# SUPREME COURT OF QUEENSLAND

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| CITATION: | *CDG v John Siganto as Litigation Guardian for BJG & Ors* [2018] QSC 11 |
| PARTIES: | **CDG a person under a legal incapacity, by his litigation guardian LMG**<br>(Applicant)<br><br>**v**<br><br>**JOHN SIGANTO AS THE LITIGATION GUARDIAN FOR BJG**<br>(First Respondent)<br><br>AND<br><br>**LEG**<br>(Second Respondent)<br><br>AND<br><br>**MJN**<br>(Third Respondent) |
| FILE NO/S: | S61/18 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court Rockhampton |
| DELIVERED ON: | 2 February 2018 |
| DELIVERED AT: | Rockhampton |
| HEARING DATE: | 29 January 2018 |
| JUDGE: | McMeekin J |
| ORDERS: | **1. Pursuant to s 22 of the *Succession Act* 1981 (Qld), the Applicant have leave to apply for an order pursuant to s 21 of the *Succession Act* 1981 (Qld), that a Will be made for CDG.**<br>**2. Pursuant to s 21 of the *Succession Act* 1981 (Qld), a Will be authorised to be made for CDG in terms of the draft Will which is exhibit "LMG-3" to the affidavit of LMG filed with this application.**<br>**3. The Applicant's and the Respondent's costs of and incidental to the originating application be paid out of the assets of CDG on an indemnity basis.**<br>**4. The affidavits filed in these proceedings be placed in a sealed envelope and marked "not to be opened save by order of a Court or a Judge".** |

5. **In any publication of these reasons the names of the various persons will not be identifiable.**
6. **Further, that the electronic file summary for this matter be anonymized.**

CATCHWORDS: SUCCESSION – MAKING OF A WILL – TESTAMENTARY CAPACITY – LOSS OR LACK OF CAPACITY AND STATUTORY WILLS – where the applicant applies for leave under s 22 of the *Succession Act* 1981 (Qld) to bring a further application under s 21 of the Act for an order authorising a Will to be made on behalf of her husband – where the husband has acquired a brain injury as a result of an accident – where the husband lacks testamentary capacity – where a large sum of money was paid to the husband by way of damages – where the husband has a current Will made before he suffered the acquired brain injury – where the applicant is concerned that the provisions of that Will are not appropriate given the dramatically changed circumstances of the husband's prospective estate – whether the proposed Will is or may be a Will that the husband would make if he were to have testamentary capacity

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

*Lawrie v Hwang* [2013] QSC 289, cited
*McKay v McKay & Ors* [2011] QSC 230, cited
*Re JT* [2014] QSC 163, cited
*Re Keane; Mace v Malone* [2011] QSC 49, cited
*Re Matsis; Charalambous v Charalambous* [2012] QSC 349, cited
*RKC v JNS* [2014] QSC 313
*Sadler v Eggmolesse* [2013] QSC 40, cited
*SPM v LWA* [2013] QSC 138, cited
*Van der Meulen v Van der Meulen & Anor* [2014] 2 Qd R 278, considered

COUNSEL: A M Arnold for the applicant

SOLICITORS: Swanwick Murray Roche for the applicant
Grant and Simpson for the first respondent

[1] **MCMEEKIN J:** LMG, applies for leave under s 22 of the *Succession Act* 1981 (Qld) (the Act) to bring a further application under s 21 of the Act for an order authorising a Will to be made on behalf of her husband, CDG.

[2] CDG has acquired a brain injury as a result of an accident. There was a claim brought on CDG's behalf and a large sum of money was paid to CDG by way of damages. He has a current Will made before he suffered the acquired brain injury.

LMG is concerned that the provisions of that Will are not appropriate given the dramatically changed circumstances of CDG's prospective estate.

**Relevant Legislation**

[3] The power of the court to make a statutory will is derived from s 21 of the Act which provides:

> **"21 Court may authorise a will to be made, altered or revoked for person without testamentary capacity**
>
> (1) The court may, on application, make an order authorising—
>
> (a) a will to be made … in the terms stated by the court, on behalf of a person without testamentary capacity; or
>
> ….
>
> (2) The court may make the order only if—
>
> (a) the person in relation to whom the order is sought lacks testamentary capacity; and
>
> (b) the person is alive when the order is made; and
>
> (c) the court has approved the proposed will, alteration or revocation.
>
> (3) For the order, the court may make or give any necessary related orders or directions.
>
> (4) The court may make the order on the conditions the court considers appropriate.
>
> (5) The court may order that costs in relation to either or both of the following be paid out of the person's assets—
>
> (a) an application for an order under this section;
>
> (b) an application for leave under section 22.
>
> (6) To remove any doubt, it is declared that an order under this section does not make, alter or revoke a will or dispose of any property.
>
> (7) In this section—
>
> person without testamentary capacity includes a minor.

