He erroneously believed they would sell the complex and put him in a retirement home.

[165] During this time, APB continued to reside with CL and JHL in a gated complex. He was isolated by CL and JHL, who monitored his contact and restricted communications from his children and old friends. After APB moved in with CL and JHL, calls to APB went unanswered and visits were not permitted. APB's daughter, CRB asked APB's old friends to contact him, and the old friends faced similar difficulties in attempting to make contact with APB whilst he was living with CL and JHL.

[166] This isolation is further evidenced by Dr CL and a registered nurse, SJ, both of whom were initially allowed contact with APB when he moved in with CL and JHL. SJ was retained by CL and JHL and initially visited APB twice daily, five days a week, to assess his health. SJ became suspicious of CL and JHL's motives, and the significant influence they had over APB. In May 2013 she suggested to APB that he should be more independent. A period of antagonism with CL and JHL ensued and SJ's visits with APB were slowly limited. On 18 July 2013 she was informed by text message that her services were no longer required.

[167] As discussed in paragraphs [77] – [82], APB's longstanding general practitioner of 10 years, Dr CL, ceased to see APB in July of 2013, after telling APB he was well enough to once again live independently.

[168] After the QCAT decisions were given, and the Public Trustee became administrator of APB's financial matters, JHL applied on 10 October 2013 to the Public Trustee for funds to cover the living expenses of APB, claiming $1,150 per week. He also retrospectively claimed expenses for the five months APB had already been residing with them at the time at the same rate, totalling $22,025.

[169] CL became aware at some stage that, despite APB telling her on 18 April 2013 that she and JHL, KLA and MSR would be "looked after", there was no provision for them in APB's 18 April 2013 will. On 4 March 2014, MSR arranged for APB to consult a solicitor. This was a solicitor known to MSR, and they had been partners many years ago. MSR did not disclose to the solicitor anything about the QCAT hearings, and that APB was vulnerable and potentially lacked capacity. MSR told the solicitor not to ask him anything about APB. He simply requested the solicitor to ring APB, who was in hospital at the time and wanted someone to do his will. Alerting the solicitor to the issue of APB's testamentary capacity would have been the proper and professional thing to do. Suggesting to a fellow practitioner that APB's testamentary capacity should be carefully and properly assessed would not, however, have been in MSR's interests. He knew that APB wanted to leave a will which benefited him, CL, JHL and KLA.

[170] The solicitor attended upon APB in hospital on 4 March 2014 and APB signed a handwritten will that day. A more formal typed will, in substantially the same terms, was prepared. On 7 March 2014, APB signed this will, in which the friends stood to substantially benefit, with CL to receive 16 per cent, JHL 16 per cent, MSR 16 per cent and KLA 10 per cent: in total 58 per cent of his wealth.

[171] On 7 April 2014, the Adult Guardian (appointed by QCAT) decided that CL and JHL could make contact with APB only with permission of the Adult Guardian. The reasons

given for this decision included the risk of financial abuse, the refusal by CL and JHL to return APB to his place of residence on 25 March 2014 and their history of not acting in his best interest. After these orders were repeatedly breached, the orders were amended on 23 May 2016 to ban all contact. Nonetheless, JHL and CL continue to contact APB.

Should any provision be made for MSR?

[172] MSR became a friend of APB after meeting him in March 2013, and sees him every few weeks. MSR saw him more frequently during the period that he was staying with CL and JHL between April 2013 and March 2014. I accept the Litigation Guardian's submissions that MSR sought to ingratiate himself with APB to advance the business and financial interests of himself and CL. I also find that MSR acted improperly in doing so. MSR and CL poisoned the professional and personal relationship which had existed between APB and IDN. This was contrary to APB's interests.

[173] No satisfactory explanation could be given by MSR as to why APB was taken from St Andrew's Hospital on 17 April 2013 without waiting to speak to staff about APB's condition. I conclude that MSR, CL and JHL did not want hospital staff to interfere with their plan to take APB to a nearby solicitor's office to revoke IDN's power of attorney.

[174] One reason for APB's friendship with MSR and the three other new friends was APB's deluded belief that they had put their "bodies on the line for him": something he told MSR on 21 June 2013. In February 2015 at a gathering at the home of CL and JHL, APB said "I owe my life to these four people".

[175] I conclude that these and similar statements about what his four new friends had done for him and why he wanted them to have a very large part of his estate were the product of APB's cognitive decline, his vulnerability to influence and the exercise of that influence, particularly by CL. APB was misled about the intentions of doctors who treated him at St Andrew's Hospital, APB's own general practitioner, IDN and APB's children. APB's cognitive decline and vulnerability to influence led him to have irrational beliefs about IDN and APB's children, and to wrongly believe that he owed his life to his four new friends.

[176] I find that if APB now had testamentary capacity and if he was aware of the true facts, then he would not make provision for MSR. He would conclude that MSR was responsible, with others, for destroying his trust in IDN and in his having the distorted belief that IDN and his children conspired to imprison him and to shorten his life.

[177] MSR swore in his affidavit dated 20 April 2017 that he does not have any expectation of receiving anything from APB's estate. Nor should he. Given his disgraceful conduct and lack of any expectation, I conclude that no provision should be made for MSR in the statutory will.

Should any provision be made for CL?

[178] I accept the Litigation Guardian's submission that CL sought to ingratiate herself with the predominant intention of advancing her business and financial interests. I found CL to be a very unimpressive witness. Her evidence to the effect that she simply did what she thought would please APB and, for example, was not interested in obtaining the

right to manage the centre in her own interests was simply unbelievable. I do not discount the possibility that CL has convinced herself that her actions were motivated purely out of friendship for, and admiration of, APB. However, I formed an adverse view of her credibility as a witness.

[179] She was a party to the disgraceful conduct on 17 April 2013.

[180] CL visited APB when he was in St Andrew's Hospital. APB did not like being in hospital and by mid-April 2013 came to believe that the doctors and rehabilitation staff were intent on having him enter an "old folks" home and not return to his home. The truth is that the doctors, occupational therapists and other health care professionals were assessing his needs. On 8 April 2013, Dr Lu, having earlier been informed by a health care professional that APB's house was a squalor, told IDN that APB's house was of concern and that an occupational therapist's home visit was advisable to see if returning home was an option. An occupational therapist home visit was scheduled for 18 April 2013. In short, health professionals were investigating how APB might live independently, with appropriate assistance.

[181] It is hard to resolve the question of whether APB informed CL (wrongly) that the doctors wanted him to go to an "old folks" home or whether CL contributed to this belief. When APB gave evidence before QCAT he explained that the day before he left hospital, CL visited him and asked why he needed to be in hospital. According to APB, CL and her husband went to see Dr Lu and came back and told APB that he was going to be put into a home. Around this time APB decided that he would not talk to IDN because he had seen Dr Lu and IDN talking and he thought "well they're getting on cosy", which aroused his suspicion.

[182] Dr Lu and others were not at liberty to disclose confidential details concerning APB's condition to CL. However, he did tell CL and JHL on the evening of 16 April 2013 that APB could not go home alone or without necessary services. If CL was truly interested in APB's health, there were proper processes by which she could seek to ensure that his welfare was protected. Assisting him to leave hospital without all of his medication, and without first checking with medical or other hospital staff, was not one of them.

[183] CL may have been misinformed by APB about the treatment he was receiving in hospital and the intentions of doctors and other health care professionals. However, by 17 April 2013 she had reason to doubt APB's cognitive state and his decision-making capacity, including his decision that he wanted to leave hospital. She had an interest in facilitating his leaving hospital. This was to procure a revocation of the power of attorney which had been given to IDN, and have APB grant a new power of attorney to someone who would be more sympathetic to her business plans. IDN's letter showed that as at 17 April 2017 he was not willing to progress her appointment as property manager of the centre. It suited CL's financial interests to have IDN's appointment as attorney revoked.

[184] Having helped APB to leave hospital, CL then embarked upon a course whereby APB came to perceive IDN as an enemy when, in fact, IDN was acting in APB's interests. CL was responsible for isolating APB from communications with family and friends.

[185] I have no reason to not accept the affidavit evidence of the registered nurse SJ who cared for APB and visited him at CL's home between 21 April and 19 July 2013. Her casual wage was paid by APB's then solicitors. She has no interest in the outcome of this proceeding. Her evidence is supported by other witnesses about how CL and JHL isolated APB. Her evidence and other evidence satisfies me that:

(a) CL was motivated by self-interest and a desire to be provided for in APB's will;

(b) CL and JHL restricted communications between APB and his children;

(c) CL and JHL sought to poison APB against IDN;

(d) After SJ raised concerns about APB and the control CL exerted over him, SJ's access to him was restricted;

(e) CL told APB that Dr VM was not to be trusted because he was aligning himself with IDN;

(f) APB appreciated the care SJ provided to him and would have been happy for SJ to continue to care for him;

(g) CL and JHL terminated SJ's services because SJ wanted APB to be more independent and such a goal interfered with their control over APB.

[186] I conclude that if APB now had testamentary capacity and knew that CL:

(a) was strongly motivated by self-interest;

(b) isolated APB from those who had a genuine concern for his welfare, including APB's general practitioner and SJ; and

(c) was responsible for poisoning his professional and personal relationship with IDN,

then APB would not make provision for CL or her husband in his will.

[187] According to CL, she does not have any expectation of receiving anything from APB's estate. Nor should she. I decline to make provision for her in a statutory will.

Should any provision be made for JHL?

[188] JHL, CL and MSR assisted APB to leave the hospital on 17 April 2013 in the circumstances I have earlier described. JHL also was complicit in APB's isolation for a period of a year. Even after the Adult Guardian made non-contact orders, JHL continued to contact APB. His contact may have been motivated in part by genuine friendship for APB. However, JHL and his wife had a reason to stay in APB's good books. He had, after all, made a will which gave them 32 per cent of his huge wealth.

[189] JHL says in his affidavit sworn 20 April 2017 that he has no expectation of receiving anything from APB's estate. However, he, and APB's other new friends, asserted in their respective affidavits that if APB had capacity to make a will, then it would be in

the form proposed as an exhibit to KLA's affidavit. That will provided for the four friends to share equally in 50 per cent of APB's estate.

[190] I conclude that if APB had testamentary capacity and knew the facts which are before me, then he would not make provision for JHL. I decline to make provision for him in a statutory will.

