SUPREME COURT OF QUEENSLAND

CITATION:	*MZY v RYI* [2019] QSC 89
PARTIES:	**MZY** (applicant) **v** **RYI** (respondent)
FILE NO:	SC No 10357 of 2018
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	10 April 2019
DELIVERED AT:	Brisbane
HEARING DATE:	14 March 2019 Supplementary written submissions 21 March 2019
JUDGE:	Wilson J
ORDER:	The orders of the Court are:

1. Leave is granted to the applicant pursuant to s 22 of the *Succession Act* 1981 (Qld) to apply for an order authorising a will to be made on behalf of SGA.
2. Pursuant to s 21 of the *Succession Act* 1981 (Qld) a will be made for SGA in the terms stated by the Court in a form of will to be submitted by the applicant.
3. Perpetual Trustee Company Limited ACN 000 001 008 be appointed as the executor of the estate in the will which is made for SGA in accordance with s 21 of the *Succession Act* 1981 (Qld).
4. The applicant draft a form of will in accordance with these reasons, provide a copy of the draft will to the respondent to the application, and submit the same within five days of the date of this order 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 *Succession Act* 1981 (Qld).
5. Liberty to apply as to the form of the will submitted in accordance with paragraph 2 prior to the execution of the will.
6. The applicant has authority to sign a binding death benefit nomination in favour of SGA's estate, for any superannuation fund that is held by SGA.
7. The trustee of any such superannuation fund is to accept the binding death benefit nomination signed by the applicant on behalf of SGA, provided it is

otherwise valid.

8. The applicant's costs of the proceeding be assessed on the indemnity basis and be paid out of the assets of SGA.
9. The respondent's costs of the proceeding be assessed on the indemnity basis and be paid out of the assets of SGA.
10. 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 public, be in an anonymised form.

CATCHWORDS: SUCCESSION – MAKING OF A WILL – TESTAMENTARY CAPACITY – LOSS OR LACK OF CAPACITY AND STATUTORY WILLS – where the applicant applied pursuant to s 22 of the *Succession Act* 1981 (Qld) to be granted leave to apply pursuant to s 21 of the *Succession Act* 1981 (Qld) for an order authorising a statutory will to be made – where the proposed testator lacks testamentary capacity due to cerebral palsy – whether a statutory will should be made – whether the proposed statutory will is or may be a will the proposed testator would make if she were to have testamentary capacity.

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

Re APB, ex parte Sheehy [2017] QSC 201, followed
Van der Meulen v Van der Meulen & Anor [2014] QSC 33, applied
GAU v GAV [2014] QCA 308, applied
CDG v John Siganto as Litigation Guardian for BJG & Ors [2018] QSC 11, considered
McKay v McKay & Ors [2011] QSC 230, considered
Banks v Goodfellow (1870) LR 5 QB 549, cited
In the Will of Wilson (1897) 23 VLR 197, cited
Deecke v Deecke [2009] QSC 65, cited
SPM v LWA [2013] QSC 138, cited
Re: JT [2014] QSC 163, cited
RKC v JNS [2014] QSC 313, cited
Hartman v Nicotra (unreported BS 11925 of 2017, Mullins J, 19 December 2017), followed
Schafferius v Piper (unreported BS 12145 of 2016, Boddice J, 8 December 2016), followed
Hickson v Humphrey (unreported BS 384 of 2011, de Jersey CJ, 11 April 2011), considered

COUNSEL: R Treston QC for the applicant
A Collins for the respondent

SOLICITORS: McInnes Wilson Lawyers for the applicant
Bell Legal Group for the respondent

[1] This is an application for a court made will for a person without capacity pursuant to section 21 of the *Succession Act* 1981 (Qld) ("the Act").

Background facts

[2] The applicant is the mother and primary carer of SGA.

[3] The respondent is SGA's father. The applicant and the respondent are divorced.[1]

[4] SGA is 30 years old, does not have capacity to make a will, and has significant assets.[2]

[5] SGA currently has no will.[3]

[6] The applicant applies under section 22 of the Act for leave to apply for an order under section 21 of the Act authorising that a will be made for SGA.[4]

SGA's circumstances

[7] SGA was born on 20 July 1988.[5]

[8] SGA suffers from severe cognitive impairment due to suffering cerebral palsy with minor epilepsy as a result of complications during her birth.[6]

[9] A personal injuries action was brought on SGA's behalf by the applicant as SGA's next friend.[7] The proceeding was compromised at mediation for approximately $4,400,000.00.[8] The settlement was sanctioned by the Supreme Court of New South Wales on 18 November 2011.[9] The Trust Company (Australia) Limited were originally appointed to receive, hold and manage the balance of the settlement funds.[10] Perpetual Trustee Company Limited ("Perpetual") is now the manager of SGA's estate.[11]

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1 Affidavit of MZY filed 25 September 2018, exhibit MZY-3, p 3.
2 Affidavit of MZY filed 25 September 2018, p 1, para 5; Supplementary written submissions of the applicant received 21 March 2019, p 1, para 3.
3 Affidavit of MZY filed 25 September 2018, p 1, para 5; Supplementary written submissions of the applicant received 21 March 2019, p 1, para 4.
4 Originating Application filed 25 September 2018; Supplementary written submissions of the applicant received 21 March 2019, p 1, para 5.
5 Affidavit of MZY filed 25 September 2018, exhibit MZY-1, p 1.
6 Affidavit of MZY filed 25 September 2018, p 1, para 4; Supplementary written submissions of the applicant received 21 March 2019, p 1, para 7.
7 Affidavit of MZY filed 25 September 2018, p 2, para 1; Supplementary written submissions of the applicant received 21 March 2019, p 1, para 8.
8 Affidavit of MZY filed 25 September 2018, p 3, para 18, exhibit MZY-8; Affidavit of RYI filed 15 November 2018, p 4, para 42; Supplementary written submissions of the applicant received 21 March 2019 p 1, para 8.
9 Affidavit of MZY filed 25 September 2018, exhibit MZY-8, p 163.
10 Affidavit of MZY filed 25 September 2018, p 3, para 19.
11 Affidavit of MZY filed 25 September 2018, p 3, para 20; Affidavit of RYI, p 4, para 44.

SGA's family

[10] The applicant (SGA's mother) is 58 years old,[12] and the respondent (SGA's father) is 60 years old.[13]

[11] Both parties were represented by counsel at the hearing.

[12] The applicant and the respondent have two other adult children together, AWA, and JWG.[14]

[13] SGA lives with, and is cared for by, the applicant (with the assistance of carers) in a house owned by SGA.[15]

[14] The respondent cares for SGA on Sunday nights,[16] although there is some dispute as to the regularity of such visits.

[15] SGA's siblings, AWA and JWG, both live and work outside of Queensland[17] and therefore they are unable to regularly visit SGA. However, SGA maintains a loving relationship with both of her siblings.[18]

[16] The applicant and the respondent were married in 1987, but they separated in 2009 and were divorced in 2013.[19]

SGA's ongoing health issues

[17] It was not contested by either party that SGA has a number of ongoing health issues.

[18] SGA has the following impairments:

a. cerebral palsy;
b. temporal lobe epilepsy (controlled by antiepileptic medication);
c. major depression; and
d. depressive anxiety disorder.[20]

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12 Affidavit of MZY filed 25 September 2018, p 1, para 2; Supplementary written submissions of the applicant received 21 March 2019, p 2, para 12.
13 Affidavit of RYI filed 15 November 2018, p 1, para 2.
14 Affidavit of RYI filed 15 November 2018, p 1, para 4; Affidavit of MZY filed 25 September 2018, p 1 to 2, para 7.
15 Affidavit of MZY filed 25 September 2018, p 2, para 9.
16 Affidavit of RYI filed 15 November 2018, p 4, para 51; Supplementary written submissions of the applicant received 21 March 2019, p 2, para 18.
17 Affidavit of MZY filed 25 September 2018, p 11, para 69 to 70.
18 Affidavit of MZY filed 25 September 2018, p 12, para 71; Supplementary written submissions of the applicant received 21 March 2019, p 2, para 16.
19 Affidavit of MZY filed 25 September 2018, MZY-3, p 3; Affidavit of RYI filed 15 November 2018, p1 to 2, para 3 and 13.
20 Supplementary written submissions of the applicant received 21 March 2019, p 3, para 20. See also Affidavit of MZY filed 25 September 2018, p 4, para 21, exhibit MZY-11, p 169 to 170.

[19] SGA requires full personal care and constant supervision, and:

a. is dependent for assistance in all aspects of daily living and mobility;
b. will never live independently;
c. has uncertain cognitive function and insight;
d. is unable to speak and never has had any speech. She has limited communication through AUSLAN sign language but this has become more limited;
e. has extremely poor balance. She is unable to walk unaided and only for very short distances;
f. has unpredictable and difficult behaviour, extreme mood swings and major outbursts;
g. has no inhibitions, which can lead to erratic and socially unacceptable behaviour;
h. is unable to attend to her own hygiene needs; and
i. is unable to attend to meal preparation or consumption.[21]

[20] SGA's level of function will not improve. She will require assistance with aspects of daily living and supervision for the rest of her life; her need for assistance will increase with age.[22]

[21] It is not known how long SGA will be able to reside at her home with the care provided by her mother and carers.[23]

[22] SGA has a diminished life expectancy of a further 30 years, giving her a survival age of approximately 60 years.[24] She is presently aged 30.[25]

SGA's daily life

[23] The applicant is SGA's primary carer and she states that she intends to remain so for the rest of her life.[26] Although, it is not known how much longer the applicant will be able to care for SGA before needing additional carers.[27]

[24] The applicant prepares SGA's meals each day and attends to her hygiene needs including assisting SGA in using the toilet and washing.[28]

[25] The applicant also attends to all of SGA's other needs including performing housework, purchasing groceries, managing SGA's carers, organising SGA's

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21 Supplementary written submissions of the applicant received 21 March 2019, p 3, para 21.
22 Affidavit of MZY filed 25 September 2018, p 7, para 39; Supplementary written submissions of the applicant received 21 March 2019, p 4, para 22.
23 Transcript of hearing on 14 March 2019, p 65 line 45 to 46; p 66, line 1.
24 Affidavit of MZY filed 25 September 2018, exhibit MZY-6, p 62; Supplementary written submissions of the applicant received 21 March 2019, p 4, para 23.
25 Affidavit of MZY filed 25 September 2018, exhibit MZY-1, p 1.
26 Supplementary written submissions of the applicant received 21 March 2019, p 4, para 25.
27 Transcript of hearing on 14 March 2019, p 65 line 45 to 46; p 66, line 1.
28 Affidavit of MZY filed 25 September 2018, p 7, para 44; Supplementary written submissions of the applicant received 21 March 2019, p 4, para 26.

medication and incidentals, organising SGA's appointments and undertaking case management activities for SGA.[29]

[26] For four days during the week, SGA attends activities outside the home arranged by the [Recreation and Sport Centre].[30]

[27] SGA relies on the care and assistance of not only her mother, but also paid carers for every aspect of her daily life.[31] There is no question that the care required of SGA is intense, physically demanding and unrelenting.

Statutory framework for court made wills

[28] "Statutory wills" were introduced into the Act by amendments in 2006.[32]

[29] The making of an order is a two stage process.