[4] There are two basal jurisdictional facts that must be shown under s 21(2). One is that CDG is alive. He is. The other is that CDG has no testamentary capacity. I will discuss the evidence below but it is clear that CDG has no capacity and no real or even remote prospect of regaining capacity.

[5] This power to authorise the making of a Will can only be exercised if leave is granted under s 22 of the Act which provides:

> "**22 Leave to apply for s 21 order**
>
> (1) A person may apply for an order under section 21 only with the court's leave.
>
> (2) The court may give leave on the conditions the court considers appropriate.

(3) The court may hear an application for an order under section 21 with or immediately after the application for leave to make the application."

[6] Section 23 details the information that must be provided to the court upon hearing an application for leave under s 22 (unless otherwise provided):

"**23 Information required by court in support of application for leave**

(a) a written statement of the general nature of the application to be made by the applicant under section 21 and the reasons for making it;
(b) satisfactory evidence of the lack of testamentary capacity of the person in relation to whom an order under section 21 is sought;
(c) any evidence available to the applicant, or that can be discovered with reasonable diligence, of the likelihood of the person acquiring or regaining testamentary capacity;
(d) a reasonable estimate, formed from the evidence available to the applicant, of the size and character of the person's estate;
(e) a draft of the proposed will, alteration or revocation in relation to which the order is sought;
(f) any evidence available to the applicant of the person's wishes;
(g) any evidence available to the applicant of the terms of any will previously made by the person;
(h) any evidence available to the applicant of the likelihood of an application being made under section 41 in relation to the person;
(i) any evidence available to the applicant of a gift for a charitable or other purpose that the person might reasonably be expected to give by will;
(j) any evidence available to the applicant, or that can be discovered with reasonable diligence, of the circumstances of a person for whom provision might reasonably be expected to be made by a will by the person in relation to whom the order is sought;
(k) any evidence available to the applicant, or that can be discovered with reasonable diligence, of any persons who might be entitled to claim on intestacy;
(l) any other facts of which the applicant is aware that are relevant to the application."

[7] Section 24 particularises the matters of which the court must be satisfied of before granting leave under s 22 as follows:

"**24 Information required by court in support of application for leave**

(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, including persons who have reason to expect a gift or benefit from the estate of the person in relation to whom an order under section 21 is sought;
(c) there are reasonable grounds for believing that the person does not have testamentary capacity;
(d) the proposed will … is or may be a will … that the person would make if the person were to have testamentary capacity;

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

**Background**

[8] CDG was born on 11 December 1967 and so is aged 50 years. He and LMG have been partners for about 28 years. They have two children, LEG (aged 20) and BJG (aged 15). CDG has a son by another relationship – MJN aged 24. MJN was born as a result of a relationship formed during a brief separation between CDG and LMG. MJN was effectively raised by his mother but has been accepted by LMG and her children as part of the wider family and is friendly with his step siblings.

[9] The accident in which CDG suffered brain injury occurred on 16 October 2011.

[10] The damages claim was settled and $3 million was paid to CDG along with various other sums that are not relevant to note. The psychiatric reports note that CDG has cognitive problems following frontal lobe damage. He is able to function to a degree but is very dependent on LMG. LMG cares for CDG thus saving the cost of paying outside carers. As a result the damages sum is intact. CDG's present net worth is in the order of $3.1 million. His estate is managed by the Perpetual Trustee Company Limited ("Perpetual"). Perpetual is aware of the application and does not oppose it.

[11] CDG and LMG made Wills in 2004. CDG left his entire estate to LMG and if she pre-deceased him then 95% to LEG and BJG to share equally and 5% to MJN.

[12] LMG says that their combined assets then were very modest – a car on which monies were owed and not much else.

[13] LMG has two concerns. One is that should both she and CDG die LEG and BJG may not have reached sufficient maturity to handle the financial benefit and burden of what presently is a considerable sum of money. She wishes to have a trust put in place until the children are aged 25 years to protect that prospective and potential fund. She believes CDG would want that too. The second concern is whether sufficient provision is made for MJN.

**The Proposed Will**

[14] The applicant has submitted a draft of the proposed statutory Will. The proposed will provides for:

(a) the revoking of previous wills and codicils;
(b) the appointment of Perpetual as executor and trustee with David Lipke, solicitor, as the sequential executor in default.
(c) a gift of CDG's household contents to the LMG;
(d) a gift of 10% of CDG's residuary estate to MJN;
(e) a gift of 90% of CDG's residuary estate to LMG;
(f) if for any reason that gift to LMG fails then the 90% share is to go to LEG and BJG equally, assuming they survive CDG, that 45% share to be held on a nominated trust with Perpetual as trustee until the beneficiary reaches 20 years when he or she becomes joint trustee with Perpetual until that person reaches age 25 years.