The short period of friendship with the new friends

[191] It is convenient at this point to address the submission that, having regard to wills made by APB in 2005, 2007 and 2012, it is not surprising that he chose to confer a substantial benefit on his four new friends in 2014, notwithstanding that he had known them for only a few years.

[192] I do not exclude the possibility that if APB had testamentary capacity in 2014 (or now) and did not have irrational beliefs about conspiracies involving IDN and his children, then he might make substantial provision for new friends as well as old friends. After all, he made substantial provision for HT in the 2005 will and substantial provision for IDN and his sister in 2007 and 2012. Incidentally, it is not necessary for me to decide whether or not APB had testamentary capacity in November 2012. In any event, there is a significant difference between the persons who he chose to benefit in those earlier wills, and the four "friends". Objectively speaking, APB had reason to feel grateful at different times for the work that HT and IDN had done in progressing his long-awaited dream of developing the land.

[193] By contrast, the four friends did not, on any objective analysis, advance APB's interests or his welfare. APB's welfare would have been much better had he continued to receive medical treatment at St Andrew's Hospital and had his rehabilitation needs professionally assessed. Absent the selfish intervention of MSR, CL and JHL, APB would have maintained a decent relationship with IDN and not become isolated from him and from APB's children.

[194] Therefore, I do not rule out the possibility that under different circumstances APB might have made substantial provision in his will for individuals who earned his favour by advancing his interests. However, MSR, CL and JHL did not do so.

[195] In exercising my discretion under s 21, I decline to include any provision for them.

Should any provision be made for KLA?

[196] KLA is a retired medical specialist who became a friend of APB in early 2013. KLA was a neighbour of CL and JHL and met APB when he came to CL's house about a business arrangement. KLA came to see APB regularly, about once or twice a week, during the year when APB lived with CL and JHL. KLA formed a strong friendship with APB and visits him regularly at his home. He tries to see him once a week.

[197] The Litigation Guardian is correct to submit that KLA does not appear to have been motivated by self-interest. He appears to care genuinely about APB's welfare. In that regard, in early 2013 when APB showed signs of congestive cardiac failure, KLA suggested that he see a cardiologist promptly and arrangements were made for this to happen. After APB was admitted to St Andrew's Hospital, KLA seemingly was not

informed about why IDN took him to that hospital rather than to a hospital on the Gold Coast. Having been told certain things by CL, KLA said words to this effect:

> "I can tell you what is going to happen. [IDN] will get one of his medical friends to certify [APB] as mentally incompetent which will bring the power of attorney into play, he will have control of [APB] and [APB] has had it."

It is unfortunate that KLA jumped to this erroneous conclusion. IDN took APB to St Andrew's Hospital in reliance on the best possible medical advice and for very good reasons.

[198] On or about 16 April 2013, KLA was told by CL that she, in turn, had been told by APB that he was not receiving any treatment in St Andrew's Hospital, that soon they were going to discharge him to an old persons' home with a "secure unit for the mentally incapacitated" and that he was going to be locked away. This was untrue. KLA advised CL (correctly) that it was open to APB to discharge himself, provided he took full responsibility for the consequences, and that in order to do so APB would have to give written advice to the hospital that he intended to discharge himself. KLA was not involved in the episode which occurred in Brisbane on 17 April 2013.

[199] KLA says he has no expectation of receiving anything from APB's estate. He does not claim to have any financial need and he says that his concern has been to ensure that APB's wishes are heard and understood.

[200] The counterfactual inquiry of what provision APB probably would make if he had testamentary capacity is a complex one in respect of KLA. If APB had testamentary capacity and his vulnerability to influence had not been exploited by MSR, CL and JHL, then the course of events would have been completely different. KLA may still have become a friend of APB because of APB's friendship with KLA's neighbours.

[201] In any event, if APB had capacity today and was aware of the facts he would place KLA in a different category to CL, JHL and MSR. He would not regard KLA as being financially motivated and would have regard to KLA's continuing acts of friendship. That would not necessarily qualify KLA for any substantial benefit. After all, old friends of APB such as JW and AR, who have far greater financial need than KLA, did not receive substantial pecuniary gifts under APB's recent wills.

[202] Overall, it is distinctly possible that if APB had capacity today he would make no provision for KLA. However, it is possible, as the Litigation Guardian notes, that he would give KLA a legacy of less than $50,000. I conclude that provision should be made for KLA in an amount which APB may have chosen as a token of his appreciation of KLA's friendship in recent years. An appropriate pecuniary gift is $20,000.

What provision should be made for long-term friends?

GWC

[203] At [43] I introduced GWC as a person who has been a good friend of APB for over 55 years and who continues to have contact with him on a weekly basis. GWC is APB's former brother-in-law. I accept GWC's uncontested evidence about the duration and strength of their friendship and how APB considered GWC to be his "little brother".

[204] APB made provision for GWC in a will dated 5 October 1998 by, in effect, providing that he would receive four per cent of the residue.[38]

[205] The will dated 11 May 2007 made GWC and others primary beneficiaries under a testamentary trust. An accompanying Memorandum of Wishes indicated that APB wanted to provide his primary beneficiaries with an ongoing income stream from the trust that would allow them to have "a lasting benefit from the assets I have built up during my life". APB did not want any of the primary beneficiaries (who included his children and grandchildren) to receive a large, lump sum benefit that might be "depleted by unexpected events such as divorce or bankruptcy".

[206] APB's will dated 9 November 2012 made GWC a discretionary beneficiary to whom the trustee might apply income or capital. An accompanying Memorandum of Wishes dated 9 November 2012 referred to GWC and three other old friends (including JW and AR) who were made discretionary beneficiaries. It expressed the wish that the trustees of the testamentary trust would limit assistance to these individuals to the maximum aged pension they would be entitled to receive at the time (disregarding any means or assets test). He also specifically wanted the trust to, if necessary, assist with the accommodation expenses of GWC and the three named beneficiaries "for the remainder of their lives".[39]

[207] In his will dated 18 April 2013, APB made a simple will which gave 30 per cent of his estate to each of his children and the remaining 10 per cent to GWC.

[208] Surprisingly, but consistent with APB lacking testamentary capacity in March 2014, wills dated 4 March 2014 and 7 March 2014 left nothing to GWC. These wills, which were effectively procured by CL and MSR, made some provision for APB's children (presumably in the light of what was said about his children in cl 8, to obviate an application for further provision) and SPB's wife (about whom he said favourable things). He divided the remaining 58 per cent between CL, JHL, MSR and KLA. Comments were made in relation to APB's new friends (see cl 9). Nothing was said about GWC.

[209] On 19 July 2016, APB signed a document recording his wishes for his statutory will. He expressed a wish to leave one per cent of his estate to GWC, with this amount to be given to him by APB's trustees crediting a credit card in GWC's name. If GWC was to die before the one per cent was fully expended then the balance was to be left in APB's estate.

[210] On 9 May 2017, APB told Mr Sheehy that he "highly valued" GWC's "loyal friendship and assistance" over the decades.

[211] GWC submits that at different stages, over a number of years, and at a time when APB apparently had testamentary capacity, he expressed his intention to GWC to leave an entitlement to GWC from his estate. GWC "felt a bit awkward" when APB raised the topic of what he intended to happen with his affairs once he had passed. GWC never prompted those conversations. However, APB stated to GWC many times over the years, including in recent years, that he intended GWC to receive something from his

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[38] 20 per cent was allocated to GWC and four other of APB's friends at the time as might survive him, in equal shares. I note that as matters have transpired, some of APB's old friends have not survived him.

[39] Memorandum of Wishes, 9 November 2012, paragraph (g).

will. These included statements such as "You'll have so much money that you'll be able to sail first class around the world on the Queen Mary". This conversation occurred after GWC was made redundant in about 2010. On another occasion APB told GWC "You'll never have any money worries", and "Just retire and get the pension and you will be okay". In around 2010 or 2011, when APB received a health scare after suffering from pneumonia, he told GWC that GWC would be given "a credit card and cash". No specifics were mentioned.

[212] GWC is a pensioner, does not have a credit card and would not be able to afford to have a credit card and make repayments on it.

[213] Having regard to the evidence and the submissions made by GWC and other parties, I conclude that if APB had testamentary capacity he would wish GWC to benefit in a substantial way, and in a different amount to other old friends, with whom APB has been less close than in his long-standing relationship with GWC. The question is the form of benefit and the amount.

[214] GWC submits that having regard to the relationship between APB and GWC, promises made to GWC by APB and different statements of intention, any statutory will should provide a pecuniary gift in such amount as the Court deems appropriate (noting a percentage as high as 10 per cent in the 2013 will) as well as make GWC a beneficiary of the testamentary trust.

[215] In oral submissions counsel for GWC submitted that, given that GWC is now aged 70, simply making him a secondary beneficiary may inadequately benefit him and the Court might conclude that a pecuniary gift is appropriate. On the basis of an estate currently worth about $70 million, a pecuniary gift equal to one per cent would be $700,000. Counsel submitted that, insofar as regard was had to the 2012 will, the estate was nearly twice the size it was in 2012 and had a greater capacity to pay a pecuniary gift.

[216] The Litigation Guardian submitted that the statutory will should either provide for GWC as a secondary beneficiary in the testamentary trust or there should be a legacy to him of $300,000 in lieu of any benefit under the testamentary trust. The first alternative was supported by the provisions in wills in 2005, 2007 and 2012 which made GWC a beneficiary and did not provide him with a capital sum. Another point raised by the Litigation Guardian is that, as GWC gets older, it might be thought less likely that APB would wish to provide him with a capital sum. Provision by way of a capital sum, however, is consistent with other expressions of intention in old wills, in the 18 April 2013 will and statements of intention in recent years.

[217] APB's children favour a pecuniary legacy to GWC for the reasons identified by GWC's counsel.

[218] I have regard to APB's statements of intention or wishes as expressed at different times. These include times when he has lacked capacity. The Memorandum of Wishes dated 9 November 2012 gave general directions about the manner in which the trustees might be expected to exercise discretions. It did not suggest that GWC was necessarily to be favoured in the same way and to the same extent as other old friends. The intent was to provide each of them with at least the maximum age pension they would be entitled to receive and also to assist them with "accommodation expenses …" for the remainder of their lives. Each might have different needs and accommodation expenses. It is not

clear that APB had testamentary capacity on 9 November 2012. What was recorded by the lawyers who prepared his will at the time may not reflect fully what he would have wished to say about the comparative claims of GWC and other old friends. It may not reflect what he would have said had he had testamentary capacity and remembered earlier promises he had made to GWC. In any event, the relevant issue is what APB's intentions would be now if he had testamentary capacity. His estate is larger and has a greater capacity than in 2012 to provide for pecuniary gifts.

