SUPREME COURT OF QUEENSLAND

CITATION:	*McKay v McKay & Ors* [2011] QSC 230
PARTIES:	**IAN RONALD MCKAY** (applicant) **v** **CECILY MAUREEN MCKAY** (first respondent) and **ERIN FRANCES GORLICK** (second respondent) and L**EE JOHN MCKAY** (third respondent) and **CLARE MAREE MCKAY** (fourth respondent)
FILE NO/S:	3665/11
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 August 2011
DELIVERED AT:	Brisbane
HEARING DATE:	30 June 2011
JUDGE:	Ann Lyons J
ORDER:	**1. Pursuant to s 22 of the *Succession Act* 1981 (Qld) the applicant be granted leave to apply for an order pursuant to s 21 of the *Succession Act*** **2. Pursuant to s 21 of the *Succession Act* a will is authorised to be made on behalf of Cecily Maureen McKay in the terms set out in Exhibit IRMI of the affidavit of Ian Ronald McKay filed 3 May 2011** **3. The parties' costs of the originating application be assessed on the indemnity basis and paid out of the estate of the first respondent**
CATCHWORDS:	SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – where the applicant seeks a statutory will to be made on behalf of his wife, the first respondent –

where the first respondent suffered serious injuries as a result of a motorcycle accident in 2006 – whether the first respondent lacks testamentary capacity – whether the proposed statutory will is or may be a will the first respondent would make if she were to have testamentary capacity

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

Banks v Goodfellow (1870) LR 5QB 549,
Deecke v Deecke [2009] QSC 65,
Frizzo v Frizzo [2011] QSC 107
Hickson v Humphrey (unreported BS 384 of 2011, de Jersey CJ, 11 April 2011)
Hoffmann v Waters (2007) 98 SASR 500
In Re D(J) [1982] Ch 237
Payne v Smyth as Litigation Guardian for Welk [2010] QSC 45
Re Bock (unreported BS 8794 of 2010, de Jersey CJ, 23 September 2010),
Re Fenwick [2009] NSWSC 530
Re Keane; Mace v Malone [2011] QSC 49
Re Joachim (unreported, BS 12325 of 2008, Dutney J, 22 December 2008),
Re Weick (unreported BS 7033 of 2009, Applegarth J, 27 August 2009);
Re Winstanley (unreported, BS 11203 of 2007, Daubney J, 18 January 2008),

COUNSEL: J I Otto for the applicant
No appearance for the respondent

SOLICITORS: Schultz Toomey O'Brien Lawyers for the applicant
No appearance for the respondent

[1] **ANN LYONS J:** The applicant Ian Ronald McKay ("Mr McKay") and the first respondent Cecily Maureen McKay ("Mrs McKay") have been married since 1 February 1975. Their marriage has been a happy one and they have three children, the second, third and fourth respondents, namely Erin Gorlick, Lee Mckay and Clare McKay.

[2] On 26 November 2006 Mr McKay and Mrs McKay were involved in a motorcycle accident. Mrs McKay suffered serious injuries which left her permanently and severely disabled. She resides with her husband in a home which has been constructed to suit her needs. Mrs McKay requires 24 hour care, much of which is provided by Mr McKay. Carers are also employed to assist Mr McKay with her care.

[3] A claim for personal injuries was brought on Mrs McKay's behalf and on 18 February 2010 a settlement agreement, which provided that substantial damages would be paid to Mrs McKay, was sanctioned by this Court. Pursuant to that Order Perpetual Trustees (Perpetual) was appointed as administrator of that fund. On 7

February 2011 QCAT appointed Perpetual as administrators for all financial matters. Given Mrs McKay's care needs the fund will need to be carefully managed to ensure this need for care is met for the rest of her life.

[4] Despite a thorough search having been undertaken to locate a will executed by Mrs McKay none has been found.

[5] Mr McKay therefore sought the leave of the Court to bring an application pursuant to s 22 of the *Succession Act* 1981 (Qld) (the Act) for an order under s 21 of the Act authorising a will to be made on behalf of his wife. The will sought is in the terms exhibited to the applicant's affidavit filed 3 May 2011 and essentially seeks orders that Mrs McKay's estate is left to him but if he should predecease her then her estate is left equally between their three children.

[6] On 30 June 2011 I granted leave to bring the application and made orders authorising that a will be made on behalf of Mrs McKay. These are my reasons.