[30] First, at the leave stage, the Court may grant leave pursuant to section 22 of the Act, and to obtain leave the applicant must set out information pursuant to section 23 of the Act. Section 24 then sets out the matters of which the Court must be satisfied in order to grant the leave.

[31] The second stage is generally referred to as the substantive stage.

First stage

[32] The scheme of the Act therefore requires a person who seeks an order under section 21 of the Act to first apply for leave under section 22, which provides:

> "**22 Leave to apply for section 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".

[33] As to the information required at the first stage, section 23 of the Act sets out the information which must be given to the Court on an application for leave, whilst section 24 sets out the matters of which the Court must be satisfied in order to grant leave.

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29 Affidavit of MZY filed 25 September 2018, p 7 to 8; Supplementary written submissions of the applicant received 21 March 2019, p 4, para 27.

30 Affidavit of MZY filed 25 September 2018, p 8, para 50; Supplementary written submissions of the applicant received 21 March 2019, p 4, para 28.

31 Affidavit of MZY filed 25 September 2018, p 7 to 8; Supplementary written submissions of the applicant received 21 March 2019, p 4, para 29.

32 *Succession Amendment Act* 2006 (Qld) (No 1 of 2006).

[34] The matters about which the Court must be given information are set out in section 23, and include:

a. evidence of the lack of testamentary capacity and the likelihood of the person ever regaining capacity (sections 23(b) and 23(c));
b. the size and character of the estate (section 23(d));
c. a draft proposed will (section 23(e));
d. any evidence of the person's wishes (section 23(f));
e. evidence of any previous Will (section 23(g));
f. evidence pertaining to the likelihood of an application being made under section 41 (a family provision application) (section 23(h));
g. evidence relevant to gifts which the person might have given to charities or otherwise (section 23(i));
h. evidence as to whom the person might have been reasonably expected to provide for under their will (section 23(j));
i. evidence of any persons who might be entitled to claim on intestacy (section 23(k)); and
j. other relevant facts (section 23(l)).

[35] Section 24 then provides that the Court must be satisfied of five matters before granting leave. They are:

a. that the applicant for leave is an appropriate person to make the application;[33]
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;[34]
c. there are reasonable grounds for believing that the person does not have testamentary capacity;[35]
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;[36] and
e. it is or may be appropriate for an order to be made under section 21 in relation to the person.[37]

[36] According to Applegarth J in *Re APB, ex parte Sheehy* [2017] QSC 201:

> "[112] On the hearing of an application for leave, the Court:
> (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.

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33 *Succession Act* 1981 (Qld) s 24(a).
34 *Succession Act* 1981 (Qld) s 24(b).
35 *Succession Act* 1981 (Qld) s 24(c).
36 *Succession Act* 1981 (Qld) s 24(d).
37 *Succession Act* 1981 (Qld) s 24(e).

> [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". 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.
>
> [115] The guiding principle is that whatever is done, or not done, must be for the benefit of the incapacitated person".[38]

[37] If leave is granted, the Court then moves to the substantive stage of the application, the second stage.

Second stage

[38] Section 21 of the Act provides that the Court may authorise a will to be made, altered or revoked for a person without testamentary capacity.

[39] Section 21 of the Act states as follows:

> "**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 or altered, in the terms stated by the Court, on behalf of a person without testamentary capacity; or
> (b) a will or part of a will to be revoked on behalf of a person without testamentary capacity.
> (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

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38 *Re APB; ex parte Sheehy* [2017] QSC 201 para 112 to 115, footnotes omitted.

> 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".

The principles in respect of statutory wills

[40] The agreed legal principles in respect of the Court considering an application for the making of a statutory will are set out by Applegarth J in *Re APB, ex parte Sheehy* [2017] QSC 201.[39] Reference is also made to the observations of Jackson J in *Van der Meulen v Van der Meulen & Anor* [2014] QSC 33, and more recently by McMeekin J in *CDG v John Siganto as Litigation Guardian for BJG & Ors* [2018] QSC 11.

[41] In *Re APB, ex parte Sheehy* [2017] QSC 201, Applegarth J said (of the substantive stage):

> "[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. 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.
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> [124] If leave is granted to make the application, then an order

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[39] *Re APB, ex parte Sheehy* [2017] QSC 201, para 107 to 126.

> 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, and the Court may make the order on the conditions the Court considers appropriate.
>
> [125] The discretion at the second stage is not constrained by any express statutory criteria. Instead, the discretion should be exercised 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 section 21 is the will the person probably would have made if he or she had capacity. Other considerations will apply in the particular circumstances and the legislature, not having listed factors, it is inappropriate and unhelpful to articulate the factors which might influence a discretion of the kind conferred by section 21."[40]

[42] The applicant submitted,[41] in reliance upon *Re APB, ex parte Sheehy* [2017] QSC 201,[42] the appropriate test at the second and substantive stage is whether the will is a will the person "*probably would have*" made if he or she had testamentary capacity. The applicant submitted that in other cases of this Court,[43] the Court has applied the same test at the substantive stage to the leave stage, that is the will "*is or may be*" one the testator would make if he or she had testamentary capacity. Arguably, there is little difference in either test in the case of a "nil capacity" testator such as SGA.

[43] It is important to note that the Court is not bound by the rules of evidence.[44]

All persons with a proper interest in the application have been served

[44] Perpetual was served with the application and advised it did not intend to appear at the hearing.[45]

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40 *Re APB, ex parte Sheehy* [2017] QSC 201, para 121 to 125, footnotes omitted.

41 Supplementary written submissions of the applicant received 21 March 2019, p 24, para 100.

42 *Re APB, ex parte Sheehy* [2017] QSC 201, para 125.

43 The applicant referred to *Deecke v Deecke* [2009] QSC 65, para 26 onwards; *Payne v Smyth as Litigation Guardian for Welk* [2010] QSC 45, para 25 onwards; *Bock v Bock* [2010] (unreported 23 September 2010 per de Jersey CJ); *McKay v McKay* [2011] QSC 230, para 80 onwards; *Re Matsis; Charalambous v Charalambous & Ors* [2012] QSC 349, para 23 onwards; *Re Keane* [2012] 1 Qd R 319, para 333 to 334, and 337 to 338; *Van der Meulen v Van der Meulen & Anor* [2014] 2 Qd R 278, para 238 to 284; *Sadler v Eggmolesse* [2013] QSC 40; *Lawrie v Hwang* [2013] QSC 289, para 46; *Re JT* [2014] QSC 163, para 36; *RKC v JNS* [2014] QSC 313, para 38; *JW v John Siganto as Litigation Guardian for AW and CW* [2015] QSC 300, para 26.

44 *Succession Act* 1981 (Qld) s 25(c).

45 Affidavit of Jody Pezet (applicant's solicitor) filed 17 December 2018, p 1, para 2 to 4; exhibits JLP-1 and JLP-2.

[45] SGA's siblings[46] and her father were served,[47] however, only the father appeared at the hearing.

[46] I am satisfied that there is no other person who should be served with the application.

The position of the applicant

[47] Prior to the hearing, the applicant's proposed will ("the first proposed will"):[48]

a. appointed the applicant as executor, with Perpetual to be substitute executor should that appointment fail;
b. gifted $20,000 to SGA's carer JHA;
c. gifted SGA's principal place of residence and household contents to the applicant;
d. divided the residue of her estate as follows:
    i. 90% to the applicant; and
    ii. 10% to the respondent.

[48] According to the first proposed will, if the applicant did not survive SGA, then the residuary estate was to be divided equally between those who survive SGA, out of the respondent and SGA's siblings. If the respondent did not survive SGA, there was a gift over to the applicant.[49]

[49] Following the hearing, the applicant provided an amended proposed will ("the amended proposed will") which sought to:[50]

a. appoints the applicant as executor, with Perpetual to be substitute executor should that appointment fail;
b. gift SGA's principal place of residence and household contents to the applicant;
c. divide the residue of her estate as follows:
    i. 75% to the applicant; and
    ii. 25% to the respondent.

[50] According to the amended proposed will, if the applicant does not survive SGA, then the residuary estate is to be divided equally between those who survive SGA, out of the respondent and SGA's siblings. If the respondent does not survive SGA, then the residuary estate is to be divided equally between those

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46 Affidavit of Jody Pezet (applicant's solicitor) affirmed 12 March 2019, filed by leave, p 1 to 2, para 1 to 7; exhibits JLP-1, JLP-2, JLP-3 and JLP-4.

47 Affidavit of Jody Pezet (applicant's solicitor) filed 17 December 2018, p 2, para 7 and exhibit JLP-4.

48 Affidavit of MZY p 15 to 16 and exhibit MZY-24, p 240; Written submissions of the applicant filed by leave, p 9, para 49.

49 Affidavit of MZY p 15 to 16 and MZY-24, p 240; Written submissions of the applicant filed by leave, p 10, para 53.

50 Supplementary written submissions of the applicant received 21 March 2019 p 26, para 103. Further proposed will received 21 March 2019.

who survive SGA out of the applicant and SGA's siblings.[51]

The position of the respondent

[51] The respondent's initial position was that no leave should be given, and the status quo should remain, as there is no need to alter the position of intestacy.[52]

[52] The respondent submitted that what the applicant purports to do in this instance is to have the Court "*look into a crystal ball*" and reach a conclusion that the applicant will continue in her current role of carer for the remainder of the life of SGA and that the dynamics, and the financial position, will not alter. The respondent submitted such a position is not supported by the evidence; the circumstances may change markedly particularly in respect of SGA's needs.[53]

[53] The respondent's primary position was that, based on the applicant's case, this application is entirely without support as there are no features which warrant the application being made.[54]

[54] The respondent required this matter to be set down for a hearing with cross-examination of witnesses.

[55] Following the hearing, the respondent submitted that the applicant has only pursued the application for a statutory will on the basis that the applicant wanted the residential property of SGA's in priority, and in addition the applicant wanted 90% of the residue estate.[55] The respondent submitted that based on an allocation of $650,000 to the residential property, the applicant seeks to receive approximately 92.25% of the estate.[56]

[56] The respondent argued that if SGA were to pass, then the asset base of the applicant, after receiving 50% of the estate of SGA (in conjunction with her own assets), would be in the vicinity of $2,000,000.00.[57] The respondent argued that in such circumstances there is no conceivable argument that she could be "*dependent*" on SGA or that she could not purchase her own suitable residence if she chose to do so.[58]

[57] The respondent's ultimate submission is that the allocation between the applicant and respondent should be left in its present state, so the parties take equally in intestacy, or alternatively, a statutory will which reflects the

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51 Supplementary written submissions of the applicant received 21 March 2019 p 26, para 104. Further proposed will received 21 March 2019.
52 Written submissions of the respondent filed by leave, p 12, para 43.
53 Supplementary written submissions of the respondent received 21 March 2019, p 11, para 25.
54 Supplementary written submissions of the respondent received 21 March 2019, p 17, para 40.
55 Supplementary written submissions of the respondent received 21 March 2019, p 2, para 7A.
56 Supplementary written submissions of the respondent received 21 March 2019, p 2, para 7A.
57 Supplementary written submissions of the respondent received 21 March 2019, p 14, para 32.
58 Supplementary written submissions of the respondent received 21 March 2019, p 2, para 7A.

position of intestacy be made (acknowledging other matters which may affect the administration of an estate if beneficiaries are in conflict).[59]

[58] The respondent submitted after the hearing that having regard to the years of service of JHA and NVS, it would be prudent for a specific legacy of $40,000 to JHA, and $20,000 to NVS to be made.[60]

Evidence required for leave – the first stage

Testamentary capacity (sections 23(b) and (c))

[59] The classic statement of what constitutes testamentary capacity was set out by Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 549 as follows:

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

[60] In order that a person shall rightly understand these matters, it is essential that his mind should be free therefore "*to act in a natural, regular and ordinary manner*."[61]

[61] SGA is severely disabled with cerebral palsy.