[219] In deciding whether APB would make provision for a pecuniary gift to GWC if he had testamentary capacity today, some weight should be placed upon statements of intention made in recent years. The circumstances under which APB made the will dated 18 April 2013 have been canvassed. They were unusual circumstances and the form of the will bespeaks a lack of testamentary capacity. This is because the structure of the will was inconsistent with APB's expressed intentions concerning the continuation of the joint venture. However, the will is a recognition by him, even in difficult circumstances, that his children and his old friend, GWC, had a substantial claim upon his testamentary bounty. APB's testamentary incapacity at the time may have caused him to overlook others who may reasonably be thought to have had a claim upon his testamentary bounty. However, the will is some evidence of APB's continuing intention to benefit GWC in a substantial way.

[220] I also accord some weight to the more recent statement of wishes dated 19 July 2016 insofar as it expresses a wish to leave one per cent of his estate to GWC.

[221] GWC did not seek to ingratiate himself into APB's favour or to seek substantial provision. He was, however, promised benefits by APB at times when APB had testamentary capacity. Informal statements made by APB to GWC about how well GWC would benefit and other more formal statements of intent lead me to conclude that APB would wish GWC to obtain a substantial monetary benefit, if APB was making a will today and had testamentary capacity. GWC has remained a close friend. He has substantial needs.

[222] I conclude that if APB had testamentary capacity then any pecuniary gift would be far less than the 10 per cent seized upon in unusual circumstances on 18 April 2013, and closer to the figure of one per cent stated on 19 July 2016. GWC's advancing age, compared to the age he was in 1998 or 2012, may mean that he does not live to enjoy and spend all of the capital sum which a will may leave him. I take account of the fact that APB's intention in 2012 was to provide GWC with an income, money to meet accommodation and money to enjoy things which GWC has never been able to afford, and cannot afford on an old age pension. One cannot say for how long GWC may live. Whilst this uncertainty may favour making him a beneficiary under the trust, it does not preclude also providing him with a pecuniary gift. The risk exists that if GWC dies shortly after APB the bulk of any pecuniary gift may benefit GWC's family rather than GWC himself. Any pecuniary gift should be sufficient to provide the financial security which APB intended GWC to have after APB died. If GWC lives to be as old as APB, he will live for a further 20 years. If any pecuniary gift is depleted GWC might still have needs met as a discretionary beneficiary.

[223] Taking account of APB's statements of intention, the nature of the relationship between APB and GWC and the promises which APB made to him, as well as GWC's needs, I favour provision being made for GWC by way of a pecuniary gift. If APB had

testamentary capacity, including an awareness of the value of his estate, the income it is generating and its liquid assets then I think it likely that he would provide at this stage for GWC to receive a pecuniary gift, rather than simply depend upon the discretion of trustees. Apart from anything else, this would reflect promises which APB made to GWC and APB's recently expressed intentions in relation to GWC. Whilst a pecuniary gift of one per cent or approximately $700,000 or even more would be a provision which APB might make if he had testamentary capacity, I consider that the statutory will should provide him with a pecuniary gift of $500,000. He should also be a discretionary beneficiary under the testamentary trust, and the trustees under that trust would have regard to the fact of a pecuniary gift having been made, the use made of it by GWC, GWC's accommodation needs and his other needs.

[224] The submissions did not specifically address the extent to which a pecuniary gift in that amount might affect at some future date GWC's receipt of his age pension. That would depend upon his financial circumstances and the law governing age pensions at the time any benefit is received. However, such a gift might enable GWC to improve his accommodation and acquire a home that better suits his needs. Enabling GWC to be suitably accommodated in his old age would be consistent with APB's wishes.

JW and AR

[225] I have introduced the circumstances of these old friends of APB at [44] – [46]. Their positions, both factually and legally, are similar, and it is convenient to address them together. They are represented by the same lawyers and their submissions are essentially the same.

[226] Like GWC, JW and AR were primary beneficiaries, along with others, of the testamentary trust established by the 11 May 2007 will and were discretionary income beneficiaries of the testamentary trust established by the 9 November 2012 will. JW (but not AR) was provided for in the 5 October 1998 will with four per cent of the residue. JW (but not AR) was provided for in a 17 February 2005 will to the extent of five per cent of APB's then estate. As noted, JW and AR each have very limited financial resources and this explains their limited representation in the matter before me. Each is in receipt of an age pension. Each understands that he is able to hold assets of up to $380,500 before becoming ineligible for a full age pension. In written submissions each seeks a legacy in the amount of $380,500.

[227] The Litigation Guardian submits that these submissions misapprehend APB's intention as expressed in the 2012 Memorandum of Wishes. The Litigation Guardian submits that this did not envisage a lump sum payment but for sums to be provided to them periodically and, if necessary, an additional amount to meet accommodation expenses. The Litigation Guardian submits that JW and AR should be secondary beneficiaries in the testamentary trust. APB's children support the Litigation Guardian's position.

[228] It is unnecessary to repeat the history of the wills or other matters which I have canvassed in connection with GWC. GWC's position is materially different to those of JW and AR, notwithstanding the fact that all were named as beneficiaries under certain testamentary trusts. It seems that GWC has had a longer and deeper friendship with APB. As noted, APB was like an older brother to GWC and over the 55 years they have known each other they have confided in each other about very personal matters. APB made specific promises to GWC about benefits he would leave him in his will.

[229] Having regard to previous statements of APB's intentions with respect to JW and AR, and taking account of the different circumstances which have arisen since those statements were made, including the financial position of the centre and the current circumstances of JW and AR respectively, I consider it likely that, if APB presently had testamentary capacity, he would benefit JW and AR in a will.

[230] I conclude that any pecuniary gifts to JW and AR would be quite moderate, and that they would be included as beneficiaries under a testamentary trust. I conclude that APB would wish his trustees to provide each of them with a regular income of the kind to which they would be entitled to receive as aged pensioners (disregarding any means or assets test) and also provide them with amounts that are necessary to assist them with accommodation expenses, including accommodation in their advanced years when they may require accommodation in a retirement village or nursing home. I consider that the will should provide for a pecuniary gift of $50,000 to JW, a pecuniary gift of $50,000 to AR and for each of them to be included as secondary beneficiaries of the testamentary trust.

What provision should be made for each of the children?

[231] There is no question that provision should be made for each of APB's children, and that they should benefit by way of (a) a pecuniary gift; (b) distribution of income as a primary beneficiary under a testamentary trust; and (c) by a fixed percentage of the capital which is distributed on the winding up of the testamentary trust.

[232] Each of the children should benefit to a substantial extent because if APB had testamentary capacity he would regard them as being the natural objects of a substantial part of his testamentary bounty. Wills which he made when he had testamentary capacity and other statements of his testamentary intentions over the years support substantial provision being made for each of his children.

[233] Over the course of many years APB indicated that he was retaining the land for the benefit of his children. He made promises to them about the benefit they would derive from the land and its development.

[234] Wills made when APB had testamentary capacity substantially benefited his children in different ways. For example, his 5 October 1998 will had them sharing equally 50 per cent of the residue of his estate. His 2005 will had them sharing 65 per cent of his estate. His 2007 will made them primary beneficiaries of a testamentary trust but did not provide for them to share in the capital of that trust upon its termination. His 2012 will provided each child with a pecuniary gift of $250,000, made each of them a primary beneficiary of a testamentary trust and gave them shares totalling 20 per cent of the testamentary trust on its termination. The will made on 18 April 2013, which was made in unusual circumstances, gave 90 per cent of his estate to his children. This suggests that they were foremost in his mind at that time. In 2013, after he had left hospital and when he spoke on the telephone to SPB, APB explained that he had retained the land and reinvested money into the project so that, in time, his children could say "Look what we've inherited" and "Look what our children have to look forward to".

[235] Late in 2013 he became critical of his children. According to KLA, at a QCAT hearing in September 2013, APB was "disheartened" by the behaviour of his children who he

thought had sided with IDN. The wills he made on 4 March and 7 March 2014 gave 13 per cent of his estate to ENB, 13 per cent to SPB and nine per cent to CRB. Clause 8 of his will dated 7 March 2014 explained that he had provided for his children in the manner set out in that will after taking account of all the relevant circumstances including what he described as "the disappointing and hurtful manner in which each of them has behaved towards me …". He added that the foregoing did not apply to YG (SPB's wife) whom he stated "has always been good, kind and caring towards me to which I have been very grateful over the years". I conclude that this will was made when APB lacked testamentary capacity and his attitude towards his children at that time was influenced by misinformation about their intentions. His incapacity led him to be mistaken, even deluded, about the natural objects of his testamentary bounty.

[236] I conclude that if APB now had testamentary capacity and knew the true facts about his children and IDN, then he would make a will which substantially benefited each of his children.

[237] Subject to two issues, I consider that provision should be made in equal measure for each of APB's children. The first issue is the extent to which adjustments are to be made to the interests which would otherwise be enjoyed by SPB to address the improbability that he will respect APB's wishes and be responsible for providing for his own child following APB's death. The second issue is what provision is made for the spouses of APB's children, and YG in particular.

[238] The form of provision for each of APB's children should be by way of pecuniary gift, distribution of income as a primary beneficiary under a testamentary trust (with a guaranteed minimum income) and a share of the distribution of the capital of the trust as soon as reasonably practicable after the vesting date of the trust. The will proposed by the Litigation Guardian and the will proposed by IDN provide for such a form of will.

[239] Two matters affect the selection of an appropriate pecuniary gift to the children and others. One is the uncertainty which exists concerning the extent to which legal costs which are ordered in favour of certain parties, such as the Litigation Guardian, will diminish the liquid assets of APB. I apprehend that these costs are very significant. Another uncertainty is the extent to which the liquid assets will increase by the substantial monthly income which APB earns by the time APB dies.

[240] I also note that the will proposed by the Litigation Guardian provides that the legacies are conditional upon there being sufficient money or assets from which the legacies can be paid. In the event that there is insufficient money or assets, the legacies reduce rateably.

