SUPREME COURT OF QUEENSLAND

CITATION:	*Re Keane; Mace v Malone* [2011] QSC 49
PARTIES:	**JOSEPHINE ANGELA MACE** (applicant) **v** **KIERAN MALONE** (respondent)
FILE NO:	13088 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	25 March 2011
DELIVERED AT:	Brisbane
HEARING DATE:	25 January and 2 February 2011
JUDGE:	Daubney J
ORDER:	**1. The application is dismissed.** **2. I will hear the parties as to costs.**
CATCHWORDS:	SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MAKING OF A WILL – TESTAMENTARY CAPACITY – IN GENERAL – where an application made under s 22 *Succession Act* 1981 (Qld) for leave to apply for an order under s 21 Succession Act 1981 (Qld) – where an application made for an order under the *Succession Act* 1981 (Qld) authorising a will in certain terms be made – where the testator does not have testamentary capacity – where the testator has an existing will. *Succession Act* 1981 (Qld), ss 21, 22, 23, 24, 25 *Mental Capacity Act* 2005 (UK) *Mental Health Act* 1959 (UK), s 102(1)(c) *Succession Act* 2006 (NSW), s 22 *Wills Act* 1936 (SA), s 7(3)(b) *Wills Act* 1997 (Vic), s 26 *Boulton v Sanders* (2004) 9 VR 495, considered *Deecke v Deecke* [2009] QSC 65, considered *Hoffmann v Waters* (2007) 98 SASR 500, considered *C (a patient), Re* [1991] 3 All ER 866, considered *D(J), Re* [1982] Ch 237, considered *Re Fenwick* [2009] 76 NSWLR 22, considered

COUNSEL:	R Peterson for the applicant R Treston for the respondent
SOLICITORS:	McInnes Wilson Lawyers for the applicant Gleeson Lawyers for the respondent

[1] Josephine Angela Mace has applied for:

(a) leave, pursuant to s 22 of the *Succession Act* 1981, to apply for an order under s 21, and

(b) an order under s 21 authorising a will in certain terms be made on behalf of Patrick Milo Keane.

[2] During the hearing, the convention was adopted of referring to family members by their given names, for ease of identification, it is convenient for me to do the same in this judgment.

[3] Josephine is one of Patrick's sisters. It was not in issue before me, and indeed it was clear on the evidence, that Patrick is a person without testamentary capacity. Patrick is 91 years old, is physically and mentally infirm, and is cared for in a nursing home.

[4] Patrick has an existing will, dated 19 September 2000 ("the 2000 will"). Josephine, however, seeks the making of a new will which will completely change Patrick's testamentary dispositions. She says, in effect, that this is what Patrick would do if he were capable, in light of events which have occurred within his wider family since he made the 2000 will.

[5] The application is opposed by those family members who would lose an interest in Patrick's estate if the proposed new will is made.

Patrick's family history

[6] Patrick, who was born in 1919, is the eldest in a sibship of eight. Josephine is his youngest sister.

[7] Josephine has three children – Leon, Wendy and Darren.

[8] Patrick had a younger sister, Mary Malone, who was about two years younger than him. Mary, who is since deceased, had seven children – Maree McColl, Lurlene Begley, Leone Kenny, Kieran Malone, Brendan Malone, Terrence Malone and Rita Dow. Kieran has had effective carriage of the opposition to Josephine's application, and swore the principal affidavits filed for that purpose before me.

[9] Patrick never married and has no children.

[10] It is undisputed on the material that for much of his life Patrick lived in close proximity to, or with, Mary. The affidavit material filed by the competing family members contains contest about matters such as the degree to which Mary and her husband were assisted by Mary's father when they purchased a dairy farm in Hursley Road, Toowoomba in 1955. It is clear, however, that Mary and her family

operated a farm in Toowoomba (including on a further property in Hursley Road acquired in the mid-1960s) until 1976.

[11] During that time, Patrick for many years had his own dairy farm at Linthorpe, about 30 kilometres away from Mary's Hursley Road property. He visited Mary and her family frequently, and ate with them two or three times a week. In 1971, Patrick vacated the Linthorpe farm to enable his brother Vince and Vince's family to live there. Patrick moved in with Mary and her family at Hursley Road for some months.

[12] At about the same time in 1971, Mary leased a property at Charlton (outside Toowoomba) on which she started a dairy farm. This farm was three or four kilometres from the Hursley Road farm. The operations on the Charlton farm were Mary's own endeavour. The uncontradicted evidence is that in about 1971 Patrick and Mary's daughter Leone moved into the Charlton farm and began to work it in what was described to me as an "informal partnership" with Mary. Patrick did not have any proprietary interest in the Charlton farm, and travelled each day to work on his own farm at Linthorpe.

[13] In 1964, Patrick had purchased a property in the Linthorpe area from Robert Hohn. This property was landlocked, and had no road access. In order to gain access to what was described as the "Hohn block", Patrick had to traverse another property situated at 95 Kenny Road owned by Reg Spratt. Kieran deposed to the fact that Patrick expressed concerns that if Reg Spratt sold his property, the new owner might not continue to allow Patrick to drive through it in order to access the "Hohn block".

[14] In 1975, Patrick, Mary and Leone purchased the property at 95 Kenny Road from Reg Spratt. Kieran described this in his affidavit as a "strategic purchase" for Mary and Patrick because it allowed access to the landlocked block.

[15] At about the same time, Mary surrendered the lease on the Charlton farm, and Patrick and Leone moved to the 95 Kenny Road property. Mary transferred the dairy licence which she held from the Charlton farm to the 95 Kenny Road property. She also moved her farm machinery to the 95 Kenny Road property, including a tractor, a combine planter, harrows, sundercut and other machinery. It was not in issue before me that, from this time on, Patrick and Mary operated in business together in partnership. The following statement in Kieran's principal affidavit was not contradicted:

> "The partnership between [Mary] and [Patrick] was not just a financial or business arrangement however, but was a loving relationship between two siblings which continued for the next 30 odd years until about 2004 when Uncle Pat started to develop dementia."

[16] In 1979, Mary moved to the 95 Kenny Road property, and lived there with Patrick and Leone until 1986.