[62] The evidence of SGA's treating psychiatrist, Dr Z, is that SGA does not have testamentary capacity as a result of her intellectual disability.[62]

[63] There is no dispute as to this issue.

Size and character of the estate (section 23(d))

[64] SGA's assets are managed by Perpetual. They are:

a. a property in the State of Queensland ("the property"),[63] valued at

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59 Supplementary written submissions of the respondent received 21 March 2019, p 5, para 7D.
60 Supplementary written submissions of the respondent received 21 March 2019, p 6, para 32.
61 *In the Will of Wilson* (1897) 23 VLR 197 at 199 approved by Dixon J in *Timbury v Coffee* (1941) 66 CLR 277 at 283.
62 Affidavit of MZY filed 25 September 2018, p 4, para 25, exhibit MZY-13, page 174.
63 Affidavit of MZY filed 25 September 2018, p 14, para 86, exhibit MZY-20.

$650,000.00.[64]

b. As at 10 September 2018, SGA's other assets held by Perpetual totalled approximately $2,334,138.75, and are as follows:
   i. Perpetual Cash Account - $551.01 (approximately);
   ii. motor vehicle - $40,000.00 (approximately); and
   iii. Perpetual Private Pension Wrap (superannuation) - $2,293,587.74 (approximately).[65]

[65] As at 10 September 2018, SGA's estate was valued at approximately $2,984,138.75.

[66] However, the most recent update is that as at 6 February 2019, the amount in the Pension Wrap is $2,172,982.30.[66]

[67] The applicant states that the total asset pool at the time of the hearing was approximately $2,860,000.00.[67]

[68] The respondent submits there is no up-to-date valuation of the property before the Court and it is not difficult to envisage that there has been some appreciation of the property's value in the five years since purchase.[68] Further, if that property were to appreciate in value, whilst the funds available for SGA's maintenance were to be depleted, then the property would represent an increasing proportion of the value of the estate.[69]

[69] It is noted that Perpetual values the general portfolio as at 6 February 2019 at $713,446.68, which includes the property.[70]

[70] I acknowledge the asset pool may be more than $2,860,000.00, but the difference in value of the asset pool is not significant. Accordingly, for ease of calculation, I will be proceeding on the basis of the total asset pool being approximately $2,860,000.00.

Draft will (section 23(e))

[71] The applicant's amended proposed will is set out at paragraphs 49 to 50 herein.

Evidence of wishes (section 23(f),(g) and (i))

[72] As SGA's medical condition resulted at birth, SGA has never been able to communicate her wishes for the distribution of her estate. She has no existing will.[71]

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64 Affidavit of MZY filed 25 September 2018, exhibit MZY-21.
65 Affidavit of MZY filed 25 September 20198, exhibits MZY-21 and MZY-22.
66 Affidavit of RHA affirmed 13 March 2019, filed by leave, exhibit RHA-3.
67 Supplementary written submissions of the applicant, p 9, para 48.
68 Supplementary written submissions of the respondent, p 7, para 13.
69 Supplementary written submissions of the respondent, p 7, para 13.
70 Affidavit of RHA affirmed 13 March 2019, filed by leave, exhibit RH-3.
71 Affidavit of MZY filed 25 September 2018, p 15, para 90; Supplementary written submissions of the

Possible family provision applications (section 23(h))

[73] The applicant is the only person currently eligible to bring a family provision application.[72]

[74] Parents are only eligible if they are being "*wholly or substantially maintained or supported*" by SGA as at the date of her death.[73] The respondent therefore is not an eligible applicant for provision.

[75] The evidence of the applicant's solicitor is that this may change if something were to happen which prevents the applicant being able to care for SGA, and/or the respondent was more actively involved in the care for her, a relationship might be created where he did become an eligible applicant as a dependant.[74]

[76] Siblings are not eligible at all.[75] It is also highly improbable that SGA will die having a spouse and/or any children.[76]

[77] In the circumstances of this case, intestacy which leaves open the prospect that the applicant could later bring a family provision application were she still dependent upon SGA at the date of SGA's death, would produce "*needless and wasteful litigation*".[77] Further, such a position would lead to the respondent being the person who applies for letters of administration on intestacy.[78]

[78] This would not be at all ideal in the circumstances. The applicant and the respondent have an extremely entrenched hostile relationship and I have no confidence that the respondent would take an objective, sensible or constructive approach to a family provision application involving the applicant.

Circumstances of a person for whom provision might reasonably be expected (section 23(i))

[79] The applicant has provided evidence of the circumstances of her two children, AWA and JWG, and described their relationship with SGA.[79]

[80] The applicant's amended draft will also considers the possibility of a gift to

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applicant received 21 March 2019, p 12, para 58.

72 Supplementary written submissions of the applicant received 21 March 2019, p 14, para 65.

73 *Succession Act* 1981 (Qld) s 40 – definition of "dependant".

74 Transcript of the hearing on 14 March 2019, p 26, line 7 to 28.

75 *Succession Act* 1981 (Qld) s 40 – definition of "dependant".

76 Affidavit of MZY filed 25 September 2018, p 7, para 40; Supplementary written submissions of the applicant received 21 March 2019, p 14, para 67.

77 Supplementary written submissions of the applicant received 21 March 2019, p 13, para 59; p 14, para 62, citing Palmer J in *Re Fenwick* [2009] NSWSC 530 at [194] wherein his Honour interpreted the requirement of the New South Wales equivalent of s 23(h) of the *Succession Act* 1981 (Qld).

78 Supplementary written submissions of the applicant received 21 March 2019, p 14, para 63.

79 Affidavit of MZY filed 25 September 2018, p 11 to 12, para 68 to 72.

persons outside the family and concludes that SGA might make a gift in favour of SGA's long term carer, JHA.

[81] The respondent submitted that it would also be appropriate to make a gift in favour of another carer, NVS. The applicant opposes such a gift.

Persons to take on intestacy (section 23(k))

[82] Should SGA die intestate:

a. her parents would take her estate equally on intestacy, or if only one of them survives, they take the entire estate;[80]
b. if neither parent survives SGA, then the estate would be equally distributed to her siblings, or if any sibling predeceases SGA leaving children, then to their children.[81]

[83] Should SGA die intestate then the applicant could make a family provision application, and the respondent would (unless circumstances changed as at the date of death) be excluded from making any application for further provision.[82]

Any other relevant facts and other information or matters (section 23(l) and section 25)

[84] I note the difference in sections 23(1) and 25 of the Act. In this case, these "catch-all" provisions engulf issues that have arisen as a result of the longstanding entrenched hostility between the parties.

[85] Section 23(l) of the Act imposes a mandatory obligation to give the Court any other facts of which the applicant is aware that are relevant to the application. Section 25 provides that the Court may have regard to any information given to the Court under section 23, and may inform itself of any other matter relating to the application in any way it considers appropriate.

[86] It is convenient to deal with all the issues that fall under these sections at the one time.

Longstanding hostility between the parties

[87] There are many disputes between the parties in relation to SGA; I have had regard to them all.

[88] It is clear that some of these issues are relevant; some of them have little or no relevance.

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80 *Succession Act* 1981 (Qld) sch 2, pt 2, circ 2.
81 *Succession Act* 1981 (Qld) sch 2, pt 2, circ 3; s 37(1)(a).
82 Transcript of the hearing on 14 March 2019, p 26, line 7 to 28; Supplementary written submissions of the respondent received 21 March 2019, p 10, para 24.

[89] The parties are somewhat blinded to the relevance, or not, of issues by their hostility towards each other.

[90] It cannot be stressed enough that these parties have a dysfunctional relationship; this unfortunately contaminates how they view the other in relation to SGA and her will.

[91] This is not the first time they have been in contested litigation over SGA.

[92] In the Queensland Civil and Administrative Tribunal ("QCAT"), there was a contested hearing, as to whom should be appointed SGA's guardian for decisions about accommodation, health care and the provision of services, and for contact decisions.[83] QCAT observed that the applicant had been the primary care provider on a full time basis throughout SGA's life, the respondent providing a financial contribution, working full time and providing his attention in a supporting role.[84] QCAT observed that SGA's parents were involved in "*vitriolic and litigious family law proceedings*".[85]

[93] Both parents agreed that, in view of their dysfunctional relationship, the Adult Guardian should be appointed in relation to contact decisions.[86]

[94] Both parents also agreed that there was the need for the appointment of a guardian for SGA, and the respondent proposed that the Adult Guardian be appointed.[87] The applicant submitted that she should be appointed, having been SGA's carer since birth.[88]

[95] In respect of other personal decisions (accommodation, health care and provision of services), QCAT observed:

> "[36] It is generally accepted that the parties that MZY has been SGA's primary carer since birth. SGA resides with MZY, and MZY wishes for this arrangement to continue into the future … I cannot see any logical reason to not allow MZY to continue to perform this important and pivotal role that she has held for her daughter, and instead handing the role over to the Adult Guardian. Where a parent is ready, willing and able to be part of their own adult child's decision-making processes, it is unthinkable that this Tribunal would remove them from a role they have performed well, on the sole basis that they find themselves party to a vitriolic family dispute. MZY has loved and tended to SGA's personal, financial and emotional needs, making the sort of sacrifices in her own life that are

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83 Affidavit of MZY filed 14 December 2018, exhibit MZY-1, p 1 to 10.
84 Affidavit of MZY filed 14 December 2018, exhibit MZY-1, p 3, para 4.
85 Affidavit of MZY filed 14 December 2018, exhibit MZY-1, p 3, para 3.
86 Supplementary written submissions of the applicant received 21 March 2019, p 22, para 90.
87 Affidavit of MZY filed 14 December 2018, p 2, para 10; exhibit MZY-1, p 5, para 25.
88 Affidavit of MZY filed 14 December 2018, exhibit MZY-1, p 5, para 25; Supplementary written submissions of the applicant received 21 March 2019, p 22, para 89.

> necessary to care for a child like SGA in the process. MZY is, in my view, the most appropriate person to perform this role for SGA.
>
> …
>
> [38] … The evidence suggests that MZY has made concerted efforts to arrange orderly communication, and that RYI and his various legal representatives have been unresponsive."[89]

[96] The applicant was appointed as guardian for SGA for accommodation, health care and provision of services matters by an order of QCAT in 2012. This appointment remains in place.[90]

[97] It is clear that the relationship between the applicant and the respondent is characterised by significant hostility and distrust. It can only be described as dysfunctional. Their affidavits seethe with tension and hostility about the other. I approach each of their evidence about the other with hesitation.

[98] I am of the view, such is their hostility about each other, that they are incapable of giving any objective evidence about each other.