[241] As to the size of the pecuniary gift to each child, each proposed will leaves this blank, but I was assisted by submissions. I note that the 9 November 2012 will made provision for each child to receive a pecuniary gift of $250,000 but with a smaller share of capital than provided for in the proposed will. The Litigation Guardian submits that the pecuniary gift to each child should be $500,000. IDN submits that it is reasonable to conclude that APB would have contemplated increasing the amount above $250,000 to each of his children because of the time which has elapsed since the 2012 will and that his estate has increased in size since that time. He also proposed the amount be increased to $500,000. The children also submit that the pecuniary gifts to them should be increased due to the passage of time and the significantly greater liquidity which

APB now enjoys. However, their submissions note that reasonable minds will differ as to the amount which should be gifted to each of them and to other persons to whom a pecuniary gift is made.

[242] Reference was made in IDN's submissions to the clear financial needs of the children, and I take this into account. However, the children also had clear financial needs in 2012 and their financial needs will be addressed to some extent after APB's death by the guaranteed income which they will receive under the testamentary trust. The draft wills which were considered during the hearing provide for each child to receive income from the trust in a certain amount being four times the gross annual basic minimum wage unless the net income of the trust fund is insufficient to do so. I consider that the statutory will should provide a pecuniary gift of $500,000 to each child.

[243] Subject to the issue concerning APB's grandson, RO, and the issue concerning provision for the spouses of APB's children, the statutory will should provide for the distribution of capital upon the winding up of the testamentary trust in the manner contained in the proposed will, namely for 80 per cent to be distributed in equal shares to his children.

The grandson

[244] At [16] – [29] I have described the situation of the grandson, RO, and how SPB's failure to respect APB's wishes places RO in a different position to APB's other grandchildren.

[245] The 2005 will left RO five per cent of the residue of APB's estate. In more recent wills APB did not provide for his grandchildren to benefit directly from his estate (other than being beneficiaries to whom income could be applied for medical and education expenses). They were not given a share of the capital of the trust upon the trust being wound up. APB did not make provision for his grandchildren, including RO, in this regard because of his view that:

> "I am responsible for my Children and my Children are in turn responsible for their Children …"

These words appear in paragraph 7 of his Memorandum of Wishes dated 9 November 2012. In paragraph 6 of the same document he states:

> "I have included provision for the Trustees to make distributions to my Grandchildren to fund medical and education expenses. However, I have deliberately not provided for any distributions to be made to my Grandchildren for discretionary spending or for them to receive a capital sum on the winding up of the Trust."

[246] Later in the same document he provided some further guidelines to his trustees in administering the testamentary trust. These included the following:

> "(d) As previously mentioned, while a Child of mine is living, I would like the Trust to fund the education of the Children of that Child (i.e. my Grandchildren). However, upon the death of my Child, it is my strong wish that no further distributions be made to such Grandchildren

unless they are required to complete the funding of education already commenced.

(e) It is my strong wish the ex-nuptial child of my son, [SPB] is provided for out of the Trust in the same way as my other Grandchildren."

This last sentence explains why APB's grandson, RO, was included along with other grandchildren as a beneficiary, but not as a primary beneficiary, under the 9 November 2012 will.

[247] The present issue is not concerned directly with that matter. It is concerned with APB's wish that each of his children should provide for their children. APB made it clear in his Memorandum of Wishes dated 9 November 2012 and elsewhere that after he died he expected his children to be responsible for supporting their own children financially. To use APB's own words when speaking to SPB in 2013, rather than a Memorandum of Wishes prepared by a lawyer, APB told SPB that he hoped that SPB, his brother and his sister could stand there one day and say "Look what we've inherited", and "Look what our children have to look forward to".

[248] When APB said this to SPB, SPB did not say in response "I do not intend that my child should benefit in the way you expect".

[249] It might be suggested that APB should have suspected that SPB would not financially support his own son out of the income which SPB could expect to receive under a testamentary trust, or out of the capital which would be distributed to SPB upon the trust's termination. It might be said that APB should have known that SPB did not intend to benefit RO in any way, including by inheritance. However, there are three reasons why I am disinclined to reach this conclusion. First, SPB's failure or refusal to provide financial support for RO in the past (other than when required by the Child Support Agency) is explicable by reason of his own limited means. It does not inform what he would be expected to do when he became a multi-millionaire. Second, there is no evidence that SPB was privy to the terms of the 2012 will or the 2012 Memorandum of Wishes which made clear APB's wish that SPB be responsible for providing for his own child following APB's death, and that, knowing this, SPB indicated to APB that he had no intention of respecting his father's wishes. Thirdly, when APB spoke to SPB about his intentions in 2013, SPB did not respond that, contrary to APB's wishes, SPB's child would have nothing to look forward to by way of inheritance. In fact, SPB responded that he understood what his father was saying.

[250] If APB now had testamentary capacity, what would he provide, knowing that SPB has no intention of being responsible for providing for his own child after APB's death? In my view, it is likely that APB would adjust the benefits which SPB might otherwise have enjoyed under a will if he knew that SPB did not intend to respect his wishes, namely that each of his children should provide for their own children following his death.

[251] The most likely form of adjustment would be with respect to the distribution of capital upon the winding up of the trust. In addition, consideration would be given to the period prior to the winding up of the trust. During that period RO would find himself in a different position to APB's other grandchildren. Whilst all grandchildren might be the subject of discretionary distributions of income, they would also be the indirect

beneficiaries of a guaranteed income stream under the testamentary trust to his or her parent. APB's children would be in a position to provide for their own children after APB's death by providing financial assistance out of the wealth they would receive from the trust. For example, this might be in the form of financial assistance to help a child to acquire their own home. SPB's refusal to be responsible for providing for his own child after APB's death and prior to the winding up of the trust justifies provision being made for RO so that he is not disadvantaged compared to APB's other grandchildren.

[252] One way would be to include RO as a primary beneficiary with an entitlement to income and to adjust SPB's guaranteed income accordingly. However, a simpler and preferable way is to provide for a pecuniary gift to RO. RO should be provided with a pecuniary gift of $300,000 on account of the practical certainty that after APB dies and before the trust vests SPB will not support his son out of the guaranteed substantial income SPB will receive from that trust.

[253] The next issue concerns the distribution of capital upon the winding up of the testamentary trust. The submissions made on behalf of RO submit that he should receive a cash legacy, be made a primary beneficiary as to income and receive five per cent of the capital of the trust. This is based upon past expressions of APB's testamentary intentions (including the five per cent provision in the 2005 will for RO) and the fact that APB must have assumed that SPB would provide for RO, whereas the evidence indicates that this will not occur.

[254] I have regard to APB's Memorandum of Wishes dated 19 July 2016 in relation to his statutory will. In that document he effectively disinherits his children and wants changes to the 7 March 2014 will. His four new friends are to receive 22.5 per cent each, or 90 per cent of his estate. Relevantly, he wished to provide two per cent to the children of CJA, two per cent to the children of CRB and two per cent to the child of SPB.

[255] APB met RO for the first time in the precincts of the Court on 22 August 2017. At that meeting APB warmly embraced RO and said kind things like "You're wanted, understand that". APB said that he hoped that RO understood why APB had not wanted to make a gift to him, as he would have to do something similar for his other grandchildren which he was unwilling to do. It is unclear what gift APB was referring to. It probably refers to an *inter vivos* gift which was the subject of recent discussion when RO's circumstances became known.

[256] At the meeting APB said to RO that RO "had been poorly treated" by SPB with "malice". APB told RO that "he must fight with equal malice to gain his rightful share of his father's estate". APB said that whilst SPB's wife is a lovely person, RO "was the rightful heir to his father's estate". RO did not respond and later told his solicitor that he did not know what to say. It is unclear whether APB was encouraging RO to "fight with equal malice" against SPB in the current proceeding or in some later proceeding, perhaps decades into the future when RO might seek further provision from SPB's estate. Because what APB said in what was obviously an emotional meeting is unclear, I place limited weight upon it. However, it appears that APB regards RO as the person who is entitled to inherit what SPB inherits from his father. This is consistent with what APB said to SPB in 2013.

[257] Leaving aside the conversation which occurred on 22 August 2017, I return to earlier expressions of APB's wishes and his intent that SPB should provide financially for RO out of the wealth which SPB would expect to inherit from APB. SPB has made clear that he does not intend to financially support his own son out of the guaranteed income flow which he will receive from the testamentary trust, from any pecuniary gift which the will provides to him or from the substantial share of the capital of the trust which will be distributed to him upon the termination of the trust. In these ways, SPB has disrespected APB's wishes.

[258] If APB had testamentary capacity I consider that he would make an adjustment to the interest that SPB otherwise would enjoy, particularly in respect of the distribution of capital. APB might reduce what otherwise would be SPB's share of the capital distribution by substantially more than five per cent. In all the circumstances, I consider that the statutory will should provide for RO to receive five per cent of the capital of the trust upon its termination and that SPB's presumptive share of 26.67 per cent should be reduced accordingly to 21.67 per cent. Subject to the next issue concerning provision for spouses, this results in a distribution of capital of 26.67 per cent to ENB, 26.67 per cent to CRB, 21.67 per cent to SPB and five per cent to RO.

How should the spouses of APB's children be provided for?

[259] The draft will proposed by IDN in the course of the hearing differs in some respects from that proposed by the Litigation Guardian. The will proposed by IDN includes the spouses of APB's children amongst the secondary beneficiaries of the trust. Those secondary beneficiaries include the children and descendants of ENB, CRB and SPB. The Litigation Guardian opposes the inclusion of the spouses of APB's children as secondary beneficiaries because of wishes APB expressed in earlier wills, and in his Memorandum of Wishes dated 9 November 2012. In in paragraph 5 of that document he stated:

> "I have deliberately not included my Children's spouses as beneficiaries of the Trust because I am of the view that each of my Children is responsible for their own family."

[260] I favour the inclusion of the spouses of APB's children as secondary beneficiaries, notwithstanding the 2012 Memorandum of Wishes. Their inclusion as secondary beneficiaries does not guarantee them any income. Instead, it permits the discretionary distribution of income to such a spouse in the event that APB's child predeceases him or does not survive him for very long. If, however, APB's child survives then it would seem unlikely that the spouse would receive any income distribution as a secondary beneficiary. His or her interest would be adequately protected by sharing in the substantial income which would be distributed to APB's child as a primary beneficiary.