[17] On 30 April 1981 Patrick executed a statutory declaration (presumably for tax purposes), describing himself as a joint tenant in a one undivided one-third share with Mary and Leone of the 95 Kenny Road property, and acknowledged that Mary and Leone had effected improvements to that property to the value of $60,000.

[18] Mary and her husband sold the Hursley Road property to a developer in about 1986 for $1,000,000. Mary received some $900,000 of that, with her husband receiving the balance. Kieran deposes that, over the years, Mary used that money to purchase land and do subdivisions and improvements on the Linthorpe properties. After the Hursley Road property was sold, Mary's husband (who had been living either on the Hursley Road property or, occasionally, in Ireland) moved into the 95 Kenny Road property with Mary, Patrick and Leone. Mary's husband died in 1992 leaving, amongst other things, a house in Dublin to his children. The children agreed to pass that house to Mary. Mary sold the Dublin house, and used the proceeds to develop and maintain the 95 Kenny Road property and other properties that she and Patrick had acquired around the Linthorpe area. Patrick and Mary continued to live in the property at 95 Kenny Road.

[19] Over the ensuing years, Patrick and Mary continued to work together in a business sense, while sharing the home at the 95 Kenny Road property. There were also, it seems, a number of rearrangements of property holdings between them. According to Kieran (whose evidence on this point was uncontradicted), when Patrick made the 2000 will he had the following property interests:

(a) Lot 167 on AG 85 County of Aubigny Parish of Motley ("16 Paddy's Lane") – registered in Patrick's name. In 2001, Patrick transferred a half interest in this property to Mary, and they thereafter held it as joint tenants;

(b) Lot 2 on RP 228004 ("Lot 2") – registered in Patrick's name. In November 2000, Patrick transferred a half interest in this property to Mary, and they thereafter held it as joint tenants;

(c) Lot 21 on Plan A342701 ("Lot 21") – registered in Patrick's name. In July 2001, Patrick transferred a half interest to Mary and thereafter they held it as joint tenants;

(d) Lot 128 on AG 1122 ("Lot 128") – registered in Patrick's name, but in December 2000 Patrick transferred a half share (registered in December 2001) to Mary and thereafter they held it as joint tenants;

(e) Lot 20 on CPA 342701 ("Lot 20"), Lot 110 on CPAG 3 ("Lot 110") and Lot 211 on CPAC 42593 ("Lot 211")– held by Patrick, Mary and Leone as tenants in common in one third shares. In 2001, Patrick instructed Bernays Solicitors that he wished his one third share to be held by him as a joint tenant with Mary; this transfer was effected in October 2001.

[20] At the time of making the 2000 will, Patrick did not have a registered interest in the 95 Kenny Road properties. He and Leone had transferred their interests in those properties to Mary many years previously.

[21] There are some differences in recollections between family members on details of the circumstances under which particular pieces of property were acquired or disposed of over the years. Nothing turns on these differences. It is quite clear on the material that Mary was an astute and canny businesswoman. It is also quite clear that for many years she and Patrick collaborated in business and in the acquisition of properties.

[22] In his principal affidavit, Kieran refers to the fact that in January 2000 the marriage of his brother Terrence failed, and Terrence returned to live with Mary and Patrick at 95 Kenny Road. Terrence lived there "on and off until about May 2001". Kieran then deposed to the following:

> "59. Mum and Uncle Pat stayed living at 95 Kenny Road until my mother's death in October 2007. At that time she was aged 86 and he was 88.
>
> 60. It was not until late 2003 that I first noticed any deterioration in Uncle Pat's mental state. To begin with he would simply forget what was happening when, for example, he was playing cards. Gradually however he needed more and more care. My mother and my sister Leone were the only persons providing that care.
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> 61. At the time that Uncle Pat started to deteriorate in late 2003 and early 2004 he had been living with my mother and our family in one way or another since 1971.
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> 62. From about 2005 Uncle Pat's condition meant that he needed to be cared for on a full time basis. For example, he became incontinent and was totally dependent upon my mother's care for all his needs. She would often have to clean him after he had soiled himself. She would provide all meals, do the shopping, do his laundry, help him with bathing, shaving and toileting etc.
>
> 63. Even though dealing with Uncle Pat was a handful, my mother would not hear of putting him into a nursing home. She loved him very much and she said that he needed to be cared for in familiar surroundings. This constant care was a struggle for my mother, especially at the age of 86. My mother continued to care for Uncle Pat up until shortly before her death when she eventually became too ill."

[23] A number of the matters deposed to by Kieran were disputed by Josephine and another of Patrick's sisters, Joan. Joan said that she had observed a decline in Patrick's memory from the mid-1990s. That may well be, but nothing turns on that fact. In an affidavit in reply, Josephine stated that Mary had told her that Mary did not want to put Patrick in a nursing home because "everyone would come to know your business". Josephine said that Mary often complained about having to look after Patrick, that Josephine offered to help look after him, but Mary would not have anyone help her. There was, however, no challenge to Kieran's deposition as to the nature and extent of the care which Mary, who was herself well into her 80s, provided to her brother Patrick.

[24] The various family members who have sworn affidavits have descended into varying degrees of detail as to the closeness (or otherwise) of the relationships which they enjoyed with Patrick. Given the nature of this application, it is unsurprising that those in Josephine's camp, including Josephine, would seek to portray themselves as having enjoyed a close and loving relationship with Patrick over many years. The same can be said in respect of the material filed on behalf of the respondent. It is unnecessary for present purposes for me to descend into the detail of the family baptisms, weddings and other events in the extended family within which Patrick was claimed to have played an important role. I am quite

prepared to find that Patrick regarded all of the members of his extended family with affection and undoubtedly did contribute to their personal lives in many and varied ways. The fact that he was an affectionate brother and uncle is not, however, determinative of the present application.

[25] In late 2006 and 2007 Mary engaged in transactions concerning the properties in which she was a joint tenant with Patrick. Josephine places particular reliance on these transactions for the present application. The circumstances of those transactions were not contested before me, and were described in the findings of the Guardianship and Administration Tribunal ("the Tribunal") in hearings which were subsequently conducted in respect of Patrick's affairs. It is relevant to note that, for the purpose of effecting the transactions, Mary held an enduring power of attorney from Patrick, which had been signed when he executed the 2000 will.