The Court's power to authorise the making of a will.

[7] Section 21 of the Act provides authority for a will to be made on behalf of a person without testamentary capacity. Pursuant to s 22 of the Act however the applicant must first seek leave of the Court to bring an application under s 21. This two stage process is common in the Australian legislation with respect to statutory wills and has been discussed in a number of cases. In the 2007 South Australian decision of *Hoffmann v Waters*[1] Debelle J referred to this requirement as follows:

> "This requirement has been included to provide a process by which to screen out baseless or unmeritorious applications and, in particular, baseless claims that a person lacks testamentary capacity: *Monger v Taylor* [2000] VSC 304 at [22]; *Boulton v Sanders* [2004] VSCA 112; (2004) 9 VR 495 at [11]; *Bryant v Blake* (2004) 237 LSJS 23 at [25]. The application for leave can be heard at the same time as the substantive application. As is apparent from the reasons which follow, Adam at present lacks and there is no likelihood that he will ever have testamentary capacity. He has a substantial estate. These are good reasons to grant permission to make the application."

[8] Section 23 sets out the material to be provided at the hearing of an application for leave under s 22.

> "(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;
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> (b) satisfactory evidence of the lack of testamentary capacity of the person in relation to whom an order under section 21 is sought;
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> (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;

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1 (2007) 98 SASR 500 at [10]

(e) a draft of the proposed will, alteration or revocation in relation to which the order is sought;
(f) any evidence available to the applicant of the person's wishes;
(g) any evidence available to the applicant of the terms of any will previously made by the person;
(h) any evidence available to the applicant of the likelihood of an application being made under section 41 in relation to the person;
(i) any evidence available to the applicant of a gift for a charitable or other purpose that the person might reasonably be expected to give by will;
(j) any evidence available to the applicant, or that can be discovered with reasonable diligence, of the circumstances of a person for whom provision might reasonably be expected to be made by a will by the person in relation to whom the order is sought;
(k) any evidence available to the applicant, or that can be discovered with reasonable diligence, of any persons who might be entitled to claim on intestacy;
(l) any other facts of which the applicant is aware that are relevant to the application."

[9] There is no controversy in the present application that the material referred to in s 23 has been provided to the Court.

[10] Before leave may be granted to make an application pursuant to s 21, the Court must also be satisfied of the matters set out in s 24:

"**24 Matters court must be satisfied of 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."

[11] In respect of s 24(a) I am satisfied that Mr McKay is an appropriate person to make the application as Mrs McKay's husband of 35 years and the father of their three children. He resides with Mrs McKay and provides significant care to her. I consider that he has sufficient connection to her affairs to appropriately bring an application concerning the disposition of her estate. There is no doubt however that Mr McKay is also the person who may benefit under the proposed will.

[12] In this regard I note the comments of Mullins J in *Deecke v Deecke*:[2]

> "[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."

[13] In respect of s 24 (b) I am satisfied that 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 subject estate. Mrs McKay's husband and children are the persons for whom she might reasonably be expected to provide for in her will. They are also the only persons who would be entitled to her estate or to make an application under s 41 of the Act if she were to die intestate. Further, all three children have sworn affidavits indicating that they support the application and the Orders sought.

[14] The only other entity which may have a "proper interest in the application" is Perpetual who are Mrs McKay's administrators for "all financial matters". Perpetual was initially appointed to manage the settlement fund by this Court on 18 February 2010 and on 7 February 2011 QCAT extended that appointment to encompass "all financial matters". This order was sought by Mr McKay as one of the previous administrators to ensure there was no duplication in the management of Mrs McKay's financial affairs.

[15] Perpetual has been served with the application. "Financial matters" are defined in Schedule 2 Part 1 of the *Guardianship and Administration Act* 2007 and includes "a legal matter relating to the adult's financial or property matters." A "legal matter" is then defined in Part 3 of Schedule 2 as follows;

> **18 Legal matter**
> A *legal matter*, for an adult, includes a matter relating to—
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> (a) use of legal services to obtain information about the adult's legal rights; and
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> (b) use of legal services to undertake a transaction; and
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> (c) use of legal services to bring or defend a proceeding before a court, tribunal or other entity, including an application under the *Succession Act 1981*, part 4 or an application for compensation arising from a compulsory acquisition; and
>
> (d) bringing or defending a proceeding, including settling a claim, whether before or after the start of a proceeding.