[261] The more important issue concerns whether any amendment should be made to the proposed will in the form suggested by APB's children so as to include the children's spouses in the distribution of capital upon the winding up of the trust.

[262] Each proposed will contains slightly different provisions concerning the Vesting Date. However, each provides for the winding up of the trust upon or as soon as reasonably practicable after the Vesting Date, and for the distribution of capital. Under each draft, 10 per cent of the capital of the trust vests in QIMR Berghofer and 10 per cent vests in Toc H. As to the remaining 80 per cent, each draft will provides as follows:

> "a) 80% to be distributed in equal one third shares to my children, that is [ENB], [SPB] and [CRB] provided that if any of my children are not living at the Vesting Date, but leave Children who are living at the vesting date, then the share of the Capital of the Trust to which that deceased child would have been entitled shall vest in my deceased child's Children ("Grand-child of mine") provided that if any Grand-child of mine has died leaving children ("Great Grand-child of mine") who are living at the vesting date, then the share of the Capital to which the Grand-child of mine would have been entitled, shall vest in the Great-Grand-children of mine. In the event that my children are not living at the Vesting Date and are not survived by any Grand-child of mine or any Great-Grand-child of mine, the share of the Capital to which my deceased child would otherwise have been entitled will be dealt with in accordance with sub-clause c) below."

[263] The children's submissions advance a proposal whereby their spouses benefit by survivorship. They suggest the inclusion of the words "Domestic Partner or" in

different places in the relevant clause. However, the redrafted clause does not address how APB's deceased child's share would be divided as between his or her domestic partner and his or her children who were living at the Vesting Date. I shall return to that issue.

[264] The children's submissions accept that under the 2012 will and earlier wills their spouses were not to take in substitution. They argue that whereas the proposed will must be one that "is or may be" a will that the person would make if he or she had testamentary capacity in order for the Court to grant leave, the exercise of discretion under s 21 is not so conditioned. They argue that the Court "must balance the considerations that the will is or may be one that the person would make if they had testamentary capacity with what the reasonable testator is likely to have done if fully understanding of the circumstances, including the practical effect of the will proposed".[40] They further submit that a just and wise testator, acting properly, would not leave a spouse of a child destitute.

[265] I do not understand this submission to suggest that the exercise of discretion under s 21 involves approving a will in a form that would be made by a "just and wise" testator. That concept, which is applied in family provision proceedings, is not reflected in the terms of the relevant provisions of the Act. Given the purpose of those provisions, an important consideration is the will which the person probably would have made if he or she had testamentary capacity. That is not the only consideration, however, it is an important one. The information which must be provided to the Court in exercising its broad and flexible discretion includes any evidence available to the applicant of the person's wishes.[41] This is not to suggest that the incapable person's wishes, insofar as they may be ascertainable, are given effect. In an extreme case those wishes may be perverse or irrational. Nevertheless, the person's wishes should be taken into account. It has been said that in exercising its broad discretion the Court will:

> "… give objective consideration to appropriate provision for those who might reasonably expect to benefit from the incapable person's estate … The task of the court is to make a will which in the court's judgment reflects an objectively proper disposition of the incapable person's estate giving weight to, but not being bound by, the wishes of the incapable person insofar as they can be reliably ascertained".[42]

[266] Applying those principles in the context of the present issue, I should give weight to, but not be bound by, past expressions of wishes of APB concerning provision for the spouses of his children. I should also have regard to the values and priorities which APB has exhibited in the past when considering and expressing his intentions, rather than the assumed attitude of a "just and wise" testator. That said, I should not assume that, if he had testamentary capacity, APB would act completely unreasonably or capriciously. For example, I would not lightly assume that he would make a will which was likely to leave a grandchild or a spouse of a child destitute.

[267] The will proposed by the Litigation Guardian does not guarantee the spouses of APB's children any particular provision. Instead, consistent with APB's wishes in 2012, the

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[40] Children's supplementary submissions, para 217.
[41] The Act, s 23(f).
[42] *R v J* [2017] WASC 53 at [31].

spouses might be expected to benefit indirectly when each of APB's children obtains a pecuniary gift, enjoys substantial distributions of income from the trust as a primary beneficiary and also obtains a substantial distribution of capital when the trust is wound up.

[268] The children seek the inclusion of their spouses in the provision for distribution of capital on the winding up on the basis that a reasonable testator would not make a will which "cut off all benefit of the capital on winding up to a spouse of a long and happy relationship merely because their partner (the deceased's child) is dead". This is persuasive argument. It is met, however, to some extent by the possibility of the spouse benefiting indirectly if APB's child is not living at the Vesting Date. For example, if ENB died before the Vesting Date, then his spouse would not take the benefit of his share of capital. Instead, as the children's submissions recognise, ENB's surviving spouse "would have the benefit of knowing that [her] children did, and inferentially [she] would benefit by that approach". ENB's surviving spouse might reasonably expect, if otherwise destitute, to obtain financial support from his and her children who would inherit their father's share of the capital of the trust. The same position would apply to CRB's spouse and their children.

[269] The position of SPB is different. His spouse is not the mother of his child and could not necessarily expect to indirectly benefit in the way that the spouses of ENB and CRB would expect to benefit from their children receiving a large inheritance upon the distribution of the trust. This potential outcome seems harsh and unfair, particularly in circumstances in which APB appears to have been well-disposed to SPB's spouse, YG. He mentioned her favourably in his March 2014 will. YG informed me at the hearing of the nature of their relationship and how, following her father's death, she regarded APB as something of a father figure. In a telephone conversation in April 2013, shortly after he left hospital, APB said that he loved YG and treated her like his own daughter.

[270] Although regard must be paid to APB's wishes, as reflected in his 2012 will and in the accompanying Memorandum of Wishes, in respect of both spouses of his children and his grandchildren, regard also must be had to other expressions of his intentions at different times. These include his intentions in 2014. I immediately note that APB probably lacked testamentary capacity when making the will dated 7 March 2014. In essence, it divided his estate into two parts, with 58 per cent of his estate to benefit his "new friends". As to the remaining 42 per cent, cl 4.2 of that will directed as follows:

> "4.2.1 As to 13% of my estate, for my son [ENB] if he survives me for 30 days.
>
> 4.2.2 As to 13% of my estate, for my son [SPB] if he survives me for 30 days.
>
> 4.2.3 As to 9% of my estate, for my daughter [CRB] if she survives me for 30 days.
>
> 4.2.4 As to 7% of my estate, for [YG] … if she survives me for 30 days.
>
> 4.2.5 If any beneficiary named in the sub-sub-clauses 4.2.1 to 4.2.4 does not survive me to attain a vested interest under the relevant sub-sub-clause but is survived by a biological or adopted child or

> children who survives me and attains the age of 25 years, then such child or children shall take and if more than one in equal shares as tenants in common the share in my estate which such parent would have taken had he or she lived to attain a vested interest in my estate."

The clause went on to declare what would happen in relation to any child contemplated by sub-sub-clause 4.2.5 who attained the age of 18 years.

[271] Two matters assume significance. First, APB altered the view expressed in 2012 about the children of his children not benefiting by survivorship. This appears in cl 4.2.5 of the 2014 will. The second matter is that he made specific provision in favour of the spouse of one of his children.

[272] I consider it likely that if APB presently had testamentary capacity he would adopt a similar approach.

[273] An alternative would be a clause governing distribution of capital along the lines suggested by his children in their submissions. However, as previously noted, this clause does not address how the share of APB's child would be divided as between the child's surviving spouse and the child's surviving child or children. On balance, and having regard to APB's intention that his children should inherit from him and that, in turn, their children should inherit from their parents, I am inclined to adopt a provision similar to that contained in cl 4.2.5 of the 2014 will, and cl 8.2(a) of the Litigation Guardian's draft will.

[274] There is no obvious answer to the question of how APB would address the issue of how the spouse of a child of APB might benefit if the child was not alive at the Vesting Date. I conclude that the statutory will should make a provision of the kind contained in cl 8.2(a) of the Litigation Guardian's draft and cl 11.7.2(a) of the IDN draft. Such a provision might be said to indirectly benefit the spouse of ENB and the spouse of CRB who might expect financial support from their children who would enjoy the benefits of the capital distribution. The position of YG is different and APB could have accommodated it by making a similar provision to that contained in his 2014 will whereby she shared in the capital of his estate. That probably would be subject to a proviso that she is still the spouse of SPB at the Vesting Date, and that if she is not then her share vest in SPB (if he is alive) or otherwise in his child or children.

[275] In summary, I generally favour the proposed wills in their draft form which does not include provision for the spouse of a child to benefit by taking the share of APB's child if the child is not living at the Vesting Date. It is, however, appropriate to accommodate the position of YG who could not necessarily expect to be financially supported by SPB's son, RO, if SPB dies. The fact that APB made separate provision for YG in 2014 is an additional reason to make a distribution of capital to her. That should be reflected in a corresponding reduction in the capital distribution which otherwise would be made to SPB.

[276] In summary, 80 per cent of the trust fund should be distributed as follows:

(a) 26 ⅔ per cent to ENB;

(b) 26 ⅔ per cent to CRB;

(c) 16 ⅔ per cent to SPB;

(d) 5 per cent to RO;

(e) 5 per cent to YG.

[277] The distributions to ENB, CRB and SPB will be subject to the same proviso contained in cl 8.2(a) of the draft will which enables the share of the capital of the trust to which the deceased child would have been entitled to vest in the deceased child's children or grandchildren. I have quoted this proviso in [262]. A similarly worded proviso will apply to RO. A proviso will need to be drafted in respect of YG's share, as indicated.

Should there be one or two testamentary trusts?

[278] The essential issue is whether:

(a) the joint venture interest be held on a separate testamentary trust with IDN as sole trustee of that trust, with the income beneficiary of that trust being a separate testamentary trust ("the AB Testamentary Trust"), the trustees of which would be joint executors of the will: IDN and a partner of a large accounting firm.

(b) there be joint trustees of only one testamentary trust, namely IDN and a partner of a large accounting firm.

[279] The case for (a) is that IDN has been successfully conducting the affairs of the development on behalf of APB since 2007, has a good working relationship with HRT and the confidence of the lender. Also, if IDN was required to consult with a co-executor and joint trustee in respect of the day to day affairs of the centre, there would be delays and substantial costs for the co-trustee's professional time.