[26] In summary, the transactions were as follows:

(a) In December 2006, Mary sold the 16 Paddy's Lane property and applied the net proceeds of some $250,000 first in discharge of a mortgage in her name over another property and the balance was paid to a private account in her name. None of the proceeds of sale were paid to Patrick;

(b) On 9 July 2007, Mary executed a transfer which severed her joint tenancy with Patrick of Lot 2, Lot 21 and Lot 128, leaving her and Patrick as tenants in common in equal shares of these properties. The solicitor who acted for Mary in respect of the severance of the joint tenancies provided a statement to the Tribunal in which he confirmed that the question of severance of joint tenancies arose in the course of Mary consulting with him about preparation of a new will. He said:

> "It was during those discussions that I recommended a search be undertaken to determine what, if any, land titles were held as joint tenants as those joint tenancies would not ordinarily form part of Mrs Malone's estate under her Will. Title Searches were undertaken. Upon discovering the fact that some properties were held as joint tenancies, Mrs Malone wanted to ensure that she was able to include some (not all) of her land interests in her Will and accordingly the lots referred to in the Transfer documents were to be dealt with in order to sever the joint tenancy. During this discussion, Mrs Malone's daughter [presumably Leone] was present.
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> Instructions were received from Mrs Malone to prepare the property transfer.
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> Nobody represented Mr Keane's interest in the property transfer as Mrs Malone had an individual right to sever the joint tenancy pursuant to section 59 of the *Land Title Act* with or without the joint tenant owner (namely Mr Keane) knowing or consenting.
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> Whether or not Mr Keane had the ability to understand or otherwise, Mrs Malone had the right to sever the joint tenancies. We [i.e. the solicitors] do not agree that has changed ownership rights except to the extent that the way in which the property is held has been altered. Mr Keane's half share interest has been maintained."

(c) On 10 August 2007, Mary entered into a contract to sell Lot 2 and Lot 21 to Leone for $320,000. As matters unfolded, this contract never settled. On any view, however, this contract would have been very beneficial to Leone, as the nominated sale price was well below the properties' market value.

[27] It seems that Mary, at this time, hid from her family (perhaps with the exception of Leone) the fact that she was critically ill with cancer. Josephine says that in August 2007 Mary asked her to come and stay at the 95 Kenny Road property to look after Patrick while Mary went to America with Leone, who, Mary said, was to have a throat operation. Josephine moved into the property. It also seems that it was anticipated that Mary and Leone would only be away for a relatively short trip. Mary left some cash for Josephine for food and supplies. (Josephine says she left $800; Kieran disputes this and says he recalls Mary speaking of leaving $2,200 for Josephine. In any event, Josephine was not required to pay for the phone or utilities at the property and had the use of a motor vehicle at the property.)

[28] In truth, however, the purpose of the trip was for Mary to have medical treatment. Mary communicated little with her family while she was in the United States. Josephine says that in one discussion she did have with Mary at this time, Mary told her that she had put $150,000 from the sale of "Patrick's old homestead" in trust with her solicitors. Josephine subsequently checked with those solicitors, and ascertained that they did not keep money on trust in that manner.

[29] Mary died in hospital in the United States on 7 October 2007. Under the terms of the enduring power of attorney he had executed in 2000, Leone thereupon became Patrick's attorney.

[30] Josephine says that after Mary's death, Leone told her that when she returned from the United States "she was going to finish up everything and get the lot, she was talking about selling properties".

[31] Leone had withdrawn some $70,000 from Mary's bank account (although, in fairness, one can anticipate that significant sums would have been required to pay Mary's medical bills). Before leaving for the United States, Mary had changed her will to leave Leone as the principal beneficiary who would receive 90 per cent of Mary's estate.

[32] Josephine consulted initially with the Public Trustee and then, it seems, made application to the Adult Guardian in respect of Patrick's affairs. In October 2007 the Adult Guardian suspended the power of attorney which Leone held and then applied to the Tribunal for orders that the Adult Guardian be appointed as Patrick's guardian and the Public Trustee as his administrator.

[33] On 12 December 2007, the Tribunal made orders:

(a) revoking the enduring power of attorney;

(b) appointing Kieran and Brendan as Patrick's guardians, and

(c) appointing the Public Trustee as Patrick's administrator for financial matters.

[34] By this time, the wider family had effectively split into two camps – Josephine's and Kieran's, with Patrick in the middle.

[35] Since Mary's departure for the United Stated in August 2007, Patrick has had various care regimes:

(a) From August 2007 until February 2008, Patrick was cared for by Josephine at 95 Kenny Road;

(b) Between mid-February and the end of May 2008, Patrick was cared for by Kieran and his wife;

(c) In late May 2008, Patrick went back under the care of Josephine for some three or four weeks until he fell and broke his hip;

(d) When he broke his hip, Patrick was taken to hospital, where he remained until he was transferred to a nursing home in July 2008. Patrick has remained in that nursing home.

[36] Behind those care regimes, however, the members of the wider family were engaged in numerous applications before the Tribunal and in the courts.

[37] I have already referred to the proceedings in the Tribunal under which, on 12 December 2007, Kieran and Brendan were appointed as Patrick's guardians. This appointment was, however, short-lived. The curial dealings which ensued were summarised in the reasons of the Tribunal subsequently delivered on 15 April 2008:

> "[5] The appointments of the nephews as guardians was for a period of 12 months. Almost immediately after the Tribunal hearing, the Tribunal received an application to stay the Tribunal's decisions. This Stay application was subsequently withdrawn. An application was made the day after the Tribunal hearing to the Supreme Court, seeking an appeal against the decisions of the Tribunal. This appeal did proceed.
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> [6] From 5 February 2008 to 22 February 2008, the Tribunal received five further applications to review the appointments made on 12 December 2007. ...
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> [The Tribunal here set out the numerous applications which had been made]
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> [7] These applications were essentially requesting a review of the appointments of both the guardians and the administrator. These applications were subsequently clarified at the hearing and will be discussed later.
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> [8] The applications were brought because the various applicants considered that the appointed guardians were not acting appropriately and they sought alternative guardians. Concern had been expressed in the applications regarding a lack of consultation with family members regarding accommodation decisions, ongoing family conflict, a lack of co-operation between the guardians and others, decisions not being made in a timely fashion and a lack of availability of the guardians. All applications were heard together in Brisbane on 27 February 2008."