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2 [2009] QSC 65.

[16] I consider it important therefore that Perpetual were served with the application. Perpetual advised the solicitors for the applicant in a letter dated 16 June 2011 that it did not wish to appear at the application and would abide by the Order of the Court. Perpetual also indicated that their position is that the application "does not appear in itself to be a financial matter within the Guardianship and Administration Act 2007". Perpetual indicated that as administrator its only interest in the current application related to the legal costs that might have to be met out of Mrs McKay's assets. Perpetual has indicated that as long as the costs are not unusually high then they will not significantly affect the ability of the fund to meet Mrs McKay's needs for the remainder of her lifetime.

[17] It is clear that Part 2 of Schedule 2 of the Act specifically provides that "making or revoking the adult's will" is a "special personal matter" rather than a financial matter which an administrator can make decisions about. It is clear however that an administrator is authorised to use legal services to obtain information about the adult's legal rights in relation to financial or property matters as well and is also authorised to bring or defend a proceeding which I note specifically includes bringing an application under the *Succession Act.*

[18] Without deciding the matter, as there has not been legal argument on this issue and Perpetual are not represented in these proceedings, it would seem to me that it is arguable that an administrator in the circumstances of a particular case could take the view that as administrator it was appropriate to obtain legal advice about the adult's legal rights in relation to a particular application for a statutory will that relates to their client. It also seems to me that given the nature of the inquiry that the Court is required to undertake in relation to the making of a statutory will that an administrator may well be required to provide specific information to the Court in relation to such matters as the adult's financial affairs and current support arrangements. It is clear that s 25 (b) of the Act provides that the court may inform itself of any matter relating to the application in any way it considers appropriate and s 25 (c) provides that the court is not bound by the rules of evidence. There may also be an argument that an administrator is an "appropriate person" to bring an application for a statutory will to be made in the circumstances of a particular case. In some cases it may be that the administrator is the only person in the adult's life.

[19] In the present case however it is clear that Perpetual as administrator have adopted an entirely appropriate approach in the particular circumstances of this case in advising the Court of their intention to abide by the order and not seeking to appear.

[20] I am accordingly satisfied that the requirements of s 24 (b) have been met.

[21] I must also be satisfied with the matters set out in s 24(c) and s 24(d).

Are there reasonable grounds for believing Mrs McKay does not have testamentary capacity?

[22] The test for testamentary capacity is well defined and is known as the *Banks v Goodfellow*[3] test. In the 2009 decision of *Re Fenwick*[4] Palmer J outlined the evolution of the UK and Australian statutory provisions in relation to statutory wills. His Honour specifically endorsed the *Banks v Goodfellow* test with respect to

[3] (1870) LR 5QB 549.
[4] [2009] NSWSC 530.

the lack of testamentary capacity required with respect to statutory wills. In *Frizzo v Frizzo*[5] Applegarth J recently restated the test in the following terms:

> "[21] The classic test for testamentary capacity was enunciated in *Banks v Goodfellow*. The relevant principles were restated by Powell JA in *Read v Carmody*:
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> 1. The testatrix must be aware, and appreciate the significance, of the act in the law upon which she is about to embark;
> 2. The testatrix must be aware, at least in general terms, of the nature, extent and value of the estate over which she has a disposing power;
> 3. The testatrix must be aware of those who may reasonably be thought to have a claim upon her testamentary bounty, and the basis for, and nature of, the claims of such persons;
> 4. The testatrix must have the ability to evaluate, and discriminate between, the respective strengths of the claims of such persons.
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> In this last respect, in the words of *Banks v Goodfellow*, no disorder of the mind should poison her affections or pervert her sense of right, nor any insane delusion influence her will, nor anything else prevent the exercise of her natural faculties.
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> [22] The *Banks v Goodfellow* test does not require perfect mental balance and clarity; rather, it is a question of degree. As Cockburn CJ put it in that case, 'the mental power may be reduced below the ordinary standard' provided the testatrix retains 'sufficient intelligence to understand and appreciate the testamentary act in its different bearings.'"

[23] Following the accident Mrs McKay was hospitalised for a long period of time. A number of medico-legal reports were prepared in relation to her claim for damages for personally injuries. On 26 October 2010 Mrs McKay was examined by consultant psychiatrist, Dr Bartholomew Klug specifically for the purpose of assessing whether she has testamentary capacity and whether she is likely to regain capacity.