[280] The case for (b) is that whilst IDN's integrity and expertise are not questioned, APB favoured his two executors being joint trustees and this is consistent with the Court's usual preference and practice. This secures the beneficiaries of the trust the protection afforded by the trustees supervising, and being accountable to, each other. The potential problems of having the second trustee being involved in day-to-day matters might be addressed by:

(a) appropriate delegation by the second trustee to authorise IDN to exercise certain powers or discretions, and/or

(b) IDN being employed as an agent to sign documents like leases and to attend to other day-to-day business.

The Litigation Guardian's proposal

[281] The will proposed by the Litigation Guardian appoints IDN and another executor (being a partner of a large accounting firm) as executors of APB's estate to hold his estate on trust, to administer his will and to deal with the balance of the estate after paying the estate's debts etc. This will require the executors to pay legacies under the will and then deal with the balance of the estate in accordance with the provisions of the will. Those

provisions include cl 7 which creates a trust to be known as the AB Testamentary Trust. That trust will hold the joint venture interest and the property for so long as is necessary to do so for the purposes of the JVA and to otherwise deal with the property in a manner consistent only with the requirements of the JVA and the finance agreements. It also holds the balance of APB's estate remaining after payment of the pecuniary legacies contained in cl 6.

[282] The primary beneficiaries of the proposed AB Testamentary Trust are:

> "(a) My son, [ENB] if he survives me;
>
> (b) My son, [SPB] if he survives me;
>
> (c) My daughter, [CRB] if she survives me; and
>
> (d) If any of my abovenamed children do not survive me but leave Children who survive me by thirty (30) days and attain the age of twenty-five (25) years, then those Children on a per stirpes basis ('my Grandchildren');
>
> (e) If any of my abovenamed children do not survive me, in circumstances where they are not survived by Children but are survived by grandchildren (being the children of their children), then those Children on a per stirpes basis ('my Great-Grandchildren')."

[283] The secondary beneficiaries of the proposed AB Testamentary Trust are:

> "(a) The Children and Descendants of the Primary Beneficiaries;
>
> (b) The entities (including companies and trusts) of which any of the Primary Beneficiaries are a director or directly or indirectly have an absolute, contingent or expectant interest;
>
> (c) [GWC];
>
> (d) [JW];
>
> (e) [AR];
>
> (f) QIMR BERGHOFER … or if QIMR BERGHOFER ceases to exist, then, such other organization in Australia which in the reasonable opinion of my Trustees has the same or similar objectives;
>
> (g) TOC H … or if TOC H ceases to exist, then, such other organization in Australia which in the reasonable opinion of my Trustees has the same or similar objectives."

IDN's proposal

[284] The will proposed by IDN follows a similar form. However, the primary beneficiaries of the AB Testamentary Trust are only the three children. The secondary beneficiaries are the same as (a) – (g) of the Litigation Guardian's proposed will. However, IDN's

draft adds to the secondary beneficiaries in subclause (a) the spouses of the primary beneficiaries.

[285] Another important difference is that the will proposed by IDN creates an additional trust in respect of the joint venture interest. IDN is appointed as the trustee of this testamentary trust. The income beneficiary of the trust is the AB Testamentary Trust. The joint venture interest, which is to be held by a separate trust of which IDN is sole trustee, would consist of APB's interest in the property, the JVA, the finance agreements, any bank accounts operated pursuant to the JVA, APB's obligations under the JVA and all matters relating to the conduct of the joint venture. In fact, the IDN proposal is for a "split executorship" by which IDN is appointed as executor of that part of APB's estate which relates to his interest in the joint venture. There is no contest that a testator may make A his executor for a particular asset, and B his executor for another asset.[43]

[286] Therefore, whilst the issue requiring resolution is conveniently described as the issue of whether there should be one or two testamentary trusts, IDN's proposal, which creates a separate testamentary trust for the joint venture interests, is aligned with a separate executorship for the property upon which the complex is situated and other matters which constitute APB's "joint venture interest".

The rationale for creating two testamentary trusts

[287] It seems unlikely that joint executors will operate the centre for a lengthy period. APB has ample assets to pay debts and legacies. As a result, title to the joint venture property will pass from the executors to the trustee or trustees.

[288] I have briefly explained above the rationale for creating two testamentary trusts, as well as the Litigation Guardian's preference for a single trust, subject to arrangements which are intended to address the problems identified by IDN of being required to consult with a joint trustee in respect of the day-to-day affairs of the centre and the joint venture. The Litigation Guardian argues that joint executors and joint trustees have ample power to authorise one of their number to attend to day-to-day operational matters while retaining overall control of the property and business.

APB's preference for two trustees

[289] The Litigation Guardian's submissions note that it is apparent from APB's previous wills that whenever he opted for a trust structure for the operation of the centre, he appointed two trustees. This is submitted to be consistent with the Court's preference and practice.[44] *Lewin on Trusts* observes:

> "But it is not the practice to appoint a sole trustee unless there was originally one such trustee and there are special circumstances."[45]

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[43] John Ross Martyn and Nicholas Caddick, *Williams, Mortimer and Sunnucks: Executors, Administrators and Probate* (Sweet & Maxwell, 20th ed, 2013) at [8-18] – [8-21].

[44] See e.g. s 38(3) *Property Law Act* 1974 (Qld), which requires the appointment of two trustees for statutory trusts for sale, and s 12(2)(c) *Trusts Act* 1973 (Qld) which does not permit a trustee to retire unless a trustee corporation or at least two individuals will continue to act as trustees of the trust.

[45] Lynton Tucker, Nicholas Le Poidevin and James Brightwell, *Lewin on Trusts* (Sweet & Maxwell, 19th ed, 2016) at [15-009] ("*Lewin*").

The purpose of this is to "secure for the beneficiaries the protection afforded by a second trustee"[46], by trustees supervising, and being accountable to, each other.[47]

[290] The Litigation Guardian submits that the proper inference from APB's previous wills is that APB:

(a) wanted two trustees so that they might supervise each other in the administration of the business and the joint venture property as it is a large enterprise;

(b) as a businessman intimately acquainted with what was required to operate the joint venture (both the existing business and exploiting the additional development areas), was aware that for joint trusteeship to work in practice, the trustees must agree on a division of tasks, while not abdicating their overall responsibility as trustees; and

(c) was aware that the skills each trustee possessed, and the perspective and opinions each could offer, would enhance the operation of the trust for the benefit of those entitled thereunder.

[291] In response, IDN submits that until the 2007 and 2012 wills, APB had not appointed joint executors. He then appointed IDN and his sister in each will. IDN submits there is no evidence that APB specifically wanted to appoint joint executors and, when he did, he appointed two lawyers. Also, there is evidence of APB, in considering advice from other specialists in succession law, declining to appoint an additional executor. Moreover, IDN's submissions note that when a court appoints an independent administrator, or substitutes an executor (for example on an application for the removal of an executor), only one solicitor is appointed.

The issue

[292] I will deal later with the question of who should be the executor appointed under the statutory will in addition to IDN. The present issue is related, but different. It concerns a testamentary trust which is intended, unless the land is sold, to continue the management and development of the land and conduct a complex business. The practical issue is whether such a testamentary trust should have two trustees or whether, for the reasons advanced by IDN and other parties, such a trust should have only one trustee, namely IDN.

The parties' submissions

[293] A number of respondents to the application have no position on the "one or two testamentary trusts" issue. Counsel for MSR, CL, JHL and KLA submitted that a division of the kind proposed by IDN is unnecessary and that two professional persons appointed as executors can act jointly in the usual manner.

[294] APB's children support IDN's submissions. They submit that the appointment of joint executors/trustees for the joint venture interest ought to be avoided when the interests of costs and inefficiency are considered, and the risks associated with sole appointment are weighed against them.

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[46] *Lewin* at [15-010].

[47] Gino Dal Pont, *Equity and Trusts in Australia* (Thomas Reuters, 6th ed, 2015) at [22.65].

[295] HRT made substantial submissions on this issue. Those submissions and the attitude of HRT are important because of the complex legal relationship between APB and HRT.

[296] I should address some aspects of the legal relationship between APB and HRT, to which brief reference has been made at the start of these reasons. I refer to these matters at this stage in considering the form of will which APB would now make if he had testamentary capacity. It is obvious that if he had testamentary capacity APB would make a will which:

(a) complied with his legal obligations under the JVA; and

(b) facilitated his testamentary intentions.

There is no dispute that any statutory will should facilitate the continuation of the joint venture. In his Memorandum of Wishes dated 9 November 2012 which I have quoted at [128] APB recognised that he had entered into various agreements with a joint venture partner which were to be binding on his executors and trustees. He stated:

> "My Trustees are to work with the joint venture partners to ensure the project is either completed, sold in accordance with the terms of the joint venture, or if they deem it appropriate, held as an investment to generate an income for the benefit of the beneficiaries of the Trust."

[297] I do not need to detail all of the relevant terms of APB's obligations under the JVA. Predictably, they require APB to use his best endeavours to bring about the successful performance and completion of the development and sale of the land or the land with improvements included in a particular stage of the development.

[298] The evidence, including the evidence of HRT and IDN, prove the complexity of the commercial arrangements relevant to the joint venture. It has a complicated financial structure. The matters associated with the joint venture, including planning and development issues which are ongoing, necessitate the involvement of a commercially experienced and competent person in managing APB's interests and performing his obligations. There is also a requirement under the JVA that APB obtain HRT's prior written consent to the appointment of a new attorney. IDN became APB's approved attorney in mid-2007. HRT has had, and continues to have, extensive dealings with SMP in respect of the joint venture. ANZ, as the financier of the joint venture, has dealt extensively with IDN and has expressed its confidence in IDN's handling of the affairs of the joint venture. The finance agreements address the situation which will arise after APB's death. There is a detailed provision whereby ANZ may make a "Lender No Impact Determination". This makes it important for ANZ to be satisfied that the death of APB will not affect its position.

[299] As for HRT, cl 22.2 of the JVA provides:

> "22.2 The Land Owner warrants that he has amended his last will and testament, such that the executors, beneficiaries and any trustees of any trust established by his last will and testament agree to be bound by the terms of this document and the Land Owner agrees not to subsequently amend his will to change this without the prior written consent of the Developer."