[38] Moreover, in December 2007, only days after the Tribunal's decision, Josephine filed in the Magistrates Court in Toowoomba for a domestic violence order against Kieran. On about the same day, Joan (who is in Josephine's camp) filed for similar orders against Brendan and Rita. Joan did not pursue this relief against those parties. Josephine's application against Kieran, however, came before the Magistrates Court on several occasions until she purported to withdraw it in April 2008. On 26 June 2008, Magistrate Carroll heard an application by Kieran for costs in respect of Josephine's application. He awarded costs against her, finding that her application was "groundless and brought for an improper purpose, namely to thwart the purposes of the Order of the Tribunal".

[39] As I have already mentioned, the question of Kieran and Brendan's guardianship was also back before the Tribunal in early 2008. In its reasons given on 15 April 2008, the Tribunal said:

> "[64] The Tribunal must answer the question, are the current guardians, Brendan and Kieran Malone competent to remain guardians or is another person more appropriate?
>
> [65] The Tribunal accepts that the taking of Domestic Violence Orders against the current guardians was a precipitous step of Mr Keane's sisters, and in all the circumstances would hardly appear to have been justified. There can be no doubt that this action was clearly designed to thwart the decision making processes for the guardians. The Adult Guardian in her evidence noted that [Josephine] had sidestepped the Adult Guardian when the Adult Guardian was guardian under the Interim Order and had made decisions on her own.
>
> [66] The Tribunal is of the view that [Josephine] does not want any interference in the arrangements concerning [Patrick]. The Tribunal is of the view that she has never accepted an alternative decision-maker for [Patrick], and has had great difficulty in separating the role of a guardian from the role of a carer.
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> [67] That said, the Tribunal does not consider that the current guardians, Kieran and Brendan Malone are altogether without fault. The Tribunal has heard, and this is confirmed in Ms Maddison's submission which accompanied the application for review on behalf of Joan Franks, that Kieran Malone did not provide [Patrick's] Medicare card to [Josephine] when requested, that he did not sign the necessary Centrelink papers for her carer's allowance when requested, and that he did not attempt to find any permanent accommodation for [Patrick] and his then carer [Josephine]. The Tribunal does not accept Kieran Malone's explanations as to why the first two requests were not complied with. It is incredulous that he could not make arrangements in a timely fashion to have these two matters attended to."

[40] The Tribunal then went on to make findings as to the inadequacy of care arrangements which had been, or were proposed to be, put in place for Patrick. The Tribunal said:

> "[75] The Tribunal considers that Kieran and Brendan Malone's approach to the majority of these matters and their response to criticism by

> other members of the family is somewhat disingenuous. As guardians they clearly have to bear some responsibility for the conflictual situation that has arisen with the family because of their actions and non actions as guardians."

[41] The Tribunal concluded that Kieran and Brendan should not remain as Patrick's guardians. It also rejected the appropriateness of other family members to act as Patrick's guardian, and appointed the Adult Guardian in that role for a period of three years.

[42] Additionally, on 4 April 2008, the Public Trustee as administrator of Patrick's affairs, issued proceedings in this Court against the administrator of Mary's estate. In essence, the proceedings claimed for a revesting of Patrick's interests in the estates which had been alienated by Mary and for Mary's estate to account for his share of the monies received on the sale of the 16 Paddy's Lane property. On 9 August 2010, that proceeding was settled on terms, amongst other things, that Mary's estate pay the Public Trustee as administrator for Patrick the sum of $177,481.25 (representing 50 per cent of the sale proceeds of 16 Paddy's Lane), that the contract entered into between Leone and Mary was conceded as invalid and was terminated and that title in Lot 2, Lot 21 and Lot 128 vest in, and be registered in the name of Patrick. On 17 August 2010, Martin J made orders sanctioning the settlement and the necessary consequential orders to give effect to the vesting of the real property. A further term of the settlement was that the Public Trustee, as Patrick's administrator, transfer Patrick's one third interest in Lot 20, Lot 211, Lot 110 and Lot 1 to Mary's estate. These were properties in which Patrick, Mary and Leone each had a one third interest, and in respect of which Patrick had transferred a joint half share of his one third to Mary in 2000.

[43] At the hearing before me, the parties contended that the net effect of this settlement was that Patrick's interests were now, in effect, as they had been prior to Mary commencing the process of disposition in 2007. I am not sure that this is completely accurate. Whilst Patrick's interest in the proceeds of sale of 16 Paddy's Lane has now been accounted for and there has been a revesting to him of his interest in a number of the properties, it appears that, as part of the settlement, he may have been divested of an interest in other properties. This was not litigated before me, however, and in any event I think it appropriate to proceed on the basis that the terms of the compromise reached were in Patrick's best interests for the purposes of preserving his estate. The parties before me were content to proceed on the basis that Patrick's estate now is, in value at least, effectively as it was before Mary's improper transactions.

The 2000 will and the proposed will

[44] Under the 2000 will, Patrick's estate is left as follows:

(a) A specific bequest of $2,000 to Josephine;

(b) A specific bequest of $2,000 to Joan;

(c) The residuary estate to pass to Mary, provided that if Mary predeceased Patrick then the residuary estate passes to Mary's children in equal shares.

[45] The will now propounded by Josephine is in quite different terms. Under that will:

(a) All of Patrick's estate would pass to Josephine and Joan, and

(b) None of Patrick's estate would pass, directly or indirectly, to any of Mary's children.

The present applications

[46] The present applications are made under the provisions of Part 2 Division 4 Subdivision 3 of the *Succession Act* 1991.

[47] Section 21(1)(a) relevantly provides that the Court may, on application, make an order authorising a will to be made, in the terms stated by the Court, on behalf of a person without testamentary capacity. By subsection 21(2), the Court may only make the order if the person lacks testamentary capacity, is alive when the order is made, and the Court has approved the proposed will.

[48] Section 22(1) provides that a person may apply for an order under s 21 only with the Court's leave. That leave may be given on conditions the Court considers appropriate. This requirement for leave acts as a safeguard to screen out baseless or unmeritorious applications.[1]

[49] Section 23 prescribes the information which must be given to the Court on an application for leave, unless otherwise directed, namely:

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

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1 *Hoffmann v Waters* (2007) 98 SASR 500 per Debelle J at [10], and the authorities there cited.