[99] I am concerned that they approach (on differing scales) this matter on the basis of what they don't want the other to have.

Both parties love SGA

[100] It is clear that both the applicant and the respondent love SGA very much.

The applicant is the primary carer of SGA

[101] The applicant deposes to the fact that she has always been, and remains, SGA's primary carer.[91]

[102] There is a body of evidence that also supports the fact that the applicant is the primary carer.[92]

[103] There is no question that the applicant is the primary carer of SGA; the

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89 Affidavit of MZY filed 14 December 2018, exhibit MZY-1, p 7 to 8, para 36 and 38.

90 Affidavit of MZY filed 14 December 2018, p 2, para 8; exhibit MZY-1, p 1; Supplementary written submissions of the applicant received 21 March 2019 p 23, para 94.

91 Affidavit of MZY filed 14 December 2018, p 3, para 15 and p 6, para 44.

92 The applicant submits that other evidence of the applicant's priMZY role as SGA's carer are contained in reports annexed to Affidavit of MZY filed 25 September 2018, namely, exhibit MZY-4, p 4 to 39; exhibit MZY-5, p 40 to 51; exhibit MZY-5, p 52 to 67; exhibit MZY-7, p 68 to 162; exhibit MZY-13, p 174 to 175; exhibit MZY-14, p 176 to 180; exhibit MZY-15, p 181 to 185;
and reports annexed to Affidavit of Jody Pezet (applicant's solicitor) affirmed 12 March 2019, filed by leave, exhibit JLP-6, p 19 to 39; exhibit JLP-7, p 40; exhibit JLP-8, p 41; exhibit JLP-9, p 42.

respondent acknowledges this fact in his submissions.[93]

[104] It is noted that in February 2009, an occupational therapist wrote a report for SGA's personal injuries claim.[94] For that report she spoke to the respondent, who stated:

> "RYI advised that during the course of his business, he travels, extensively at times, nationally such as to Sydney, Melbourne, Adelaide, Perth and Brisbane, at times being away for three to four days and at other times would travel internationally. He would be away, on average, three to four days per month (work days). He is aware that his absence 'puts an extra load on MZY (in caring for SGA)'. He advised that this was not by choice, but rather because of the lack of availability of carers. SGA occasionally spends time with support worker JHA when RYI is away, to reduce the strain on his wife.
> …
> RYI said there has been significant family disruption because of his daughter's condition and whilst it has not affected his business directly, his need to work has placed significant strain on his wife who had to cease work and remain home 'to tend to SGA'."[95]

[105] It is noted that the respondent states he provided care for SGA for a 12 month period between August 2009 and August 2010; this was during a time that he was at home recovering from heart issues.[96] The applicant disputes that the respondent was the primary carer during this time.[97]

[106] The respondent returned to part time work by August 2010 and to full time work by January 2011. The applicant has never returned to work.[98]

[107] It is clear that the respondent has provided care for SGA throughout her life; however, the primary carer has been the applicant. She gave up her employment to do so and look after their other children.[99] As the respondent submitted, the choice of the applicant to be the primary caregiver was the practical choice in the circumstances.[100] Although, it is questionable how much choice the applicant had; it was her reality in the circumstances.

The father's contact with SGA

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93 Supplementary written submissions of the respondent received 21 March 2019, p 9, para 19.
94 Affidavit of MZY filed 14 December 2018, MZY-3, p 4 to 39.
95 Affidavit of MZY filed 14 December 2018, MZY-3, p 14 to 16.
96 Affidavit of RYI filed 15 November 2018, p 2, para 13 to 22.
97 Affidavit of MZY filed 14 December 2018, p 3, para 15; Supplementary written submissions of the applicant received 21 March 2019, p 19, para 82.
98 Supplementary written submissions of the applicant received 21 March 2019, p 19, para 82.
99 Affidavit of MZY filed 25 September 2018, p 12, para 75 to 78.
100 Supplementary written submissions of the respondent received 21 March 2019, p 9, para 19.

[108] There is a dispute between the parties about how much contact the respondent has with SGA, and how much care the respondent has provided over SGA's lifetime.

[109] Presently, the respondent has SGA every Sunday night.[101]

[110] As previously stated, such is the hostility between the parties that both agreed at the QCAT hearing in 2012 that the respondent's contact arrangements with SGA should be conducted via the Adult Guardian.[102]

[111] The applicant states that the respondent often calls and cancels his Sunday with SGA.[103] This cancellation is said to occur at the last minute and the applicant has to then arrange for a carer, NVS, to care for SGA on a Sunday.[104]

[112] There is a dispute about how many times the respondent has done this.[105] I don't find it a material fact to determine how many times the respondent has cancelled his visits with SGA on a Sunday. It is clear he has cancelled on some occasions, and on some occasions he has given late notice.[106] It is noted that he has an elderly sick mother in Sydney that he needs to visit and this may, on occasion, impact his time with SGA on a Sunday.[107]

[113] When the applicant has extended holidays she organises carers to cover these periods.[108] She is reluctant for the respondent to even have SGA on his Sunday when she is away as she believes he has a predisposition for cancelling and this creates difficulties in arranging supplementary care, especially when she is overseas.[109]

[114] However, it is noted that on occasions the applicant has asked the respondent to look after SGA in addition to his allocated Sunday. For example, at Christmas last year the applicant wanted to visit her children in Sydney and she asked the respondent to look after SGA during this Christmas period.[110] He did so. He looked after SGA for six days over this period.[111]

[115] There is no question that the applicant has done the "lion's share" of care for SGA

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101 Affidavit of RYI filed 15 November 2018, p 4, para 51.
102 Supplementary written submissions of the applicant received 21 March 2019, p 22, para 90.
103 Affidavit of MZY filed 14 December 2018, p 3, para 18 to 22.
104 Affidavit of MZY filed 25 September 2018, p 10, para 59.
105 Supplementary written submissions of the applicant, p 2, para 18; Supplementary written submissions of the respondent, p 9, para 17; Affidavit of RYI sworn 11 March 2019, filed by leave, p 1, para 2 to 4.
106 Affidavit of NVS filed 14 December 2018, p 3 to 5; Affidavit of MZY filed 25 September 2018, exhibit MZY-16.
107 Affidavit of KWW filed 15 November 2018, p 4, para 39; Affidavit of RYI sworn 11 March 2019, filed by leave, p 1, para 3.
108 Transcript of hearing on 14 March 2019, p 48, line 18.
109 Transcript of hearing on 14 March 2019, p 71, line 35 to 39.
110 Affidavit of MZY filed 14 December 2018, p 2, para 13 to 14; Transcript of hearing on 14 March 2019, p 70, line 20 to 26.
111 Affidavit of RYI filed 15 November 2018, p 5, para 53; Transcript of hearing on 14 March 2019, p 90, line 34 to 39.

and the respondent has had significantly less contact with SGA, and provided less care to SGA, in contrast to the applicant.

National Disability Insurance Scheme

[116] In July 2018, the applicant secured a package of care for SGA from National Disability Insurance Scheme ("the NDIS") in the order of $160,000.00.[112] The applicant describes NDIS as a "*game changer*" in terms of funding additional care she can now get for SGA.[113]

[117] Before NDIS funding was available, the applicant provided a significant amount of care to SGA in conjunction with SGA's carers JHA and NVS.[114]

[118] Since receiving the NDIS funding the applicant has been able to focus on SGA's case management including employing and rostering carers, running the house and managing SGA's medication and medical appointments.[115] The applicant still acts as a backup carer if one of the carers cannot make their shift.[116]

[119] The applicant does not receive the NDIS funding directly; she makes no personal profit out of the NDIS package granted for SGA.[117] The NDIS payments do appear to cover the payments that would otherwise be made for SGA's carers,[118] thus alleviating some of the expenditure from SGA's managed assets.

[120] The applicant indicated at the hearing that she understands there to be no certainty with respect to the consistency of NDIS on an ongoing basis into the future.[119]

[121] It is clear that the NDIS has made a significant difference in the care of SGA. The applicant does not have to be as intensely involved in the day-to-day care of SGA. She is able to develop a life outside caring for SGA. The respondent notes that:

> "it allows sufficient flexibility in order to permit the applicant to spend two nights a week away from the home with her boyfriend. It also permits her to have other social outings".[120]

[122] For the applicant to strive for some form of normality, in an otherwise stressful environment of caring for SGA, should not be held against her in this application.

[123] Although the applicant now has a significant amount of support in caring for SGA

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112 Affidavit of MZY filed 14 December 2018, p 1, para 2; Transcript of hearing on 14 March 2019, p 57, line 32 to 46.
113 Transcript of hearing on 14 March 2019, p 50, line 27.
114 Transcript of hearing on 14 March 2019, p 51, line 4 to 30.
115 Affidavit of MZY filed 25 September 2018, p 8, para 46; Affidavit of MZY filed 14 December 2018, p 1, para 3; Supplementary written submissions of the applicant received 21 March 2019, p 4, para 27.
116 Affidavit of MZY filed 14 December 2018, p 1 para 3.
117 Transcript of hearing on 14 March 2019, p 57, line 32 to 46.
118 Supplementary written submissions of the respondent, p 8, para 15.
119 Transcript of hearing on 14 March 2019, p 76, line 1 to 14.
120 Supplementary written submissions of the respondent, p 8, para 15.

and now does little "hands-on" work, the care of SGA is still a consuming part of her life. For example, she has installed cameras throughout the house so when she goes out she can look at her phone, and check on SGA.[121]

[124] The applicant has organised many carers for SGA and the coordination of such care resembles keeping a jigsaw puzzle together. The respondent acknowledges that SGA has significant disabilities and there is an obvious need for structure in her life.[122]

[125] The applicant clearly gets frustrated with the respondent when he cancels his Sunday with SGA as this means she has to organise NVS to come in on a Sunday.[123] This is particularly stressful if she is overseas at the time and so she is reluctant for the respondent to have SGA when she is on holiday.[124]

The respondent would like to spend more time with SGA

[126] The respondent has given evidence that he would like to spend more time with SGA and he has asked the applicant to have assistance from SGA's carers to be able to take SGA on holidays.[125]

[127] The respondent is supported by his partner who confirms that the respondent is a devoted and caring father, and that both of them have a desire to spend more time with SGA.[126]

[128] The respondent states that he has asked the applicant whether he could have SGA from Friday to Monday,[127] although he could not specify that last occasion he had asked.[128] The applicant denies that the respondent has ever requested to spend more time with SGA.[129]

[129] The applicant is reluctant to grant such a request because she believes the respondent loves playing golf on Saturday and would not cease doing so to look after SGA.[130] Further, she believes that the respondent is somewhat unreliable and it would create issues with finding supplementary care when he cancels.[131]

[130] The applicant submitted that to the extent that the respondent indicates a willingness to take SGA more often:

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121 Transcript of hearing on 14 March 2019, p 48 to 49.
122 Supplementary written submissions of the respondent, p 9, para 19.
123 Affidavit of NVS filed 14 December 2018, p 3 to 5.
124 Affidavit of MZY filed 14 December 2018, p 5 to 6, para 34; Transcript of hearing on 14 March 2019, p 71, line 35 to 39.
125 Affidavit of RYI filed 15 November 2018, p 5, para 60 to 62.
126 Affidavit of KWW filed 15 November 2018, p 5, para 54 to 56.
127 Affidavit of RYI sworn 12 March 2019, filed by leave p 2, para 7.
128 Transcript of hearing on 14 March 2019 p 114, para 16 to 22.
129 Affidavit of MZY filed 14 December 2018, p 1, para 5; Transcript of hearing on 14 March 2019, p 69, line 14 to 15.
130 Affidavit of MZY filed 14 December 2018, p 3 para 17; Transcript of hearing on 14 March 2019, p 68.
131 Transcript of hearing on 14 March 2019, p 70 to 71.

a. he has options in terms of contact arrangements with the Adult Guardian via QCAT (which he has previously employed);
b. he has an ability to contact SGA's financial manager, Perpetual, if he wishes permission for a paid carer to assist him while he cares for SGA;
c. he claims to have text messages offering to do so, but did not produce them;
d. the applicant disputes he has made any such offers; and
e. even if such offers had been made, it is submitted that it would be of marginal relevance in SGA's considerations as to whether she would make a will, and the type of will she would make.[132]

[131] It is noted that both parties agreed that in view of their dysfunctional relationship the Adult Guardian should be appointed in relation to contact decisions.[133]

[132] The applicant submitted that despite having consented to the Adult Guardian being appointed for contact decisions from 2012, the respondent claims in these proceedings that the applicant refused him contact, insisting that all arrangements had to be made through the Adult Guardian.[134] It is submitted that the respondent's complaint seems to misunderstand that the applicant had no power to allow or make contact decisions, that power having been reserved to the Adult Guardian, with the respondent's consent.[135]

[133] The applicant states that if the respondent believes that she is denying him access to SGA, then the proper course of action would be for the respondent to apply to QCAT. The applicant further states that this would not be necessary because she would be pleased if the applicant would spend more time with SGA on a consistent basis.[136]

[134] The applicant states that it is she who approaches the respondent to ask if he can look after SGA and most of the time the respondent responds in the negative. However, the applicant does acknowledge that the respondent, on occasions, has looked after SGA outside his allotted time; she estimates this to have been less than 10 occasions in the past three years.[137]

[135] It is noted that neither party have applied for the QCAT order to be reviewed. It remains in place, and the applicant submitted that if the respondent had a legitimate concern in relation to contact he ought to have applied to QCAT for a review of it.[138]

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132 Supplementary written submissions of the applicant received 21 March 2019, p 21 to 22, para 86.
133 Supplementary written submissions of the applicant received 21 March 2019, p 22, para 90.
134 Supplementary written submissions of the applicant received 21 March 2019, p 22, para 91, referring to Affidavit of RYI filed 15 November 2018, p 4, para 45.
135 Supplementary written submissions of the applicant received 21 March 2019, p 22, para 91.
136 Affidavit of MZY filed 14 December 2018, p 2, para 11.
137 Affidavit of MZY filed 14 December 2018, p 2, para 12.
138 Supplementary written submissions of the applicant received 21 March 2019, p 22, para 92.

[136] Such a submission is correct; however, does seem to ignore that, on occasions, *ad hoc* arrangements are agreed between the parties without the need to get the Adult Guardian's sanction or direction. For example, the applicant requested that the respondent have SGA over the latest Christmas period, which he agreed to.[139]

[137] The applicant views the respondent's desire to spend more time with SGA with some cynicism and views such a desire to be only motivated by these proceedings.[140]

[138] I do not view the respondent's desire to spend time with SGA with the same cynicism. I am of the view that the respondent does truly love SGA and would like to spend more time with his daughter.

Funding of SGA's care when with the respondent

[139] The respondent states that he receives no financial assistance for any care that he provides SGA at his own residence.[141]

[140] The respondent has had to personally pay for alterations to his own house to ensure proper accessibility for SGA. The applicant's response is unsympathetic.[142] She states that it was the respondent's prerogative to buy a house with stairs, and that she did not buy a house with stairs.[143]

[141] The applicant states that the respondent has an ability to contact SGA's financial manager, Perpetual, if he wishes permission for a paid carer to assist him while he cares for SGA.[144] The respondent states that Perpetual will only deal with the applicant.[145]

Concern about the quality of the applicant's care for SGA

[142] The respondent makes a number of very serious allegations about the level of care being provided to SGA by the applicant:

> "5. Prior to the first Court date on 20 December 2018, I had concerns at the level of care being provided to SGA by MZY.
> 6. In particular:
> (a) I was aware that MZY enjoyed a busy social life with regular holidays, outings to restaurants and social functions while SGA was left with carers or

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139 Affidavit of MZY filed 14 December 2018, p 2, para 13; Affidavit of RYI filed 15 November 2018, p 5, para 53; Transcript of hearing on 14 March 2019, p 90, line 34 to 39.
140 Transcript of hearing on 14 March 2019, p 70, line 10 to 14.
141 Affidavit of RYI filed 15 November 2018, p 5, para 64.
142 Affidavit of MZY filed 14 December 2018, p 4, para 25 to 27.
143 Transcript of hearing on 14 March 2019, p 72, line 12.
144 Affidavit of MZY filed 14 December 2018, p 4, para 25; Supplementary written submissions of the applicant, p 21, para 86(b);
145 Transcript of hearing on 14 March 2019, p 109, para 35 to 39.

> on her own. MZY posted about her social life regularly on social media such as Instagram;
> (b) I was aware from my interactions with MZY that she was dissatisfied with her carer responsibilities. She told me it affected her ability to enjoy a greater social life and to further her relationship with her current partner. However, she refused to allow me extra time with SGA despite my willingness to have extra time with her;
> (c) I had frequently seen MZY at the [Tavern] on evenings playing the poker machines. Because there were a limited number of carers and limited funds to pay for them, I was concerned whether SGA was being cared for by carers or whether she had been left alone while MZY was at the tavern;
> (d) I have observed, in particular, that over the past 12-18 months SGA's demeanour had changed in that, when she spent time with me, she seemed over-sedated and highly affected by medication;
> (e) I had spoken with MZY a number of times and asked that SGA's level of medication be re-considered as it was affecting her balance and she became unable to walk unaided, so it was dangerous for her to be left alone. MZY rejected my request and told me it was best for SGA to be sedated for social reasons rather than considering her physical condition.
> (f) SGA has not been assessed directly by a specialist in respect of the appropriate provision of medication. My understanding is that MZY provides information directly to the specialist and the specialist had regard to that information
>
> …
> 10. In my opinion MZY is not secure in respect of her care for SGA and the manner in which she conducts herself. My personal view is that she is not a stable individual, based on my dealings directly with her. The level of drugs proided to SGA appears to be contingent upon what MZY informs the specialist".[146]

[143] The respondent has never contacted government authorities or the police to report his concerns about the applicant's care of SGA.[147]

[144] In assessing the respondent's allegations, it must be recognised that the respondent has an extremely hostile relationship with the applicant and the views he expresses about the applicant must be seen through that lens, unless additional evidence suggests otherwise. I have no such additional evidence.

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146 Affidavit of RYI sworn 11 March 2019, filed by leave, p 2 to 3, para 5, 6 and 10.
147 Transcript of hearing on 14 March 2019, p 106, para 22 to 35.

[145] Indeed, NVS, SGA's carer, sees the applicant and SGA together. Her evidence paints a completely different picture of the applicant's care as compared to the respondent's allegations:

> "… And in the period of time that you have observed MZY's relationship with her daughter, do you get to see MZY and SGA together?---Yeah, of course.
> Okay. How would you describe MZY's care of SGA?---Love for a mother, like anyone that I have seen.
> What about – what about her level of care or devotedness to SGA?---Look, the organisation and the communication with myself, it's all I can talk about, yeah, it's been very well. That's why I've been here for so many years because I feel like it's – her care is – you know, the priority is her daughter MZY – SGA.
> HER HONOUR: Sorry, what was that did you say – what was that you said, NVS, that MZY - - -?---Her priority - - - - - - prioritises her daughter?---Priority – yeah, prioritises MZY – SGA, and the organisation that goes with – the amount that goes with it, different organisations and different carers, that just shows me the care for her daughter.
> MS TRESTON: All right. Have you ever been concerned about the type of care that MZY gives her – gives to SGA?---No.
> All right. Have you ever been concerned about SGA's drug regime?---No. I – no.
> Has RYI ever complained to you at all about MZY's care of SGA?---Look, I haven't spoken to him for quite a few years. When they were going through their divorce there may have been times, you know, either side, that, you know, had concerns but I made it quite clear that I didn't want to get involved in that side of it for a long time, yeah".[148]

[146] I have no evidence to find that the applicant is not providing the care as set out by NVS.

[147] On the evidence before me I do not accept the respondent's allegations against the applicant.

Concerns raised about SGA's medication

[148] The respondent has raised some issues about the quality of care that the applicant provides SGA.

[149] The respondent is concerned about the medication that SGA is taking, as he has

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148 Transcript of hearing on 14 March 2019, p 39, para 5 to 35.

noted a deterioration in her condition in more recent times.[149] He is concerned that SGA is prescribed drugs by a psychiatrist without that psychiatrist having examined SGA for well over a year.[150] He states:

> "(e) I had spoken with MZY a number of times and asked that SGA's level of medication be re-considered as it was affecting her balance and she became unable to walk unaided, so it was dangerous for her to be left alone. MZY rejected my request and told me it was best for SGA to be sedated for social reasons rather than considering her physical condition.
> (f) SGA has not been assessed directly by a specialist in respect of the appropriate provision of medication. My understanding is that MZY provides information directly to the specialist and the specialist had regard to that information".[151]

[150] SGA has behavioural issues. In 2009, an occupational therapist wrote a report for the purposes of SGA's personal injuries claim wherein she stated:

> "In December 2008, MZY advised that she had no option but to cancel the proposed family visit to Sydney for Christmas 2008 because of SGA's recent abnormally aberrant and challenging behavior. The family was to go to a unit in Sydney but MZY believed it would be too difficult to take SGA on a plane given her behavior. MZY said they 'wouldn't want to cope with her on a plane'
> …
> Support workers, [names removed], were also interviewed and informed as follows … They advised that, at times, particularly in recent times, SGA's behaviour has been very difficult to modify and has included screaming, hitting out, vocalizing loudly and 'being very physical'. They are aware SGA is 'very frustrated by something' but cannot always describe what is upsetting her and sometimes she does not seem to know at all. They described her 'full-on tantrums' which last usually only a few minutes but up to ten minutes where she rocks dangerously and aggressively back and forth on her chair, vocalizes, grimaces and her athetoid body movements become markedly more exaggerated. When she is being transported in the Endeavour vehicle, she has engaged in head banging and bashing which is distressing to other occupants (attendees at the centre) and her behavior becomes distracting to the driver".[152]

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149 Affidavit of RYI sworn 11 March 2019, filed by leave, p 2, para 6(b).
150 Affidavit of RYI sworn 11 March 2019, filed by leave, p 2, para 7(d).
151 Affidavit of RYI sworn 11 March 2019, filed by leave, p 2, para 6.
152 Affidavit of MZY filed 25 September 2018, exhibit MZY-4, p 16 to 18.