No written consent has ever been given by HRT to any will made by APB. I make no finding as to whether he is currently in breach of the JVA or the potential consequences of any such breach. It is sufficient for present purposes to state that a statutory will should be in a form which APB would adopt if he had testamentary capacity so as to comply with his legal obligations, including his obligation in cl 22.

[300] HRT and its sole director, HT, were respondents to the application and made helpful submissions, including submissions in relation to an earlier draft of the statutory will. They also made submissions on the "one or two testamentary trusts" issue. They supported IDN's submissions. HRT's primary concern is to maintain the status quo in relation to the day-to-day operations of the development so as to ensure no disruption. It submits that the status quo is best met through ensuring that IDN remains:

(a) the sole authority representing the interests of APB (or his estate) in continuing the operations of the joint venture; and

(b) in a practical sense is the sole point of contact so as to obviate any interruption to the operations of the joint venture.

[301] HRT, whilst noting that the adoption of a two trust structure is not consistent with APB's prior wills, notes that none of those prior wills were presented to HRT for its consideration or consent and HRT had no knowledge of them.

[302] As to the Litigation Guardian's reliance on the point made in *Lewin on Trusts* and the appropriateness of having two trustees as a means of them supervising each other, HRT notes that for the past decade there has only been one attorney, IDN, with authority to deal with APB's interests and obligations under the JVA. I understand this submission as being to the effect that APB was content to place his trust in IDN in exercising powers under a power of attorney and that having IDN appointed as sole trustee of a testamentary trust in relation to the joint venture interests is not materially different. One might infer that this would be APB's intention if he had testamentary capacity. This kind of argument has some force, however, it cannot be taken too far. An essential difference is that while APB is alive and able to monitor IDN's performance as attorney, there is no need for anyone else to superintend or monitor his work as a trusted attorney. The position might be said to be different after APB dies. As against that, if IDN is appointed as sole trustee of a testamentary trust of which the other testamentary trust is an income beneficiary, then one would expect the other executor and joint trustee of the AB Testamentary Trust to monitor the affairs of the joint venture. That would provide some protection, but not the same degree of supervision and accountability which might be expected if joint trustees were responsible for the joint venture interest.

[303] HRT's submissions on the "one or two testamentary trusts" issue suggest that one way to address the issue of control over IDN as sole trustee of the testamentary trust of the joint venture interest would be to make the other executor (a partner of a large accounting firm with expertise in the relevant field) and HRT appointors of the joint venture interest trust. They would have a power to appoint, remove or replace the trustee or make application under s 8 of the *Trusts Act* 1973 (Qld) for an appropriate order or direction. I consider there is merit in his proposal. However, I do not see the necessity to have HRT as an appointor. The executor other than IDN would be an appointor of the testamentary trust which holds the joint venture interest.

[304] Whilst HRT's primary position is for there to be two testamentary trusts so as to facilitate the conduct of the joint venture, its alternative position in the event of a single testamentary trust would be the appointment of IDN as the agent of the other trustee as a means of maintaining the status quo. Its submissions note that this might be achieved by an appropriate direction in the will that the executors and trustees appoint IDN as agent under s 54 of the *Trusts Act* 1973 (Qld).

Other objections by the Litigation Guardian to the two testamentary trusts proposal

[305] The Litigation Guardian's supplementary submissions note that IDN's proposal permits the joint venture trustee to accumulate the whole of the income of the trust fund and that there is no obligation on it to make income distributions to the AB Testamentary Trust. It submits that such a discretionary control on the flow of income to the AB Testamentary Trust is undesirable. By contrast, under its single trust proposal, any need for income to be used to pay debts or for other purposes would be dealt with by the trustees' discretion about the amount of net income that was to be distributed to the beneficiaries.

[306] The Litigation Guardian also notes that cl 4 of the will proposed by IDN provides for *all* debts to be paid out of the "balance of my Estate", i.e. excluding the joint venture interest. This is submitted to have the potential to cast payment of debts associated with the joint venture on to other assets which are unrelated to the property and the joint venture.

[307] The issue of accumulation of income comes with its complexities. It is to be recalled that the JVA was renegotiated to facilitate income being reserved as a security buffer and to spend on pre-development costs and on capital improvements. If a trust which held the joint venture interest was required to distribute all of its income to the LA Trust then this might trigger a breach of the joint venture agreement and jeopardise the financial stability of the joint venture. In the light of the Litigation Guardian's observations concerning accumulation, IDN proposes a requirement that 40 – 50 per cent of the income be paid to the AB Testamentary Trust on a monthly basis. APB has a contractual obligation to retain 35 per cent of the income in the joint venture accounts, leaving the possibility of 15 – 25 per cent in the joint venture interest trust, if required.

A modified one trust proposal compared to a modified two trust proposal

[308] Upon analysis, the present issue is not so much a choice between having one testamentary trust or two. It is a choice between a one testamentary trust proposal, suitably modified to avoid certain problems, and a two trust proposal, suitably modified to avoid certain problems. Each proposal, as modified, seeks to achieve the same objective, namely the continuation of the joint venture in accordance with APB's wishes, so that the value of the joint venture interest and the land is enhanced if it is not sold during APB's lifetime. Each modified proposal seeks the continuation of a productive working relationship between the parties to the joint venture.

[309] The Litigation Guardian seeks to accommodate the concerns expressed by certain parties, including HRT, the children and IDN. These concerns are about the costs of having a joint trustee whose fiduciary obligations and potential liability for breach will not permit that joint trustee to leave the conduct of the joint venture interest under the effective

day-to-day control of IDN. The concerns extend to delay in decisions being made and interference with the successful operation of a joint venture. Any significant inhibition on the successful operation of the joint venture may affect the confidence of ANZ. To accommodate these and other concerns, the Litigation Guardian proposes that the statutory will authorise the trustees to "delegate in writing, the exercise of any power or discretion and to execute any powers of attorney or other instruments necessary to effect the delegation". Under this power the joint trustee might delegate powers and discretions to IDN, for example, delegate to him the power to sign leases and other documents and to make decisions affecting the trust property up to a certain amount or value. The Litigation Guardian also proposes that the other trustee employ IDN as agent, instead of acting personally. The power to employ agents is conferred by s 54 of the *Trusts Act* 1973 (Qld).

[310] IDN's alternative proposal for two testamentary trusts seeks to accommodate concerns expressed by the Litigation Guardian about the terms of the draft will originally proposed by him. These include the accumulation of income. The Litigation Guardian raises legitimate concerns about not having a second trustee to supervise the other trustee. HRT's submissions which support the two trust proposal usefully suggest that the other trustee of the AB Testamentary Trust be an appointor under the additional trust of which IDN would be sole trustee.

[311] A modified one trust proposal, which includes either delegation of powers and discretions to IDN, his appointment as an agent of the other trustee or both, would facilitate continuation of the joint venture and the day-to-day operations of the centre to the satisfaction of HRT and the lender. If so, it would be the kind of will which APB may have made if he had testamentary capacity.

[312] A modified two trust proposal, including appropriate supervision of IDN as sole trustee, also is a form of will which APB may have made if he had testamentary capacity.

[313] The confidence reposed in IDN as APB's attorney after 2007 with respect to the joint venture, and IDN's performance in advancing the interests of APB, provides grounds to suppose that APB would have been prepared to have IDN as sole trustee of an additional testamentary trust in respect of the joint venture interest. However, if appropriately advised, APB would have considered the advantages of having two trustees in terms of appropriate supervision of IDN by a person who could work co-operatively with IDN and who had professional skills which complemented IDN's skills. In that context, APB would have been required to consider how those advantages might be obtained by other means if IDN was to be the sole trustee.

[314] Ultimately, APB, if faced with the issue which I am presently addressing, probably would have adopted a testamentary trust arrangement which was likely to satisfy his joint venture partner and the lender, and enable IDN to continue with the ordinary affairs of the joint venture, whilst being subject to some degree of supervision in the interests of those who were to benefit under his will.

[315] IDN's submissions note that he has been successfully conducting work in connection with the complex and the joint venture since 2007. QCAT saw fit to allow him to continue this work as a sole appointee, with distribution of income and reporting obligations to the Public Trustee. The Public Trustee as APB's appointed administrator

for financial matters has been satisfied with IDN's performance. The Official Solicitor to the Public Trustee reports that IDN:

(a) distributes monthly net income to the Public Trustee;

(b) provides the Public Trustee with accounts and tax information "regularly and when required";

(c) provides a comprehensive annual report, and

(d) gives oral updates from time to time.[48]

[316] In my view, the proposal for two trusts would benefit by the inclusion of similar reporting requirements and supervision, whereby IDN as sole trustee of the second trust would be required to report to the other trustee of the other testamentary trust. Such a specified reporting regime would remove any uncertainty about the extent of IDN's obligation as sole trustee to provide information to the beneficiary of the joint venture interest trust. Another appropriate measure would be an obligation to consult the other trustee of the other testamentary trust before making certain major decisions (suitably defined) affecting the trust, such as decisions to sell the trust property or enter into major transactions above a certain value.

[317] Subject to the working out of the terms of such arrangements, I would be prepared to approve a will which included two testamentary trusts.

[318] As noted, the approval of a modified one trust proposal may not differ greatly in practical terms from the approval of a modified two trust proposal. A modified one trust proposal with extensive delegations of power and discretions to IDN and his appointment as agent to transact much of the business of the trust may not be very different from a two trust proposal which includes reporting and other obligations as a means of enhancing the supervision of IDN as sole trustee of the joint venture interest trust.

[319] I emphasise that any mechanisms to enhance the supervision of IDN as sole trustee is not a reflection upon him. The Litigation Guardian makes clear, as I do, that IDN's integrity and expertise are not questioned. Instead, such mechanisms are intended to align with the reporting obligations to which IDN has been subject in his current role and avoid uncertainty about the content of his obligation as sole trustee to provide information for the benefit of the beneficiary of the trust. My expectation is that IDN will develop a professional working relationship with a person appointed as joint trustee of the AB Testamentary Trust, and consult with that person in the interests of the beneficiaries of that trust before making major decisions affecting the joint venture interests. It will be necessary to define the kinds of decisions which would be subject to an obligation to consult. I emphasise the obligation would be to consult. Such a process of consultation, along with reporting obligations, would simply be to inform the other trustee of the AB Testamentary Trust. That other trustee as an appointor under the joint venture interest testamentary trust would then be required to consider whether there was any

[48] Exhibit 6.

basis upon which to exercise his or her powers as appointor or take any other action. If IDN performs as he has in the past in the protection of the interests of APB, then it is unlikely that the obligation to report or an obligation to consult will occasion any practical difficulties. Ultimately, I consider that the two trust proposal, suitably modified, should be adopted.