> (j) any evidence available to the applicant, or that can be discovered with reasonable diligence, of the circumstances of a person for whom provision might reasonably be expected to be made by a will by the person in relation to whom the order is sought;
>
> (k) any evidence available to the applicant, or that can be discovered with reasonable diligence, of any persons who might be entitled to claim on intestacy;
>
> (l) any other facts of which the applicant is aware that are relevant to the application."

[50] There was no issue that this information was provided in the material filed in this application.

[51] Section 24, then, sets out the matters on which the Court must be satisfied before giving leave:

> "A court may give leave under section 22 only if the court is satisfied of the following matters –
>
> (a) the applicant for leave is an appropriate person to make the application;
>
> (b) adequate steps have been taken to allow representation of all persons with a proper interest in the application, including persons who have reason to expect a gift or benefit from the estate of the person in relation to whom an order under section 21 is sought;
>
> (c) there are reasonable grounds for believing that the person does not have testamentary capacity;
>
> (d) the proposed will, 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;
>
> (e) it is or may be appropriate for an order to be made under section 21 in relation to the person."

[52] Section 25 provides that, on hearing the application for leave or for the order under s 21, the Court may have regard to any information given to the Court under s 23, may inform itself of any other matter in any way it considers appropriate, and is not bound by the rules of evidence.

[53] In respect of the matters identified in s 24, I should record that I am satisfied on the material before me that:

(a) Josephine is an appropriate person to make the application. The reference to her being an "appropriate person" is in no way a prejudgment of the merits of her application, but rather signifies acceptance of the fact that she has sufficient connection with Patrick and his affairs as to be a person who might appropriately bring an application concerning the disposition of his estate;

(b) adequate steps have been taken to allow representation of all persons with a proper interest in the application. All members of Patrick's family who have

an interest under the 2000 will, or could have an interest under the proposed will, were represented before me. Many family members have sworn affidavits in support of either Kieran's side or Josephine's side;

(c) there are reasonable grounds for believing that Patrick does not have testamentary capacity. This was not in issue, and was evident on the material before me.

[54] The central questions for determination in this application are whether I am satisfied both that the proposed will "is or may be a will" that Patrick would make if he were to have testamentary capacity and that it is or may be appropriate for an order to be made under s 21 in relation to Patrick.

[55] The history of the conferral on the courts of powers such as those contained in Subdivision 3 to make what have been described as "statutory wills" has been essayed in a number of judgments – I refer particularly to the judgments of Dodds-Streeton AJA (with whom Ormiston and Charles JJA agreed) in *Boulton v Sanders*[2] and the even more extensive historical analysis by Palmer J in *Re Fenwick*.[3] It is clear from that legislative history that the provisions now contained in Subdivision 3 had their immediate genesis in the enactment in 1959 of provisions in the *Mental Health Act* 1959 (UK) by which a judge was empowered, in effect, to make a will for a mentally incapacitated person "for making provision for other persons or purposes for whom or which the patient might be expected to provide if he were not mentally disordered" (s 102(1)(c)). Dodds-Streeton AJA made the following germane observations about this English legislation:[4]

> "Under the United Kingdom legislation leave to apply is not required. The court is not limited to authorising a proposed will which is presented to it. Rather, the court itself conducts a wide-ranging assessment of relevant factors and decides what provisions to insert in the will in accordance with the statutory purposes, including the benefit of the patient, his family, and making provision for persons and purposes for whom or which the patient might be expected to provide if he were not mentally disordered. Although the actual, and not a hypothetical patient, is to be considered 'the will is being made by the court and so by an impartial entity skilled in the law, rather than the actual patient, whose views while still of a sound disposing mind might be idiosyncratic and far from impartial'.

[56] In *Re D(J)*,[5] Sir Robert Megarry V-C set out, in the context of the English legislation, five considerations which the Court should have in mind when deciding what provisions to insert in the statutory will, saying:[6]

> "Though the statutory guidance is exiguous, it seems possible to state five principles or factors which should guide the court."

[57] In summary, those five principles were:

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2 (2004) 9 VR 495.
3 [2009] 76 NSWLR 22.
4 *Boulton v Sanders* (supra) at [22], omitting citations.
5 [1982] Ch 237.
6 At 242.

(a) It is to be assumed that the patient is having a brief lucid interval at the time when the will is made;

(b) During this assumed lucid interval the patient has a full knowledge of the past, and a full realisation that as soon as the will is executed he or she will relapse into the actual mental state that previously existed, with the prognosis as it actually is;

(c) It is the actual patient who has to be considered and not a hypothetical patient;

(d) During the hypothetical lucid interval, the patient is to be envisaged as being advised by competent solicitors;

(e) In all normal cases, the patient is to be envisaged as taking a broad brush to the claims on his bounty, rather than an accountant's pen.

[58] The approach propounded by Megarry V-C was not without difficulty in application. Palmer J in *Re Fenwick* has identified the degree of artificiality which attached to this approach, saying that the "high watermark of artificiality" was subsequently found in the judgment of Hoffmann J in *In Re C (a patient)*.[7] Adopting the propositions advanced by Megarry V-C, Hoffmann J considered that "the court must seek to make the will which the actual patient, acting reasonably, would have made if notionally restored to full mental capacity, memory and foresight".[8] The case before Hoffmann J concerned a 75 year old patient, who had been severely mentally handicapped since birth. She had never had, and never would have, testamentary capacity. She had lived in a mental hospital since the age of ten, and few, if any, of her family even knew of her existence. Apart from the staff of the hospital, the only person who had taken any interest in her was from a charitable organisation. By the time of the application to the court, the patient had inherited a substantial fortune and it was obvious that she would die intestate. The proposed will provided for a number of small legacies, including to the woman who had befriended the patient, for substantial legacies to charitable institutions concerned with the care of the mentally incapacitated, with the residue to pass to the patient's next of kin on intestacy.