[24] Associate Professor John Yeo provided reports dated 11 February 2009 and 3 September 2009. In his first report, he noted that Mrs McKay's injuries included "a severe head injury, multiple rib factures, fractures to the T5 and L3 vertebrae and left scapula. The patient's central nervous system injuries resulted in a left hemiplegia and aphasia." He noted that Cecily "appears to respond to basic verbal instructions and visual prompts (hand signals)", but needed assistance with "all personal activities of daily living". He concluded:

> "Mrs McKay's serious head and spinal injuries indicate that she will always remain seriously disabled with the need for assistance in all activities of daily living. She has however, demonstrated improvement in some cognitive functions which indicate that her rehabilitation and care should continue in her own home modified for wheelchair access."

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5 [2011] QSC 107.

[25] In his second report, Professor Yeo noted that although "there has been some improvement in the patient's cognitive function such as reading and recognition, there has been no improvement in her ability to speak and although there are functional movements present in the upper right limb, these movements are prone to fatigue and limited range". He concluded:

> "While it is still less than three years since the onset of her serious illnesses, the clinical history and examination indicates that no further significant functional recovery will occur in this patient. The patient will remain with a permanent spastic tetraparesis and cognitive loss which includes loss of useful vision in the left eye and troublesome dyskinesia as a result of the identified damage to the basal ganglia, anterior superior aspect of the mid brain, as well as multiple haemorrhagic foci, particularly in the right frontal lobe."

[26] Dr E W Ringrose, a consultant physician, provided a report on 25 May 2009.[6] He referred to Mrs McKay's "severe acquired brain injury" and "resultant left hemiparesis". He noted:

> "She has virtually no speech. She can occasionally make noises. She is however able to use a yes/no card to answer simple questions with variable success. At times she is able to spell with an alphabet board such things as the names of her husband and herself and answers to simple questions. This has been observed by the speech therapist...Her husband Ian states that sloe recognises family and friends..."

[27] Ultimately, though, he said that there "is no reliable method of communication" and concluded:

> "The overall prognosis in this case is extremely poor. Although, as stated above, some further improvement may occur, in my opinion it will not be significant. Also, in my opinion, she will never return to the workforce, she will never become self caring, she will always require the presence of at least one carer and currently two carers. Her communications skills may improve slightly but not to a significant extent."

[28] Dr Don Todman, Neurologist, provided a report dated 10 August 2009 based on his review of Mrs McKay's medical files[7]. He noted:

> "Currently Ms McKay is severely disabled. There is virtually no speech, although she does have some awareness and recognition of people around her, including family and friends. She requires assistance with all activities of daily living. All nursing care is provided. She requires a hoist for bathing and toileting. She is doubly incontinent."

[29] He observed that, as a consequence of her "severe head and brain injury", Mrs McKay had a "serious neurological disability".

[30] Mrs McKay was examined by neurosurgeon, Dr Michael Weidmann, who provided a report dated 4 September 2009.[8] He noted that Cecily "remains aphasic with no

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6 Affidavit of T Wakerley filed 3 May 2011 at pp 37 to 42.

7 Affidavit of T Wakerley filed 3 May 2011 at p 49.

attempt at verbal communication. Her daughter feels she does understand simple requests. She sometimes communicates using a simple picture board but this is not always reliable. She also has a short concentration span and tires very easily." He said:

> "I discussed the question of insight with her daughter Clare. I was not able to establish any evidence of insight myself. However Clare said she does have an understanding of her plight and she seems to have some recognition of things going on about her. She sometimes becomes quite frustrated by her limitations. She often becomes sad."

[31] He noted that there was "perhaps some awareness of what was going on around her although she did not maintain any eye contact", but concluded that:

> "Her condition has now become stable and stationary and she has reached maximum medical improvement...
> Her prognosis is poor and it is highly unlikely that her level of function will alter in the future."