[151] The applicant gave evidence about the medication regime that SGA has been on and is currently on. SGA presently takes a combination of medication including an antipsychotic drug, Risperidone, which was initially prescribed by SGA's psychiatrist, Dr Z, in around 2011 or 2012.[153] Whilst Dr Z initially prescribed Risperdine, SGA's general practitioner, Dr B now provides the repeats. The applicant states that Dr B prescribes the repeats in consultation with Dr Z.[154]

[152] Dr B has been SGA's general practitioner for over 20 years and is also the respondent's general practitioner.

[153] The applicant states that she gets SGA's prescription filled at the pharmacy and the pharmacist provides the medication in a Webster-pak in a roll of pre-packaged medication, with each day and dose set out. She gives SGA's medication in accordance with the Webster-pak and provides the respondent with SGA's medication in this form.

[154] The respondent has concerns about SGA being prescribed the Risperidone, as he believes it is the wrong type of medication.[155] He, however, makes no allegation that Dr B hasn't been properly discharging his obligation to SGA.[156]

[155] He states he raised this issue with QCAT in 2014.[157]

[156] His view is that he has seen SGA perform much better prior to the introduction of the Risperidone. He would like SGA to see an appropriate psychiatrist to consider whether a different type of drug might be more appropriate for her.[158]

[157] It is noted, that SGA's carer, NVS, has no concerns with SGA's medication regime.[159]

[158] I make no adverse finding against the applicant in relation to SGA's medication regime.

The respondent's concern for SGA's health depending upon the terms of SGA's will

[159] The respondent makes an extraordinary claim against the applicant:

> "I have genuine concerns that if the terms of the statutory will as sought by MZY are granted by the Court (that MZY receives 90% of the estate), that SGA may be at risk of her care deteriorating to the extent that her health and safety may be in danger. I do not raise that concern lightly. It is based on my longstanding dealings with MZY and my

153 Transcript of the hearing on 14 March 2019, p 46 to 47.
154 Transcript of the hearing on 14 March 2019, p 47 line 15 to 21.
155 Transcript of the hearing on 14 March 2019, p 96, line 45 to 46.
156 Transcript of the hearing on 14 March 2019, p 97, line 25 to 28.
157 Transcript of the hearing on 14 March 2019, p 96 line 1 to 5.
158 Transcript of the hearing on 14 March 2019, p 97, line 30 to 35.
159 Transcript of the hearing on 14 March 2019, p 39, line 26 to 27.

> observations of her conduct. Based on my observations, MZY is extremely irrational on occasions and has made false allegations against me in the past. I have genuine concerns for the safety of my daughter should the statutory will be made in the terms sought".[160]

[160] The respondent is clear in his view that there is a risk the applicant would change the way she would care for SGA because she had a statutory will in her favour,[161] i.e. the applicant would not care for SGA in such a way that her health would deteriorate and as a consequence the respondent is afraid of SGA's early death:[162]

> "So you think that if a statutory will is made in your ex-wife's favour she will either cease caring for or reduce her care for your daughter because she will get a financial gain out of it?---Yes".[163]

[161] The respondent has a possible concern that if a statutory will is made in the terms sought by the applicant, then the applicant might hasten her daughter's death.[164]

[162] The respondent did not resile from these allegations in supplementary written submissions. The respondent submitted:

> "a. the allegations are, of course, serious;
> b.the respondent had concern about the drugs being allocated for SGA. His concerns at least have some foundation given she has not been assessed by an independent psychiatrist for some years;
> c. if the allegations are alleged to be falsely made in order to tarnish the character of the applicant then, prima facie, they are allegations of the most serious and extraordinary nature. They were not allegations of a lower level of general misconduct or apathy or of some other character;
> d. the respondent readily acknowledged in the witness box the issues he intended to convey by those and other paragraphs in his affidavits;
> e. the respondent was not frivolous or excitable. It was not something that was said off the top of his head but was part of the content of an affidavit. He presented as an intelligent person who was prepared to make relevant concessions and answer directly;
> f. if he was going to fabricate an issue which caused him concern, there were many other issues which could have been fabricated or embellished. There was no need to make such allegations of this nature because by doing so it represented such a high risk of

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160 Affidavit of RYI sworn 11 March 2019, filed by leave, p 3, para 11.
161 Transcript of the hearing on 14 March 2019, p 108, line 20 to 44.
162 Transcript of the hearing on 14 March 2019, p 108, line 35 to 40.
163 Transcript of the hearing on 14 March 2019, p 108, line 41 to 44.
164 Transcript of the hearing on 14 March 2019, p 109, line 10 to 11.

> damaging his credit; and
> g. whilst the Court will obviously have concerns as to the content of the allegations, it begs the question as to why make those allegations if he did not believe it. The answer is simple, it is a concern which the respondent genuinely holds. If it is a concern which the respondent genuinely holds, then it is a matter which he is obliged to bring to the Court's attention. He may be rejected on a factual basis but the legitimacy of his beliefs, in all the circumstances, should not be doubted."[165]

[163] The respondent maintains this concern in the context of never seeing the applicant being violent towards SGA.[166] He states that he has seen the applicant being aggressive towards SGA, in that he has seen her shout at SGA.[167] It is noted that the respondent has not included such evidence in any of the three affidavits he has produced to the Court.[168]

[164] The applicant argued, in supplementary submissions, that the respondent gave evidence orally which had not been contained in any of his three affidavits. On each occasion that evidence sought to paint him and his concerns about SGA in a better light. As he had never previously given that evidence, there was no opportunity to assess the truth of it by contacting any of the persons to whom he alleges he made complaints.[169]

[165] The respondent does not have any such concerns about the applicant reducing her care of SGA to the point where SGA's death is hastened if SGA has a will where the applicant only receives 50% of SGA's estate.[170]

[166] The respondent's concerns, which he claims to "*genuinely hold*",[171] are plainly only held by him; they are without any evidentiary foundation.

[167] A predictor of future behaviour is past conduct. There are no concerns about the applicant's care expressed in any of the evidence before the Court, for example:[172]

> a. KSS, of the [Recreation and Sports Centre] where SGA has been attending for over 25 years describes:
>
> > "Throughout the years we have known SGA; we have had reason to liaise closely with her mother, MZY. During this time MZY has always shown through her words and actions that SGA's best

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165 Supplementary written submissions of the respondent received 21 March 2019, p 5, para 7C.
166 Transcript of the hearing on 14 March 2019, p 113, line 13 to 14.
167 Transcript of the hearing on 14 March 2019, p 113, line 13 to 34.
168 Transcript of the hearing on 14 March 2019, p 113, line 33 to 34.
169 Supplementary written submissions of the applicant, p 17, para 77.
170 Transcript of the hearing on 14 March 2019, p 115, line 4 to 12.
171 Supplementary written submissions of the respondent received 21 March 2019, p 5, para 7C(g).
172 Supplementary written submissions of the applicant, p 18, para 79.

> interests are paramount".[173]

b. SGA's general practitioner, Dr B said in August 2012:

> "This is to certify that I have known the [family] for 20 years. During that time and currently, MZY (her mother) has demonstrated that SGA's health and wellbeing are her priority. She continues to deliver this care and attention without wavering".[174]

c. SGA's psychiatrist, Dr Z, said in August 2012:

> "I have been the treating psychiatrist for SGA and MZY, throughout their difficulties and legal/financial pressures. MZY is a competent guardian for SGA, has her best interests at heart, and there is no reason MZY cannot continue in this important/supportive role".[175]

[168] As previously stated, such is their relationship that neither party can be objective about the other; their view of the other is seen through the lens of distrust and cynicism.

[169] The respondent's evidence about the applicant's care of SGA for the future being dependent on the terms of SGA's will is not supported by any other evidence. Accordingly, I do not act on it.

The applicant and respondent's financial circumstances

[170] The applicant has no home of her own,[176] and lives in a home owned by SGA.[177] The applicant's counsel submitted that the applicant has modest assets, so she would struggle financially after SGA's death without a favourable distribution from SGA's estate.[178]

[171] In the applicant's first affidavit, she sets out her assets:

a. an interest as a joint tenant with her daughter, JWG, which was purchased in 2014 for $415,000.00;
b. a term deposit with Westpac which has an unknown present balance but was on average $400,000.00 and which has derived interest in the last

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173 Affidavit of Jody Pezet (applicant's solicitor) affirmed 12 March 2019, filed by leave, exhibit JLP-9, p 42.
174 Affidavit of Jody Pezet (applicant's solicitor) affirmed 12 March 2019, filed by leave, exhibit JLP-8, p 41.
175 Affidavit of Jody Pezet (applicant's solicitor) affirmed 12 March 2019, filed by leave, exhibit JLP-7, p 40.
176 Affidavit of MZY filed 25 September 2018, p 13, para 82.
177 Affidavit of MZY filed 25 September 2018, p 2, para 9.
178 Supplementary written submissions of the applicant received 21 March 2019, p 25, para 101(d).

12 months; and

c. shares in the Commonwealth Bank then valued at $30,000.00.[179]

[172] The applicant has a mortgage in relation to the property with her daughter, in the amount of $1,600 per month.[180]

[173] The applicant receives a Centrelink carer's allowance of $120.00 per fortnight and a payment from SGA's trust of $900.00 for their weekly expenses.[181]

[174] The applicant does not have any superannuation because she has been unable to maintain paid employment because of the care that she has provided for SGA.[182]

[175] The applicant obtained $800,000.00 through her property settlement with the respondent. The applicant submits that this sum was part of the matrimonial pool available for distribution and not did not represent an amount for paid care of SGA. The applicant contends that there is no substance in any suggestion that the applicant has already been rewarded for past care to SGA and ought not to be treated more favourably in this process.[183]

[176] The respondent sets out his assets in his affidavit:

a. half interest in real property valued at $625,000.00;
b. cash at bank valued at $125,000.00;
c. 7.5% interest in a real property owned by his family trust valued at $187,500.00;
d. motor vehicle valued at $10,000.00;
e. furniture and chattels with minimal value;[184] and
f. superannuation of $20,000.00 (the respondent deposes that his previous superannuation funds were given to the applicant in their property settlement and he had to start again).[185]

[177] The respondent also sets out his liabilities in his affidavit:

a. half share Westpac mortgage secured by real property at $225,000.00.[186]

[178] The applicant alleged that cross-examination of the respondent revealed he had not disclosed his true financial circumstances.[187]

[179] The respondent alleged, prior to the hearing, that the applicant refused to provide

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179 Affidavit of MZY filed 25 September 2018, p 13, para 82.
180 Transcript of hearing on 14 March 2019, p 60, line 28 to 31.
181 Affidavit of MZY filed 25 September 2018, p 13, para 81.
182 Affidavit of MZY filed 25 September 2018, p 13, para 83.
183 Supplementary written submissions of the applicant received 21 March 2019, p 24, para 97 to 98.
184 Affidavit of RYI filed 15 November 2018, p 5, para 69.
185 Affidavit of RYI filed 15 November 2018, p 5, para 70.
186 Affidavit of RYI filed 15 November 2018, p 5, para 71.
187 Supplementary written submissions of the applicant received 21 March 2018, p 20, para 82(i).

documentation which established her financial position.[188] This submission was not made following the hearing.

Conclusions as to the leave stage

[180] Section 24 of the Act provides that the Court must be satisfied of five matters before granting leave.

The applicant is an appropriate person to make the application (section 24(a))

[181] There is no doubt that the applicant will benefit under the proposed will.