[59] In his analysis of the reasoning of Hoffmann J, Palmer J in *Re Fenwick* said:[9]

> "[95] The artificiality of the substituted judgment approach in *In re C* – i.e. imputation of an actual dispositive intention to a person who was never able to form any intention at all – is demonstrated in the following passage [of the judgment of Hoffman J] at 870(h) – 871(a):
>
> *I think that she would have recognised that although none of her family had ever been to see her, this was not on account of any lack of feeling on their part. None of them appear to have known of her existence. Taking her family as a whole, therefore, I think that she*

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7 [1991] 3 All ER 866.

8 At {32].

9 At [95] and [96].

> *would have wished to distribute her estate equally between them and the community.*
>
> *The recognition of the claims of the community would in my view have taken the form of gifts to mental health charities. I feel confident that a person in Miss C's position would have wished to benefit other people who had suffered from mental illness rather than wider or different charitable purposes. I am less confident about the particular choice which she would have made, but on the principle that people tend to prefer local and familiar causes to those which are more general and remote, I think that she would have wished primarily to benefit mentally handicapped at the hospital or within the area which the hospital serves.*
>
> [96] The reference to a "*person in Miss C's position*" indicates that what is, in reality, being sought is not an imputed actual intention of the patient but what a person – doubtless a reasonable person – in her position would do."

[60] The law in the United Kingdom concerning statutory wills continued to develop in ways which departed from, or at least paid little regard to, the "substituted judgment" approach. A "best interests" approach was adopted, and then enshrined in the *Mental Capacity Act* 2005 (UK). Palmer J concluded his historical review in *Re Fenwick* by observing:[10]

> "[108] It will be seen that, in its eighty year evolution from s 171(1) of the *Law of Property Act* 1925, the law in the United Kingdom relating to statutory wills has travelled a full circle. After a shaky start in *In Re Freeman*, the objective approach was established in *In Re Greene*. Some fifty years later, *Re D(J)* re-established the highly artificial "substituted judgment" approach of the old lunacy cases. By 2005 courts, while paying lip service to the "substituted judgment" approach, were taking the realistic and pragmatic approach that whether a statutory will should be ordered was to be determined having regard to the best interests of the patient, ascertained objectively, and to the wishes of the patient, if known. That approach is now enshrined in legislation.
>
> [109] In Australia, however, the statutory will concept was adopted before it had completed its evolutionary cycle in the United Kingdom."

[61] The question of the appropriate approach to be adopted in applying statutory will provisions in Australia has been considered on several occasions in the courts of other States. As Mullins J observed in *Deecke v Deecke*,[11] however, in considering authorities from other jurisdictions it is necessary to be aware of the differences in legislation.

[62] In Queensland, the relevant criterion under s 24(d) is whether "the proposed will ... is or may be a will ... that the person would make if the person were to have testamentary capacity."

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10 At [108] – [109].

11 [2009] QSC 65 at [26].

[63] In Victoria, the relevant provision of the *Wills Act* 1997 (Vic) is s 26, as cited in *Boulton v Sanders*[12] which proscribes the grant of leave unless, inter alia, the Court is satisfied that:

> " ...
>
> (b) the proposed will or revocation accurately reflects the likely intentions of the person, if he or she had testamentary capacity; and
>
> (c) it is reasonable in all the circumstances for the Court, by order, to authorise the making of the will or the revocation of the will for the person."

[64] I note, in passing, that s 26(b) of the Victorian legislation was amended in 2007 such that the relevant test there now is whether "the proposed will or revocation reflects what the intentions of the person would be likely to be, or what the intentions of the person might reasonably be expected to be, if he or she had testamentary capacity".

[65] In *Boulton v Sanders* (supra) Dodds-Streeton AJA emphasised the important difference between the United Kingdom legislation and the legislation then in force in Victoria by the inclusion in the Victorian statute of the requirement that the proposed will accurately reflect the testator's "likely intentions".[13] Her Honour made observations on the variety of factors to which regard may be had under the United Kingdom legislation, but highlighted the centrality under the Victorian legislation of the requirement of likelihood. She said:[14]

> "Under the Victorian legislation, the legislative insistence on an accurate reflection of the likely intentions of the testator precludes the authorisation of a will which no more probably reflects the likely intentions than any number of other possible wills, although it may accord with an assumed desire to avoid intestacy."

[66] Dodds-Streeton AJA continued:[15]

> "[111] While not excluding flexibility in matters of "detail", s 26(b) requires satisfaction on the balance of probabilities that the proposed will accurately reflects the testator's likely intentions. The question is not whether the testator would probably have preferred the proposed will to intestacy; nor whether the proposed will is one of a number of possible proposed wills, all of which might be equally likely to reflect the testator's likely intentions. If the proposed will no more probably reflects "likely intentions" than a number of other possible dispositions, in my view the requirements of s 26(b) will not be satisfied.
>
> [112] Section 26(b) does not demand certainty, but probability. However, as Mandie J [in *State Trustees Ltd v Hayden* [2002] VSC 98] recognised, the requirement of *accurate* reflection

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12 At [15].
13 At [17].
14 At [110].
15 At [111] – [112].

> demands a substantial degree of precision and exactitude about the "likely intentions"."

[67] The Queensland legislation is in quite different terms from the Victorian legislation considered by Dodds-Streeton AJA in *Boulton v Sanders*. Section 24(d) does not, in terms, invoke a test which involves ascertainment of the "likely intentions of the testator".

[68] The South Australian legislation is relevantly similar to the Victorian legislation considered in *Boulton v Sanders*. Section 7(3)(b) of the *Wills Act* 1936 (SA) requires the Court to be satisfied that the proposed will would accurately reflect the likely intentions of the intended testator. In *Hoffmann v Waters*,[16] Debelle J took a relatively robust approach to the application of the legislation, notwithstanding the apparent differences between the South Australian provision and the previous United Kingdom legislation. His Honour said,[17] after referring to the judgment of Hoffmann J in *Re C* (supra):

> "Section 7 of the *Wills Act* does not include the expression "might have been expected to provide" as appears in the legislation in the United Kingdom. Notwithstanding the absence of that expression, it is manifestly clear that is an appropriate factor to consider. It is a factor which is directly relevant to the question whether the proposed will would accurately reflect the likely intention of the intended testator. I respectfully agree with Dodds-Streeton JA in *Boulton v Sanders* (at [54]) that care should be taken in applying the English decisions which are grounded on a different statutory provision. However, in many cases such as this, where the person who lacks testamentary capacity has never been able to comprehend what is involved in making a will, it will be especially difficult, if not quite realistic, for the court to be able to determine what his likely intentions are. In other cases, it might be less difficult to determine the likely intention of the person who lacks testamentary capacity. In *State Trustees Ltd v Hayden* (2002) 4 VR 229 Mandie J applied the principles in *Re D(J)* and in *Re C*. Each case will depend on its own facts and circumstances. In this present case, it is appropriate to apply the approach in England."