[32] Robyn Murray, a consultant psychologist, provided a report dated 2 October 2009[9] which states:

> "Efforts to establish reliable communication with Ms McKay were unsuccessful. She was unable to speak at all, and it was not possible to determine her level of receptive language (comprehension). She could not provide reliable yes/no responses by head shaking, eye blinking or hand movements (pointing) to simple four word questions - eg 'Can you understand me?'
> …
> It is apparent from the medical information provided that Ms McKay sustained a severe traumatic brain injury as a result of the accident on 26th November 2006. As a consequence of that brain injury she has severe impairment in communication, and is totally dependent for self care and all activities of daily living. It is highly likely that she also has significant cognitive impairment, although formal assessment of basic and higher level cognitive functioning is impossible because of Ms McKay's impaired receptive and expressive language.
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> Based on the medical history provided as well as my observations of her current functioning, I am of the opinion that it is likely that Ms McKay has severe impairment in physical and cognitive functioning that Will render her permanently incapable of independent living.
> …
> Ms McKay is incapable of providing instructions in the matter of her personal injury claim and is incapable of managing her own financial affairs."

[33] Dr Klug provided a report dated 28 October 2010 in which he states that he attempted to communicate with Mrs McKay but that she "gave no indication that she understood my instructions", and it was not certain that she was able to respond

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8 Affidavit of T Wakerley filed 3 May 2011 at pp 62 to 71.

9 Affidavit of T Wakerley filed 3 May 2011 at pp 98 to 100.

to his questions. He concluded that Mrs McKay "currently does not have testamentary capacity" and "is unlikely to acquire or regain testamentary capacity". With specific reference to the *Banks v Goodfellow* test, he opined:

> "Due to Cecily's severe impairment in communication it is impossible to make a reliable assessment of her capacity in the abovementioned areas. However, based on available information and my observations in the-present examination, I am of the opinion that she is most unlikely to have the capacity to:
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> (a) Understand the nature of the act of making a Will.
>
> (b) Understand the extent of the property of which she is disposing.
>
> (c) Comprehend or appreciate the claims to which she ought to give effect."

[34] In *Re Fenwick*[10] Palmer J stated that in relation to the *Banks v Goodfellow* test the standard of evidence required will always be that of a specialist professional who has recently examined the incapacitated person and expresses an opinion in a report which complies with the rules of Court. His Honour continued:[11]

> "The report should state the testing which has been carried out and should give a conclusion by express reference to each of the elements of testamentary capacity enunciated in *Banks v Goodfellow*. The latter requirement is unnecessary, of course, if it is a nil capacity case in which brain injury at an early age has rendered the patient incapable of ever developing adult cognitive faculties."

[35] Palmer J also stated that it is a serious matter for a Court to make a will for a person who lacks capacity and that the level of satisfaction that a Court must feel as to the level of incapacity reflects the gravity of the power being exercised and its consequences. His Honour continued:

> "[132] The best interests of an incapacitated person and of those having a proper claim on his or her testamentary bounty are the objects of the jurisdiction which the Court exercises under Pt 2.2 Div 2 of the *Succession Act*. It is a remedial and protective jurisdiction and is, accordingly, not governed by the rules of adversarial litigation. In other words, the Judge is not a referee; rather, the Judge is to endeavour to rectify a problem which is affecting people's lives, in the best possible way. It is for this reason that s 21 provides that, in hearing an application for an order under s 18 (as distinct from an application for leave under s 20(1)(a)), the Court may inform itself of any matter, in addition to the information provided under s 19, in any manner the Court sees fit. Further, in hearing an application, the Court is not bound by the rules of evidence.
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> [133] For example, the Court may have reservations about the impartiality of an expert medical witness, even though there is no other party to the proceedings who wishes to contest testamentary incapacity. The Court may, in such a case, insist on seeing and hearing the patient for itself. It may require a report from a Court appointed expert. Indeed, the Court is more likely to feel the need to

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10 [2009] NSWSC 530.

11 At [127].

> use the investigative power expressly conferred on it by s 21(b) in a case where there is no apparent opposition to the application than in a case where the application is opposed by a party legally represented and able to adduce contradictory evidence.
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> [134] I acknowledge that some Judges will, by training and disposition, hesitate to step outside the conventional role of the Judge as referee in adversarial litigation. However, to give the Court the power of informing itself in any manner it sees fit in order to decide an application for a statutory will imposes on the Judge a heavy responsibility; it is to do, as far as possible, what is best for those affected by the decision rather than to give a result which is dictated solely by the passive reception of whatever evidence is placed before the Court by the parties.
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> [135] It goes without saying, however, that the powers given by s 21(b) and (c) must be exercised only when clearly necessary. Needless expense, delay and anguish may be caused to the parties by the Court's insistence on receiving further material which is not directed to issues which will decide the application one way or another. Further, the powers must be exercised judicially. If the application is contested, the matters upon which the Court requires further information and the results of the enquiry must all be exposed in Court in the presence of the parties and the parties must have the opportunity to respond by evidence and submission."