(g) Various other provisions are made in case of a failure of those gifts and to allow for opting out of the trusts along with mechanical provisions.

**Is the applicant the "Appropriate Person"? – Section 24(a)**

[15] I turn to the matters of which I must be satisfied before granting leave under s 24 of the Act.

[16] Plainly LMG is "an appropriate person to make the application" as s 24(a) requires. The authorities[1] caution that this aspect requires careful consideration where the applicant benefits under the proposed Will but that is hardly of much concern here. LMG's position is in fact worse under the proposed Will than under the existing Will. Her benefit drops from a 100% interest to a 90% interest. Relevant matters include:

(a) LMG is in the best position to put the relevant information before the court. She effectively manages CDG's day to day existence and is familiar with his affairs.
(b) The court can have considerable confidence that LMG is motivated by great good will to all those whose interests are affected by the proposed Will.

**Are all persons who may have an interest represented? – Section 24(b)**

[17] I must be satisfied that adequate steps have been taken to allow representation of all persons with a proper interest in the application including those who have reason to expect a gift or benefit from the estate (see s 24(b) of the Act). An associated issue is the likelihood of an application being made under s 41of the Act (see s 23(h) of the Act).

[18] Apart from those mentioned in the proposed Will, CDG's only surviving family are a father and sister. His father is aged 80 years, lies in a retirement village and is financially independent. His sister is aged about 52 years and is estranged from CDG and has been since LMG and CDG have been together i.e. for the last 28 years at least. She is not dependent on CDG.

[19] LMG is unaware of any other societal commitment that CDG had. She says that he lived for his family. He had not expressed any interest in supporting any charity.

[20] BJG's interests are protected by the involvement of Mr Siganto, an independent solicitor, as her litigation guardian.

[21] There is no evidence that any person has an interest in making an application under s 41 of the Act. The only other person likely to be interested in such an application or have rights if there were an intestacy is MJN. MJN has been served but is not represented. LMG reports that his attitude to the application is one of "happy indifference". He is employed as a sales assistant at a Harvey Norman store. He lives in a de facto relationship and has done so for about 12 months. Adequate steps have been taken to appraise him of the application and to appear if he wishes. MJN

[1] *Lawrie v Hwang* [2013] QSC 289 at [24]; and see *McKay v McKay & Ors* [2011] QSC 230.

has provided a letter in which he says that he agrees to the application and has no objection. He is an adult and presumably well capable of caring for himself.

[22] I am satisfied that the condition in s 24(b) is met.

**Testamentary Capacity – Section 24(c)**

[23] The psychiatric evidence is all one way. CDG lacks testamentary capacity. The most recent assessment was performed in August last year by a psychologist, Dr Storey. There was no change discerned from earlier assessments. CDG himself thinks that he is "good" and that there is nothing wrong with him. He understands that there should be a Will put in place to ensure that everything is "fair". However he is unable to explain how to determine what is "fair". The psychologist reports CDG has difficulty in discriminating between and weighing up alternatives. He lacks the ability to critically reason.

[24] While CDG can describe his assets and give them a value LMG reports that his views are not accurate. LMG says that he cannot cope with much more than basic ordinary transactions in daily life. He cannot pay a bill. He does not appreciate the value of money.

[25] There has been no significant change for many years now. The psychologist reports there is unlikely to be any improvement in the future.

[26] There is a strong basis for finding that CDG will never regain capacity for the purposes of independently creating a Will.

**Approval and "that the person would make" – Section 24(d)**

[27] I must be satisfied that "the proposed will … is or may be a will … that the person would make if the person were to have testamentary capacity".

[28] A number of cases have examined the appropriate approach to applying the generally expressed discretionary power in s 21 of the Act and provisions conferring similar powers in other States: *Re Keane; Mace v Malone* [2011] QSC 49 per Daubney J; *McKay v McKay & Ors* [2011] QSC 230 at [79] per Ann Lyons J; *Re Matsis; Charalambous v Charalambous* [2012] QSC 349 per Ann Lyons J; *Lawrie v Hwang* [2013] QSC 289 per Ann Lyons J; *Re JT* [2014] QSC 163 per Ann Lyons J*; Sadler v Eggmolesse* [2013] QSC 40 per Atkinson J; *Van der Meulen v Van der Meulen & Anor* [2014] 2 Qd R 278 per Jackson J. There is little point to examining the differing factual situations and the resulting exercise of the discretion. As Jackson J observed in *Van der Muelen*:

> "In my view, there is no definitive principle to be applied here. In the application of a general discretion of this kind, against the background of the statutory qualifying factors, it is of no assistance to articulate factors which influence or decide this particular case as though they have a legal significance beyond the exercise of the discretion in the particular circumstances."[2]

[2] At [51]

[29] There is some difference in approach in the cases and that was considered by Philippides J (as her Honour then was) in *RKC v JNS* [2014] QSC 313. I do not see that it matters greatly here which of the competing views is adopted.