[69] In New South Wales, the relevant legislative criterion is expressed differently again. Section 22 of the *Succession Act* 2006 (NSW) relevantly provides that the Court must refuse an application for leave unless it is satisfied that:

> " ...
>
> (b) the proposed will, alteration or revocation is, or is reasonably likely to be, one that would have been made by the person if he or she had testamentary capacity, and
>
> (c) it is or may be appropriate for the order to be made, ..."

[70] The first occasion on which this provision came to be judicially considered was *Re Fenwick* (supra). Palmer J noted the difficulties associated with relying on overseas and interstate authorities concerning statutory wills, saying:[18]

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16 (2007) 98 SASR 500.

17 At [16].

18 At [148].

> "My somewhat elaborate review of the UK decisions and the Victorian cases will show, I hope, that in interpreting and applying s 22(b) of the New South Wales Act, this Court should not attempt to seek guidance from earlier authority. In interpreting s 22(b) this Court should start 'with a clean slate'; it must interpret the words of the section in the light of the problems and difficulties which the legislation seeks to remedy, bearing in mind that legislation of this kind should receive a benevolent construction ..."

[71] His Honour considered the meaning of the words "reasonably likely", noting that the phrase was apt to various meanings. He then considered the application of the "reasonably likely" test in different potential circumstances of application, namely:

- a "lost capacity case" where the incapacitated person is adult, has formed family and other personal relationships, has made a valid will before testamentary incapacity occurred, and is now said to have expressed some testamentary intention in relation to the circumstances sufficient to warrant an application for a statutory codicil or new will;

- a "nil capacity case", where the person was born with mental infirmity or lost testamentary capacity before ever being able to develop any notion of testamentary disposition;

- the "pre-emptive capacity case", where the incapacitated person is still a minor but has lost testamentary capacity at an age at which he or she had formed relationships and had, or could reasonably be expected to have had, a fairly good understanding of will-making, intestacy and their consequences.

[72] It is unnecessary for me, for present purposes, to descend into further analysis of the application by Palmer J of the "reasonably necessary" test in each of those postulated cases, and in variants thereof. The Queensland legislation simply does not have the "reasonable likelihood" criterion contained in the New South Wales legislation, and the principles enunciated by Palmer J for the application of that particular test in New South Wales are not, I think, applicable under the Queensland legislation.

[73] It seems to me that the appropriate approach under s 24(d) of the Queensland legislation ought be one which is informed by the five principles articulated by Megarry V-C in *In Re D(J)*. The patent differences between the terms of the Queensland legislation and the statutory provisions in New South Wales, Victoria and South Australia render it quite inappropriate to import the tests which have been applied in those other places. The legislation with which Megarry V-C was concerned called for consideration of what "the patient might be expected to provide if he were not mentally disordered". The Queensland legislation aligns closely with that by requiring consideration of whether "the proposed will ... is or may be a will ... that the person would make if the person were to have testamentary capacity". I would reject the submission that the exercise under the Queensland legislation requires an assessment of whether the proposed will would more accurately reflect the testator's likely intentions more probably than other possible dispositions. That may be the appropriate test under legislation in other States, but it is not the test under s 24(d).

[74] Accordingly, adapting the principles enunciated by Megarry V-C to the present case, the approach which I adopt in considering whether the proposed will is or may be one which Patrick would make if he were to have testamentary capacity is to approach the matter as follows:

(a) To assume that Patrick is having a brief lucid interval at this time;

(b) To assume that during this interval, Patrick has a full knowledge of the past, and a full realisation that, if an order is made, as soon as the proposed will is executed he will relapse into a state of permanent testamentary incapacity;

(c) To proceed on the basis that the person being considered is Patrick himself, and not a hypothetical patient;

(d) To assume that during this lucid interval, Patrick is being advised by competent solicitors;

(e) To assume that Patrick will take a broad brush approach, rather than an accountant's pen.

[75] The fundamental submission advanced on behalf of Josephine is that the conduct of Mary in misusing her power of attorney to divest Patrick of his proprietary interests in the properties, and to sell the 16 Paddy's Lane property without accounting to him for his share of the proceeds, was so egregious as to cause Patrick to completely change his testamentary dispositions. It will be recalled that the will propounded on behalf of Josephine is one which would see Mary's family completely cut out of Patrick's will, and for Josephine and Joan, who receive only small bequests under the 2000 will, to receive the bulk of Patrick's estate. Mr Peterson of counsel, who appeared for Josephine submitted:

> "The applicant's position is that the conduct of Mary Malone and her daughter Leone is so reprehensible and disgraceful that [Patrick] would make the proposed will, if he were to have testamentary capacity. The reasons for the severance of the tenancies are stark and compelling. It just was not done on advice. The clear evidence from her solicitor at the relevant time was that she wanted to benefit her daughter Leone to the exclusion of her other children by having the interest in land severed from the joint tenancies. This behaviour was clearly driven by self interest to the exclusion of Patrick and his material needs for his special care."

[76] A copy of an affidavit sworn by Mary's solicitor was put into evidence before me. That solicitor deposed to the following:

> "17. On the morning of 9 August 2007 Mary attended our offices at Bernays Lawyers in Ruthven Street, Toowoomba with her daughter Lee [presumably a reference to Leone] and Lee's young son. Our conference took place in our conference room. Initial discussions at that appointment were in relation to Mary wanting to review her will. This discussion also touched on the assets available in Mary's estate which then turned to a discussion in relation to joint tenancies of various blocks of land which Mary owned with her brother Pat. She then instructed me to search all of the titles of land which may be in her name. From my previous dealings with Mary I was aware that Bernays Lawyers may not have had custody of all certificates

of title with respect to Mary's landholdings. I was aware of this because of the previous difficulty mentioned earlier in this my affidavit with a certificate of title that could not be located. Accordingly I arranged for searches to be undertaken of all lots of land held in Mary's name. I also obtained Mary's previous will. I did this because I wanted to be certain that we could discuss all landholdings which were owned by Mary when I took instructions and to ensure that she was aware of her landholdings.