[36] In the present case, given the medical reports set out above particularly the report of Dr Klug, I have a high degree of satisfaction that for the purposes of s 24 (c) of the Act there are "reasonable grounds for believing" that Mrs McKay does not have testamentary capacity. Further for the purpose of s 21(2)(a), I am also satisfied that Mrs McKay lacks testamentary capacity.

The requirement that the proposed will must be one which "is or may be a will ... that the person would make if the person were to have testamentary capacity"

[37] The proposed will appoints Mr McKay as the sole executor and trustee and if he is unwilling or unable to act then it appoints the three children to be the executors and trustees. The proposed will gives the whole of Mrs McKay's estate both real and personal of whatsoever nature or kind and wheresoever situate unto and to the use of Mrs McKay's trustee to hold upon the following trusts:

> (a) To pay and discharge as the trustee sees fit all Mrs McKay's due and just debts, funeral and testamentary expenses;
>
> (b) To give the rest and residue of Mrs McKay's property both real and personal to Mr McKay for his sole use and benefit absolutely provided he survives Mrs McKay for a period of 30 days. If Mr McKay predeceases Mrs McKay or does not survive her for a period of 30 days then it is Mrs McKay's intention that such of:
>
> Erin Frances Gorlick;
> Lee John McKay; and
> Clare Maree McKay

> As shall survive Mrs McKay shall take and if more than one as tenants in common in equal shares the share that Mr McKay otherwise would have taken under this clause of the will.

[38] In the event the three children do not survive Mrs McKay by 30 days or predecease her then it is contemplated in the proposed will that if the three children leave surviving biological children they then shall take as tenants in common in equal shares the share their parent would otherwise have taken. Standard clauses as to the powers of the trustee are also included in the proposed will

[39] Mr McKay and the three children have provided affidavit material outlining discussions each had with Mrs McKay in relation to her testamentary intentions before her injuries.

[40] Mr McKay swears in his affidavit of 3 May 2011 that in about 2005 before he and Mrs McKay took a trip around Australia they had a discussion about their wills and purchased "will kits" for each of them to complete. As a result of their discussions Mr McKay filled out his "will kit" will to reflect his intention that if he passed away before Mrs McKay his entire estate would go to her but if she passed away before him then his entire estate would go to the three children equally. Mr McKay swears that Mrs McKay filled out her "will kit" will to reflect the same intention, that is, if she predeceased Mr McKay her entire estate would go to him but if he passed away before her then her entire estate would go to the three children equally.

[41] Mr McKay can not recall what happened with the "will kit" wills once he and Mrs McKay filled them out. He also can not recall whether they actually signed the wills they had filled out and whether if signed, witnesses were present. Mr McKay has searched in all likely places, enquired with the three children, contacted a number of solicitors with whom they had had past dealings, contacted the banks with whom they held accounts and enquired with close friends but has not located the "will kit" wills.

[42] Lee McKay's evidence is that about 5 years ago before his parents took a trip around Australia they told him they had decided to make wills. Mrs McKay sat him down and told him that she intended to give some jewellery to his sisters and that the rest of the estate would go to his father. She asked Lee if he was OK with this and he said yes. Lee McKay swears that he believes, based on what he was told by his parents, they had filled out "will kit" wills before they went on their trip but he has never seen them and has undertaken a search amongst his personal papers for the wills to no avail.

[43] In her affidavit of 6 April 2011 Clare McKay states that she recalls about 5 years ago her mother had the clasps on her rings tightened. Mrs McKay told Clare that if she passed away Clare was to have her grandmother's ring, Erin was to have Mrs McKay's engagement and Lee was to have Mrs McKay's eternity ring. Clare McKay states that that occasion is the last time she can recall discussing it with her mother but that Mrs McKay had mentioned it to her a few times previously. Clare McKay has also undertaken a search of her personal papers for her mother's will but has not located it.

[44] Mr and Mrs McKay's eldest daughter Erin Gorlick similarly swears that about 5 years ago her mother had the clasps of her rings tightened and told her that if she was to pass away Mrs McKay's engagement ring was to go to her, Clare was to have their grandmother's ring and Lee was to have Mrs McKay's eternity ring. Erin recalls her mother telling her these wishes more than once. Erin has undertaken searches of her personal papers but has been unable to find her mother's will.