[182] A Lyons J, in *McKay v McKay & Ors* [2011] QSC 230, referenced the decision of Mullins J in *Deecke v Deecke* [2009] QSC 65:

> "[33] It is relevant to consider that the application has been brought by the applicant who may benefit by the proposed will. The applicant was in the best position, however, to put the relevant information before the Court in support of the application. The application could have been brought in the first respondent's name by a litigation guardian. The problem with that course was that the persons who would best qualify for the role of litigation guardian, namely the applicant and the first respondent's brothers who are of age, have an interest in the making of the orders".

[183] I am satisfied that the applicant is an appropriate person to make the application.[189] The applicant is SGA's mother and her primary carer.

Adequate steps have been taken to allow representation of all persons with a proper interest in this application (section 24(b))

[184] I am satisfied that adequate steps have been taken to allow representation of all persons with a proper interest in this 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 of the Act is sought.[190] SGA's siblings have been served with all of the material, and they did not appear at the hearing.[191]

There are reasonable grounds for believing that SGA does not have testamentary capacity (section 24(c))

[185] I am satisfied that SGA does not have testamentary capacity.[192]

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188 Written submissions of the applicant filed by leave, p 9, para 31.
189 *Succession Act* 1981 (Qld) s 24(a).
190 *Succession Act* 1981 (Qld) s 24(b).
191 Affidavit of Jody Pezet (applicant's solicitor) affirmed 12 March 2019, filed by leave, p 1 to 2, para 1 to 7; exhibits JLP-1, JLP-2, JLP-3 and JLP-4.
192 Affidavit of MZY filed 25 September 2018, p 4, para 25; exhibit MZY-13, page 174.

The proposed will is or may be a will that SGA would make if she were to have testamentary capacity (section 24(d))

[186] The most contentious element of section 24 of the Act is whether the draft will is or may be a will that SGA may make if she were to have testamentary capacity.

[187] For the purpose of leave, it is important to consider the draft will in the context of section 24(d) of the Act, being that the proposed will "*is or may be a will*" that SGA would make were she to have testamentary capacity.

[188] At the leave stage, the applicant does not need to satisfy the Court that this is the will SGA "*would*" make were she to have capacity, but rather that it "*may b*e" a will that she would make.

[189] In determining this question, the applicant submitted that the Court should "*simply focus on the words of the section*".[193]

[190] It is clear that there are a number of statutory will cases where a separated mother who has devoted her life to caring for a disabled child has received a larger share of the estate than a separated (non-primary carer) father.[194]

[191] In *Hickson v Humphrey*,[195] de Jersey CJ acknowledged the "*vast commitm*ent" the child's mother had shown the child over the years and his Honour inferred that, whilst the applicant remained able to render that care, the child could reasonably be expected "*to commit the lion's share of the residue to her mother*".

[192] The respondent submitted that a number of these cases[196] where a separated mother who has cared for a disabled child and has received a larger share of the estate than a separated a non-primary carer father are different to the specific facts and circumstances of this case.[197]

[193] However, all that these cases demonstrate is that, in the circumstances of those cases, it was determined that a separated mother who has cared for a

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193 *McKay v McKay* [2011] QSC 230, para 79, which the applicant submits was approved by Flanagan J in *ADT v LRT* [2014] QSC 169 (overturned on appeal, but not on this issue). (unreported BS 384 of 2011, de Jersey CJ, 11 April 2011),

194 The applicant's counsel refers to the cases of *Bock v Bock* (unreported BS 8794 of 2010, de Jersey CJ, 23 September 2010); *Saddler v Eggmolesse* [2013] QSC 40; *Hickson v Humphrey* (unreported BS 384 of 2011, de Jersey CJ, 8 April 2011); *Wickham v Smith* (unreported BS 11730 of 2011, Daubney J, 8 February 2012); *RKC v JNS* [2014] QSC 313.

195 *Hickson v Humphrey* (unreported BS 384 of 2011, de Jersey CJ, 11 April 2011), cited in *McKay v McKay* [2011] QSC 230 para 73.

196 The respondent's counsel refers to the cases of *CDG v Siganto* [2018] QSC 11; *McKay v McKay* [2011] QSC 230; *Re Joachim* (unreported BS 12325 of 2008, Dutney J, 22 December 2008); *Payne v Smythe* [2010] QSC 45; *Deecke v Deecke* [2009] QSC 65; *Re Weick* (unreported BS7033 of 2009, Applegarth J, 27 August 2009); *Re Bock* (unreported BS8794 of 2010, de Jersey CJ, 23 September 2010); *Hickson v Humphrey* (unreported BS384 of 2011, de Jersey CJ, 11 April 2011); *Wickham v Smith* (unreported 11730 of 2011, Daubney J, 8 February 2002); *Sadler v Eggmolesse* [2013] QSC 40.

197 Supplementary written submissions of the respondent received 21 March 2019, p 20, para 42.

disabled child received a larger share of the estate than a separated (non-primary carer) father. The facts and circumstances of each case are the determining factor.

[194] As Jackson J stated in *Van der Meulen v Van der Meulen* [2014] QSC 33 with respect to the application of the generally expressed discretionary power under section 24:

> "[51] 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".[198]

[195] The facts and circumstances relevant to this case must be evaluated within the statutory framework.

[196] For the purpose of obtaining leave, I am satisfied that the amended proposed will "*is or may be*" a will that SGA would make if she had capacity because:

a. SGA would want to primarily benefit the applicant as she has been primarily responsible for SGA's care for all of SGA's life and has given up a lot to be able to provide for SGA's needs;[199]
b. SGA would want to benefit her father, the respondent,[200] but not to the extent of 50% which he would receive on intestacy given that although he has assisted with her care over the years, his involvement has been more of a supporting role rather than as a primary carer. However, SGA would still wish to leave some provision for the respondent due to their loving relationship;
c. SGA would be likely to make provision for her siblings in the event that the applicant did not survive SGA;[201] and
d. if SGA were able to do so, SGA would want to make a small cash gift to her carer JHA,[202] who SGA has a close relationship with, for the devoted care she has provided SGA over a long period of time.

[197] It is clear that the respondent has a loving relationship with SGA, cares deeply for her and has been, and continues to be, an important part of her life. Such a relationship is consistent with being SGA's father. Although she has a loving relationship with her father and siblings, I am satisfied that SGA would likely favour her mother over them because of their close relationship and the devoted care which the applicant has given SGA throughout her life.

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198 *Van der Meulen v Van der Meulen* [2014] QSC 33, para 51.
199 Affidavit of MZY filed 25 September 2018, p 15, paragraph 91.
200 Affidavit of MZY filed 25 September 2018, p 15, para 94(c).
201 Affidavit of MZY filed 25 September 2018, p 16, para 94(d).
202 Affidavit of MZY filed 25 September 2018, p 16, para 94(e).

[198] I am satisfied that the amended proposed will may be a will that SGA would make if she had testamentary capacity.

[199] Accordingly, after considering all of the facts and circumstances of this case, I am satisfied that all requirements of section 24 of the Act have been met, and leave is granted for the applicant to make an application for a statutory will.

The substantive stage

[200] At the substantive stage, the appropriate test is whether the will is the will that SGA probably would have made if she had testamentary capacity.[203] This is the test I apply when considering each of the provisions of SGA's will.

[201] I consider this matter in the following context: if SGA came to make a will in the hypothetical circumstances, that her physical life were largely as it is and has been in the past, but she had testamentary capacity, and was aware of the surrounding circumstances,[204] she would likely consider the will to be appropriate.

[202] According to Applegarth J in *Re APB; ex parte Sheehy* [2017] QSC 201:

> "[125] The discretion at the second stage is not constrained by any express statutory criteria. Instead, the discretion should be exercised 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 section 21 is the will the person probably would have made if he or she had capacity. Other considerations will apply in the particular circumstances and the legislature, not having listed factors, it is inappropriate and unhelpful to articulate the factors which might influence a discretion of the kind conferred by section 21."[205]

Executor

[203] The first, and the amended, proposed wills both sought to appoint the applicant as executor of SGA's estate, with Perpetual as the substitute executor should that appointment fail. [206]

[204] The conflict between the applicant and the respondent is embedded and entrenched; both parties clearly share a relationship of hostility and distrust. It is not inconceivable that further conflict may arise in the administration of SGA's will.

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203 *Re APB; ex parte Sheehy* [2017] QSC 201, para 125.
204 *Van der Meulen v Van der Meulen* [2014] QSC 33, para 52.
205 *Re APB; ex parte Sheehy* [2017] QSC 201, para 125, footnotes omitted.
206 Supplementary written submissions of the applicant received 21 March 2019 p 26, para 103. Further proposed will received 21 March 2019, para 2(b).

[205] I do not believe it is in SGA's best interests to have either parent appointed as executor of her estate.

[206] I consider that the appointment of an independent party to be the executor of SGA's estate is the best option to prevent, as far as possible, further conflict between the parties with respect to SGA's estate.

[207] I note that Perpetual was served with the first proposed will,[207] and advised, relevantly:

> "*… as the application for a statutory will is a matter for the court to determine, we take the view that we do not consent or oppose the terms of the will or the proposed relief sought by the plaintiff."*[208]

[208] The Court may infer from this that Perpetual, having reviewed the first proposed will wherein Perpetual was proposed as the substitute executor of SGA's estate, would have no difficulty performing the role of executor of SGA's estate.

[209] Accordingly, I order that Perpetual be appointed as the executor of SGA's estate.

Gifts

[210] JHA has been SGA's carer for almost 23 years.[209] I am satisfied that SGA would want to recognise such loyal care by a gift in her will, and SGA probably would have made a gift of $20,000 to JHA if she had testamentary capacity.

[211] The respondent submitted that having regard to the years of service, if a statutory will is made, it would be prudent to have specific legacies:

a. as to JHA - $40,000.00; and
b. as to NVS - $20,000.00.[210]

[212] The applicant submitted that the care arrangement with NVS is a commercial arrangement whereby she is remunerated for her services.[211] In contrast, JHA has become involved with SGA's family over the many years she has been caring for SGA, has a close bond with her and is "*very much part of SGA's life*".[212]

[213] In all of the circumstances, there is not sufficient evidence to be satisfied that SGA would have probably made such a gift to NVS, as proposed by the

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207 Affidavit of Jody Pezet (applicant's solicitor) filed 17 December 2018, p 1, para 2 to 4; exhibits JLP-1 and JLP-2.
208 Affidavit of Jody Pezet (applicant's solicitor) filed 17 December 2018, exhibit JLP-2, p 2.
209 Supplementary written submissions of the applicant received 21 March 2019, p 14, para 64.
210 Supplementary written submissions of the respondent received 21 March 2019, p 2, para 6B.
211 Supplementary written submissions of the applicant received 21 March 2019, p 27, para 105(c).
212 Affidavit of MZY filed 25 September 2018, p 12, para 72.

respondent.

House and contents

[214] The applicant presently lives with SGA in SGA's house.[213]

[215] The applicant shares a home and contents with SGA and has done so for some time.

[216] The applicant has no home of her own, although she has a share in an investment property that she purchased with her daughter JWG.[214]

[217] Considering the level of care the applicant has provided to SGA, the length of time that they have lived together, and the circumstances where they have shared the same house, I am satisfied that SGA would want her mother to continue always having the security of a house to live in.