18. Mary said that she was going overseas and wanted to make sure that Lee was well looked after and that all of her affairs were in order.

19. I discussed Mary's current will with her in addition to the various property holdings.

20. Mary told me that her assets consisted predominantly of her interest in the various farming lands at Pittsworth, farming equipment and some cash assets. She told me that she did not own any shares and that she did not hold any interest in any superannuation fund.

21. Mary and I then reviewed the title search and her certificates of title. I told Mary that she and her brother, Patrick Keane, held a number of interests in land as joint tenants. Mary was uncertain what the effect of a joint tenancy was and I explained to her that, should she die before Mr Keane, then her interests in the land would pass to Mr Keane and would not form part of her estate.

22. I then discussed with Mary the difference between joint tenancy and tenancies in common. I explained to her that, with a tenancy in common, Mary's interest in the land would form part of her estate. Mary then understood the difference between these two forms of property holding.

23. She said that the property owned by her and Pat should never have been held as joint tenants and that this was a mistake. She said that she wished to ensure that at least some of her property would come into her estate in the event that she died before Mr Keane.

24. Mary also said that Pat had not contributed to any improvements or to the working of any of the lands throughout the time that they had owned them together. She said that she thought it unfair that Pat would stand to benefit from those improvements should she die before him. I recall that Mary also said that she wanted to be sure that there were enough assets in the estate to provide for Lee.

25. I then had a discussion with Mary regarding the possibility of severing the joint tenancies. I told her what steps would be required to be taken, including what documents would need to be drawn up and lodged with the Department of Natural Resources. Mary then said that the joint tenancy with respect to three particular lots would need to be severed so that it was held as tenants in common between herself and Mr Keane.

26. Mary then instructed me to prepare documentation to sever the joint tenancy and said that, with the landholdings changed to tenancies in common, she would have her estate effectively how she wanted it."

[77] Ms Treston of counsel, who appeared for Kieran, did not seek to condone Mary's actions, and quite properly conceded their impropriety. She did, however, point to the fact that Mary was terminally ill when she engaged in these transactions with Patrick's property, she was making preparation for her own demise, and she was acting on legal advice. It is, I think, clear that Mary understood that if she died before Patrick and her interests under the joint tenancies automatically passed to him, then under the terms of Patrick's 2000 will the properties would fall to be distributed equally among all of her children. It is quite clear from other parts of the solicitor's affidavit, in which he deposes to instructions taken from Mary about her own will, that a significant issue for Mary was to ensure that Leone received considerably more of Mary's estate than her other children. The solicitor recalled being told by Mary that "she was strongly of the view that [Leone] had contributed financially to the improvements on the land, had given her emotional support and physical support in running the property and had assisted greatly in looking after [Patrick], who was suffering from dementia and had been unwell for a number of years".

[78] Acting on the basis that, metaphorically speaking, I have a temporarily lucid Patrick sitting next to me as I write this judgment, Patrick would be aware of the following matters:

(a) Of Mary's failure to account for the proceeds of sale of the 16 Paddy's Lane property, of the severing of the three joint tenancies, and of the proposed sale of the other property to Leone (arguably at an under value);

(b) Of the circumstances of Mary's impending death which was the effective catalyst for those transactions;

(c) Of the fact that Mary's motivation was, in considerable part at least, to enable Leone to obtain a greater share of the estate than Mary's other children in recognition of Leone's significant personal and financial contributions over the years;

(d) Of the circumstances in which Mary died;

(e) Of the fact that, since her death, the improper transactions have effectively been undone, and that Mary's estate is liable to account to Patrick for his share of the proceeds of the sale of the 16 Paddy's Lane property.

[79] Patrick would also be receiving the advice of a competent solicitor. That advice would include the fact that, for all practical intents and purposes, Patrick's estate as at today is effectively as it was (in value, at least) before Mary's improper dealings.

[80] The case for Josephine is that, knowing of these matters, Patrick's response would be to disenfranchise Mary's family from claim on his estate as punishment for Mary's wrongdoing.

[81] I am far from satisfied that Patrick would adopt such a retributive approach. He would be aware of the long-standing history connecting him, Mary and Leone. He would be aware of the financial and practical circumstances, built up over many years, which led to him enjoying the benefit of a substantial estate which was intertwined with Mary's. He would understand Mary's desire to prefer Leone,

particularly given the assumption that he is receiving competent legal advice about the operation of his 2000 will and the way in which his estate will be distributed to all of Mary's children under that will.

[82] He would also know that neither Josephine nor Joan had in any way contributed to his estate. True it is that, apart from Leone, none of Mary's other children contributed to Patrick's estate. The result contended for by Josephine, however, would see Mary's side of the family completely excluded from having an interest in Patrick's estate. Given the extensive personal and financial history by which Patrick's estate and Mary's estate were so closely connected over so many years, I cannot accept that Patrick's response as at today's date, and knowing of the matters to which I have referred above, would be to exclude Mary's family from receiving the bulk of his estate.

[83] Patrick would also, of course, know of the unseemly internecine squabbling which has occurred between, principally, Josephine and Kieran since Mary's death in relation to Patrick's care. As is clear from the reasons of the Tribunal (quoted above), neither party has acted commendably in that regard. I do not consider, however, that the criticisms of Kieran's conduct would be regarded by Patrick as such as to warrant such a wholesale change to the terms of his will.

[84] Accordingly, I am not satisfied, on the particular facts of this case, that the will proposed by Josephine is or may be a will that Patrick would make if Patrick had testamentary capacity. As a corollary, I find that it is not appropriate for an order to be made under s 21 of the *Succession Act* 1981 in relation to Patrick.

[85] Accordingly, I am not satisfied that leave ought be granted pursuant to s 22 for Josephine to apply for an order under s 21 of the *Succession Act* 1981.

Conclusion

[86] The application is dismissed.

[87] I will hear the parties as to costs.