[320] There should be provision to create a corporate beneficiary, as contained in cl 8.2.10 of IDN's draft for the reasons explained by IDN's counsel.

[321] Finally, consideration will need to be given in drafting the statutory will to the point made by the Litigation Guardian concerning the payment of debts, namely that the joint venture assets be used to meet the joint venture debts and those debts not be cast on to unrelated assets.

Who should be joint executor with IDN?

[322] The joint executors under the statutory will are not expected to operate the shopping complex for a lengthy period. They will attend to payment of debts and legacies, and it is likely that title to the property and the other assets associated with the joint venture interest will pass from them to IDN as trustee of the Joint Venture Interest Testamentary Trust within a short period.

[323] During the period that the property and the joint venture interests remains under the control of the joint executors, it is expected that IDN will be authorised by the other executor to attend to day to day operational matters.

[324] The selection of an individual to be joint executor with IDN effectively determines who will become:

(a) an appointor of the Joint Venture Interest Testamentary Trust;

(b) joint trustee with IDN of the AB Testamentary Trust.

[325] In the role as joint trustee of the AB Testamentary Trust, the individual will be concerned to:

(a) receive distributions of income from the Joint Venture Interest Testamentary Trust for the benefit of the AB Testamentary Trust;

(b) consider reports and information provided by IDN in his role as trustee of the Joint Venture Interest Testamentary Trust;

(c) identify appropriate investment professionals to manage the assets of the AB Testamentary Trust, including investment in fixed interest, listed securities and other asset classes by way of an investment portfolio;

(d) in addition to other duties as a trustee, make discretionary decisions about the distribution of income to each of the named beneficiaries during the life of the trust.

[326] As an appointor of the Joint Venture Interest Testamentary Trust, the same person will be expected to generally oversee the operation of that trust.

[327] The person appointed as joint executor with IDN and who becomes joint trustee of the AB Testamentary Trust will have communications with IDN concerning the operation of the Joint Venture Interest Testamentary Trust, but not be concerned in relation to its day- to-day operations.

[328] Given the expected duration of the administration of the estate (as distinct from the duration of the testamentary trusts), and the relatively simple tasks required as executor to pay debts and legacies, I do not consider that it is necessary to appoint as an additional and third executor a person with experience in succession law, such as an accredited specialist in succession law. If it proves necessary, IDN and the other joint executor can seek advice. The more demanding role for the individual will be as joint trustee of the AB Testamentary Trust. In that role, and also as appointor of the Joint Venture Interest Testamentary Trust, the person will be expected to have an understanding of the operation of the joint venture, including its financial performance, and be consulted by IDN in relation to major decisions, such as the sale of the centre, the further development of the centre and strategies which are intended to maximise financial return to the beneficiary of the Joint Venture Interest Testamentary Trust, being the AB Testamentary Trust.

[329] Certain parties nominated suitably qualified and experienced accounting partners with the skills required to perform the functions and duties which I have described. The Litigation Guardian nominated a particular individual but correctly stated that any of the persons proposed would be suitable. I should mention that APB was consulted about the persons who had been nominated and told that all were leading chartered accounting firms with persons who could perform the necessary task. He was familiar with the name of only one of the firms. Mr Sheehy believes APB could not choose any other name because he was not familiar with those other individuals, and for no other reason.

[330] HRT nominated Ms Ann Fordyce of Pilot Partners and Mr Ross Walker of Pitcher Partners, both of whom have confirmed that they are able to accept an appointment. Each has experience in working in a fiduciary relationship and managing and dealing with the assets of others.

[331] I have reviewed the curriculum vitae of each of the persons who have been nominated by the various parties. Having considered the matter and the parties' submissions, I consider that an appropriate person to be appointed as joint executor with IDN and to thereby become a joint trustee of the AB Testamentary Trust, as well as an appointor of the Joint Venture Interest Testamentary Trust, is Ann Fordyce.

Conclusion and orders:

[332] The will to be made pursuant to s 21 of the Act should be substantially in the form proposed by the Litigation Guardian, subject to modifications noted in these reasons.

[333] The will should make pecuniary gifts in the sum of:

1. $500,000 to ENB;

2. $500,000 to SPB;

3. $500,000 to CRB;

4. $300,000 to RO;

5. $500,000 to GWC;

6. $50,000 to JW;

7. $50,000 to AR;

8. $20,000 to KLA.

[334] The will should create a Joint Venture Interest Testamentary Trust, of which the AB Testamentary Trust is beneficiary. The Joint Venture Interest Testamentary Trust may accumulate income, subject to a requirement that at least 45 per cent of its income be paid to the AB Testamentary Trust on a monthly basis. I have adopted 45 per cent as an appropriate figure, but will hear any submission as to whether the figure should instead be 40 or 50 per cent.

[335] The primary beneficiaries of the AB Testamentary Trust should be as stated in [282] of these reasons. The primary beneficiaries should receive income in accordance with clauses 7.5 – 7.8 of the Litigation Guardian's draft will.

[336] The secondary beneficiaries of the AB Testamentary Trust should be as stated in [283] of these reasons, save that sub-clause (a) read "the spouses, children and descendants of the primary beneficiaries".

[337] The trusts established by the will shall end on the Vesting Date,[49] and upon winding up, the capital of the trusts will be distributed as follows:

(a) 26 ⅔ per cent to ENB;

(b) 26 ⅔ per cent to CRB;

(c) 16 ⅔ per cent to SPB;

(d) 5 per cent to RO;

(e) 5 per cent to YG;

(f) 10 per cent to QIMR Berghofer;

(g) 10 per cent to Toc H.

The distributions in (a), (b) and (c) should be subject to the proviso contained in clause 8.2(a) of the Litigation Guardian's draft will, and reproduced in [262]. The distribution in (d) should be subject to a similar proviso if RO is not living at the Vesting Date, but leaves a child or children who are living at the Vesting Date. Subject to further submissions as to the form of the proviso, the distribution in (e) should be subject to the proviso that YG be the spouse of SPB at the Vesting Date, and, if she is not, then her share vest in SPB (if he is alive) or otherwise in his child or children if living at the

[49] This should be subject to a proviso to the effect that the Joint Venture Interest Testamentary Trust might end earlier, on the occurrence of certain defined events, for example the property or the joint venture interest being sold.

Vesting Date. In the event the distributions cannot take effect then they be distributed to QIMR Berghofer and Toc H in equal shares.

[338] The executors will be IDN and Ann Fordyce. IDN will be appointed as trustee of the Joint Venture Testamentary Trust. Ann Fordyce will be appointor of the Joint Venture Interest Testamentary Trust.

[339] IDN and Ann Fordyce will be appointed trustees of the AB Testamentary Trust. The trustee of the Joint Venture Interest Testamentary Trust will be required to report to the trustees of the AB Testamentary Trust in a form and frequency to be stated, and be required to consult the trustees of the AB Testamentary Trust before making certain defined major decisions affecting the Joint Venture Interest Testamentary Trust, such as decisions to sell the trust property or enter into major transactions above a certain value.

[340] The drafting of the will should be undertaken by the Litigation Guardian.

[341] I propose to make the following orders:

1. Leave is granted to the applicant, Peter Sheehy, pursuant under s 22 of the *Succession Act* 1981 (Qld) to apply for an order authorising a will to be made on behalf of APB.

2. Pursuant to s 21 of the *Succession Act* 1981 (Qld) a will be made for APB in the terms stated by the court in a form of will to be submitted by the applicant.

3. The applicant draft a form of will in accordance with these reasons, provide a copy of the draft will to the respondents to the application, and submit the same within five days for the purpose of the will being approved by the Court pursuant to s 21(2)(c) and then executed in accordance with s 26 of the Act.

4. Liberty to apply as to the form of the will submitted in accordance with paragraph 3 prior to the execution of the will.

5. The issue of costs be the subject of short written or oral submissions on a date to be fixed.

6. Any copy of these reasons to be published on the judgment website or in any other publication made to, or accessible by, the general public or a section of the general public, be in an anonymised form.

[342] As for costs, it may assist if I make some preliminary observations. It may be possible to state some general principles, such as that a successful applicant, who is the guardian of the person who lacks testamentary capacity, generally should have his or her costs paid out of the person's assets. However, the appropriate order depends on the particular facts of the case. There should not be a presumption, even in respect of large estates, that every affected party should have their costs paid out of the person's assets. As I noted in dealing with a pre-hearing application for a pre-emptive costs order, orders for costs may depend on the role played by a party, including whether they are seeking a benefit or protecting an expected benefit. The interests which justified persons being notified of the proceeding, the extent to which their appearance was necessary to protect that interest, their conduct of the proceeding and many other matters may be relevant to the discretion as to costs. This is not adversarial litigation,

although some aspects of it have the hallmarks of parties seeking to advantage themselves at another party's expense. The fact that a party did better or worse than the provision suggested by the applicant does not have the same weight as a party obtaining a more or less favourable result that an offer in ordinary litigation.

[343] The hearing before me was conducted efficiently, and I was assisted by all counsel and solicitors. Parties were given leave to be excused from the hearing, and, in my view, there were no unnecessary appearances. The lack of provision made for MSR, CL, and JHL, and the modest provision made for KLA when compared to what was sought by those parties when they filed their affidavits does not dispose me to make an order that their costs be paid out of the assets of APB.

[344] The unusually large value of APB's assets should not be a reason to adopt the approach that all parties should have their costs paid out of APB's assets. However, there may be a good case for most parties having their costs paid out of his assets because of the diverse interests which needed to be actively represented and that those parties assisted the Court to narrow the issues to be resolved and to resolve those issues.

[345] I will hear the parties as to costs, if necessary. Some parties, such as GWC, have already made brief oral submissions as to costs, and I do not expect them to be repeated.

[346] My priority is to promptly settle the terms of the statutory will so that it may be executed by the Registrar. I will list the matter for review on short notice if any attention needs to be given to the terms of the will to be drafted and submitted by the Litigation Guardian.