[30] In exercising the discretion vested in the Court I must determine if the draft Will before me is one CDG would or may make if he had testamentary capacity.

[31] CDG's wishes as they stood in 2004 are known by reason of the Will he then made. He made provision for his immediate family, namely his wife and offspring. There is no reason to think that the persons that he would wish to provide for have changed since 2004. The proposed Will similarly makes provision for CDG's immediate family and more or less on similar terms. Largely the proposed Will protects LMG. In that it is entirely usual and appropriate. CDG could confidently expect that LMG will make provision for their children while she lives and in her own Will in the event of her death.

[32] There are two features of significance. One is the amount left to MJN. The other is the imposing of separate testamentary trusts for LEG and BJG.

*MJN*

[33] The share of the estate left to MJN increases under the proposed Will from 5% to 10%. As well his gift does not now depend on LMG predeceasing CDG, as was the case under the 2004 Will and is the case with LEG and BJG under the proposed Will. So in that sense his position has been improved.

[34] I am conscious that the share is less than MJN would receive upon an intestacy and considerably less than his step-siblings receive under the proposed Will.

[35] At the moment the 10% interest represents an amount in the order of $300,000. That would provide MJN with a modest home, at least in the provincial area where he lives. In that he would be put on an equal footing with his step siblings in that LMG provides them with a home. If LMG predeceased CDG, LEG and BJG would be able to accommodate themselves given the present size of the putative estate.

[36] It is evident that in 2004 CDG considered that his obligations to MJN differed from his obligations to provide for LEG and BJG. The explanation for that no doubt lies in the fact that his relationship with MJN was much more distant than the relationship he enjoyed with the children living in his own home.

[37] The question here of course is whether the proposed Will is one that CDG would or may have made, not what a Court might impose on CDG's beneficiaries under a family provision application made under s 41. That section gives the Court power to make adequate provision for the proper maintenance and support of the deceased person's spouse, child or dependent if a person dies testate or intestate, if such a provision is not made. While MJN plainly qualifies as a potential applicant, he being a child of the purported deceased, there is no present basis for thinking that he has any special "need" or that CDG would be minded, or obliged, to make an especially generous provision for him or treat him as he might with the others. Things can of course change and no decision here precludes MJN from applying under s 41.

[38] The balance that LMG has arrived at is, I think, one that CDG would very likely have arrived at himself. His principal obligation is to provide for his widow not his adult children who can be expected to look after themselves. As well CDG would not reasonably expect LMG to provide for MJN as she would for her own children.

*Separate testamentary trusts*

[39] The imposition of separate testamentary trusts for LEG and BJG has been done on the basis of expert advice. The trusts will ensure that until they reach age 25 they have guidance in the management of what is presently a substantial sum. That is entirely appropriate and there is no reason to think that CDG would not agree with LMG that the course is a wise one.

[40] LEG of course is of age and could protest if he wished. BJG has the advantage of an experienced solicitor, Mr Siganto, acting as her litigation guardian and he supports the provision. Mr Siganto has spoken with LEG as well.

[41] I am satisfied that the proposed Will is one that "is or may be a will … that [CDG] would make if [he] were to have testamentary capacity".[3]

**Other Matters**

[42] Section 23 details the information which is required by the Court in support of the application for leave. Each matter mentioned, so far as relevant here, has been addressed in the material filed in support of the application.

**Non identification**

[43] A non-identification order is sought. It is commonly made in these cases: *SPM v LWA* [2013] QSC 138 per Henry J; *Re: JT* [2014] QSC 163, [41] per Ann Lyons J; *RKC v JNS* [2014] QSC 313 per Philippides J. It should be made here for the reasons there discussed. Counsel has pointed out that for the non-identification order to be effective it should extend to the electronic file of the Court being anonymised.

**Conclusion**

[44] I am satisfied that I have all the information before me as required under s 23 and that the requirements of s 24 have been proved. It is therefore appropriate to grant leave to make the application for a s 21 order and, having done so, to make the order.

**Order**

[45] The order will be in terms of the draft provided, initialled by me and placed with the papers.

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[3] *Succession Act* 1981 (Qld) s 24(d).