[218] The amended proposed will gifts SGA's home (as it exists at date of death) to the applicant. That may be the place SGA currently resides,[215] a substitute place of residence,[216] or the proceeds of sale of such place of residence.[217] This will provide a place of residence for the applicant.

[219] I am satisfied that SGA would probably have made such a provision if she had testamentary capacity.

[220] I am also satisfied that SGA would want the applicant to have the contents of the house, for the same reasons.

Residuary estate

[221] The amended proposed will divides the residuary estate in percentage shares between the applicant and the respondent. The applicant acknowledges that there is no one correct figure, and submitted that a division of 75/25, in favour of the applicant, is appropriate.[218]

[222] The total asset pool of the estate is approximately $2,860,000.00. Of this total asset pool, the house is valued at least $650,000.00. I have already determined that the house will be left to the applicant under SGA's will.

[223] Consequently, the residuary estate is approximately $2,210,000.00.

[224] If there was a 75/25 division of the residuary estate in favour of the applicant then, taking into account that SGA's will gifts her residence to the applicant, the

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213 Affidavit of MZY filed 25 September 2018, p 2, para 9; p 13, para 84.
214 Affidavit of MZY filed 25 September 2018, p 13, para 82.
215 Affidavit of MZY filed 25 September 2018, exhibit MZY-24, p 241.
216 Affidavit of MZY filed 25 September 2018, exhibit MZY-24, p 241.
217 Affidavit of MZY filed 25 September 2018, exhibit MZY-24, p 242.
218 Supplementary written submissions of the applicant received 21 March 2019, p 26, para 103.

applicant's share of the total asset pool would be $2,307,500.00. A 75/25 division of the residuary estate, combined with the value of the house, means that the applicant would receive over 80% of the total asset pool.

[225] I accept that it would be entirely appropriate for a disabled child to favour the parent who had provided primary care for a period of 30 years in their will.

[226] The respondent does not suggest that the applicant is in a strong financial position at present.[219]

[227] Presently, the applicant is dependent on SGA for an income, as she is paid $900 per week from Perpetual to manage SGA's care.[220] If SGA were to pass, she would no longer receive this income. She has not been employed in the workforce since she had SGA when she left her job as television producer.[221]

[228] The respondent submitted that if SGA were to pass then the asset base of the applicant, after receiving 50% of the estate of SGA (in conjunction with her own assets), would be in the vicinity of $2,000,000.00. Accordingly, the respondent submitted that in such circumstances there is no conceivable argument that she could be dependent on SGA or that she could not purchase her own suitable residence if she chose to do so.[222]

[229] The respondent submits that if SGA was to pass in the near future, the applicant would not be financially dependent.[223]

[230] I note that there is no evidence that SGA will pass in the near future, or imminently.

[231] I am satisfied that SGA would want to ensure that her mother, who has been her primary carer, has some financial security. SGA's will would also acknowledge the lifetime care provided by her mother with a greater proportion of her assets.

[232] If SGA did have testamentary capacity, it would be relevant to her consideration of how to dispose of assets that her primary carer since birth has been her mother. In all of the circumstances, I am satisfied that SGA would want to provide more for her mother in her will.

[233] However, I am not satisfied that it would be to the extent as proposed by the applicant. SGA would not want to diminish her father's involvement in her life by a token acknowledgement in her will as the applicant's initial proposed will did.

[234] In all of the circumstances, a 65/35 distribution in favour of the application would acknowledge the significant sacrifices her mother has made in ensuring SGA's

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219 Supplementary written submissions of the respondent received 21 March 2019, p 14, para 32.
220 Affidavit of MZY filed 25 September 2018, p 13, para 81.
221 Affidavit of MZY filed 25 September 2018, p 12, para 75 to 77. The applicant also receives a carer's pension and has other supplementary income, see transcript of the hearing on 14 March 2019, p 60.
222 Supplementary written submissions of the respondent received 21 March 2019, p 14, para 32.
223 Transcript of hearing on 14 March 2019, p 137, line 8 to 9.

care and also allow her will to (maybe) ensure her mother's financial security (depending on when she passes).

[235] On present valuation, a 65/35 distribution of the residual estate, combined with the house and contents, would see the applicant receiving 72.95% of the total asset pool.

[236] I am satisfied that a 65/35 distribution of the residuary estate in favour of the applicant, whilst significant, is appropriate in the circumstances.

If either party passes before the other

[237] The applicant's amended proposed will provides the gift over to the other parent if either the applicant or respondent do not survive the other as the same, i.e. to the other in equal shares.

[238] If either party passes before the other, then the surviving parent and SGA's siblings would each receive 33% of the deceased party's share of SGA's estate.

[239] The respondent submitted that there is no evidence before the Court as to the financial position of SGA's siblings.[224]

[240] The respondent submitted that SGA, hypothetically, would be aware that it is probable that her siblings would be provided for by her respective parents in their wills.[225]

[241] SGA has no control over what the applicant or respondent may bequeath in their wills; if she had testamentary capacity she can control what is in her will.

[242] I am satisfied SGA would want to specifically recognise her siblings in her will to ensure her siblings received a proportion of her estate if either of her parents died before the other.

[243] However, her parents should receive the lion's share of that proportion.

[244] Accordingly, the gift over if either the applicant or respondent do not survive the other should be divided in the following way:

a. 50% of the residual proportion to the surviving parent; and
b. 25% of the residual proportion to each of her siblings.

Superannuation

[245] As a large part of SGA's assets have been invested in superannuation, the applicant sought orders:

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224 Supplementary written submissions of the respondent received 21 March 2019, p 6, para 7E.
225 Supplementary written submissions of the respondent received 21 March 2019, p 17, para 39(j).

a. that she can sign a binding death benefit nomination in favour of SGA's estate, for any superannuation fund that is held by SGA; and
b. that the trustee of any such fund is to accept such binding death benefit nomination, provided it is otherwise valid.[226]

[246] Perpetual, who is the trustee of SGA's fund, has been served with this application and material and has advised it does not intend to appear.[227] The Court can infer it has no objection to the terms of the orders in relation to the superannuation.

[247] The respondent made no submissions opposing the orders.

[248] Such orders have been made in similar circumstances by Mullins J on 19 December 2017 in *Hartman v Nicotra* (unreported),[228] and Boddice J on 8 December 2016 in *Schafferius v Piper* (unreported).[229] There are no published reasons in either case.

[249] I find it appropriate to make the orders, as the majority of the assets are in superannuation, and without the direction the superannuation trustee might be in some doubt as to where the benefit of the superannuation is to fall.

Costs

[250] Section 21(5) of the Act provides:

> "(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".

[251] The applicants submit that this is clearly an appropriate case for the applicant's costs to be ordered to be paid out of SGA's assets.[230]

[252] However, I note the comments by Applegarth J in *Re APB, ex parte Sheehy* [2017] QSC 201:

> "As for costs, it may assist if I make some preliminary observations. It may be possible to state some general principles, such 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

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226 Supplementary written submissions of the applicant received 21 March 2019, p 27, para 107.
227 Affidavit of Jody Pezet (applicant's solicitor) filed 17 December 2018, p 2, para 6; exhibit JLP-4, p 7 to 8.
228 *Hartman v Nicotra* (unreported BS 11925 of 2017, Mullins J, 19 December 2017).
229 *Schafferius v Piper* (unreported BS 12145 of 2016, Boddice J, 8 December 2016).
230 Supplementary written submissions of the applicant received 21 March 2019, p 28, para 111.

> 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 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 than an offer in ordinary litigation."[231]

[253] The applicant submitted that the respondent should not obtain his costs out of SGA's assets, in light of his conduct in the proceedings,[232] which the applicant says is typified by the respondent's affidavit sworn 11 March 2019 (and filed by leave). The applicant says that the respondent has:

a. given irrelevant evidence;
b. given scandalous opinions (that his daughter's safety would be in danger if the applicant obtained a statutory will of the type she sought), unsupported by any objective or independent evidence;
c. criticised the applicant's conduct in relation to contact matters when a QCAT order was in place which he had sought, and he retained the ability to seek further orders should he require it;
d. criticised the applicant's conduct in relation to financial matters when she is not the financial manager;
e. required the matter to be set down before a hearing and cross-examined witnesses when ordinarily cases of this sort are dealt with in Applications Court; and
f. cross-examined on matters largely irrelevant to the efficient disposition of the application.

[254] The respondent submitted that the applicant initially sought approximately 92.25% of the estate in circumstances where she attempted to portray the respondent in an extremely negative light, and that the respondent could not have consented to any type of order in those circumstances and where he would be asked to accept that which the applicant contended.[233] In this respect, I note the comments of the Court of Appeal in *GAU v GAV* [2014] QCA 308 where the full Court commented "*in view of the order made and reasons given below, the respondent was justified in actively defending this appeal.*"[234]

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231 *Re APB, ex parte Sheehy* [2017] QSC 201 para 342.
232 Supplementary written submissions of the applicant received 21 March 2019, p 28 to 29.
233 Supplementary written submissions of the respondent received 21 March 2019, p 21, para 47 to 48.
234 *GAU v GAV* [2014] QCA 308, para 67.

[255] Overall, I am satisfied there is a good case for the parties having their costs paid out of SGA's assets because of the diverse interests which needed to be actively represented.[235]

[256] In these circumstances, I am satisfied that both the applicant, and the respondent's, costs of the proceeding should be paid out of the assets of SGA on the usual basis in estate matters, i.e. on the indemnity basis.

Non-identification

[257] A non-identification order is commonly made in these cases: *SPM v LWA* [2013] QSC 138 per Henry J; *Re: JT* [2014] QSC 163, [41] per A Lyons J; *RKC v JNS* [2014] QSC 313 per Philippides J. It should be made here for the reasons there discussed.

Order

[258] I make the following orders:

1. Leave is granted to the applicant pursuant to s 22 of the *Succession Act* 1981 (Qld) to apply for an order authorising a will to be made on behalf of SGA.
2. Pursuant to s 21 of the *Succession Act* 1981 (Qld) a will be made for SGA in the terms stated by the Court in a form of will to be submitted by the applicant.
3. Perpetual Trustee Company Limited ACN 000 001 008 be appointed as the executor of the estate in the will which is made for SGA in accordance with s 21 of the *Succession Act* 1981 (Qld).
4. The applicant draft a form of will in accordance with these reasons, provide a copy of the draft will to the respondent to the application, and submit the same within five days of the date of this order 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 *Succession Act* 1981 (Qld).
5. Liberty to apply as to the form of the will submitted in accordance with paragraph 2 prior to the execution of the will.
6. The applicant has authority to sign a binding death benefit nomination in favour of SGA's estate, for any superannuation fund that is held by SGA.
7. The trustee of any such superannuation fund is to accept the binding death benefit nomination signed by the applicant on behalf of SGA, provided it is otherwise valid.
8. The applicant's costs of the proceeding be assessed on the indemnity basis and be paid out of the assets of SGA.
9. The respondent's costs of the proceeding be assessed on the indemnity basis and be paid out of the assets of SGA.

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235 *Re APB, ex parte Sheehy* [2017] QSC 201 para 343 to 344.

10. 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 public, be in an anonymised form.