[45] Counsel for the applicant argues that if Mrs McKay were to die intestate then in accordance with s 36A of the Act, Mr McKay would be entitled to the first $150,000 and one-third of her residuary estate and the three children would each be entitled to two-ninths of her residuary estate.

[46] I am satisfied that Mrs McKay, during the time when she had capacity, expressed a clear view as to how she wished her estate to be distributed on her death. She expressed to her husband and each of her children her desire that her estate should pass to her husband and if he predeceased her then it was to be divided equally amongst her children. I accept the evidence that Mrs McKay expressed this desire not only in the missing "will kit" will that she prepared but also separately to each of her children.

[47] It is clear that a division of Mrs McKay's assets in accordance with the intestacy provisions of the Act would be inconsistent with the clear evidence as to Mrs McKay's previously expressed intentions.

[48] The test set out on s 24(d) is that the proposed will is or may be a will, "that the person would make if the person were to have testamentary capacity". Mrs McKay has previously had testamentary capacity and the proposed will is consistent with her previously expressed views about the distribution of her estate.

[49] In *Re Fenwick*[12] Palmer J discussed the distinction between cases where the incapacitated person has lost capacity after expressing his testamentary intentions, the so called "lost capacity" cases, cases where the incapacitated person never had capacity, the "nil capacity" cases and a third category namely where a minor was old enough to form relationships and express wishes about property but lost capacity before reaching adulthood, the "pre-empted capacity" cases. His Honour noted that the law in the UK in relation to statutory wills had reached a highly unsatisfactory state by the time Australian jurisdictions began incorporating similar provisions in legislation. He continued:

> "In cases in which an incapacitated person had never been able to form even the most rudimentary testamentary intention, the English Courts were resorting to a legal fiction in purporting to ascertain what testamentary disposition that person subjectively would have intended to make. Even where the incapacitated person had previously expressed some valid testamentary intention, the Courts were attributing to him or her a new testamentary intention upon the basis that the person, if temporarily restored to testamentary capacity, would have changed his or her mind. The fiction was employed to disguise, needlessly, that what the courts were really doing in such cases was making decisions, objectively based, in the best interests of the incapacitated person and his or her family.

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12 [2009] NSWSC 530.

> The law in the United Kingdom has recently been rationalised by a major statutory amendment, but in New South Wales and the other Australian States we are left with the provisions copied from, or inspired by, the earlier United Kingdom legislation. In applying the Australian legislation, Courts of other States have been using the United Kingdom cases as guides. Problems of the same kind as beset the English Courts are likely to arise.
>
> The difficulties stem from the fact that the Australian legislation, like the previous United Kingdom legislation, endeavours to accommodate several social policies which can come into conflict in particular cases. First, the testamentary freedom of the individual, being a basic element of the right to property, should not be usurped by the State, or by others with the State's assistance. Second, testamentary dispositions which have previously been validly made by an incapacitated person may defeat claims or expectations which contemporary society regards as just and reasonable. Third, the wishes of mentally incapacitated persons, if known, should be respected. Fourth, laws of intestacy already provides for what is to happen in the absence of will; why should that law apply differently to persons with testamentary incapacity?"

[50] In *Deecke v Deecke* Mullins J warned of the necessity to be aware of differences in legislation. In Queensland under s 24(d) the requirement is that the proposed will must be one which "is or may be a will ... that the person would make if the person were to have testamentary capacity" whereas in South Australia and Victoria the legislation provides that the proposed will "reflects the likely intentions of the person if he or she had testamentary capacity."

Queensland decisions in relation to statutory wills.

[51] There have been relatively few Queensland decisions in relation to statutory wills[13] and I propose to briefly outline the cases that have been determined. It is clear that all the cases necessarily turn on the particular facts of each case. I also consider that it is helpful to consider the cases in terms of the 3 categories outlined in *Re Fenwick* namely the "nil capacity" cases, the "pre-empted" capacity cases and the "lost capacity" cases.

The "nil capacity" cases

[52] In *Re Winstanley*[14] Daubney J authorised a statutory will in respect of a 76 year old man, Herbert Winstanley, who was and always had been intellectually impaired. The applicants were Mr Winstanley's relatives and the administrators of his estate as appointed under the Guardianship and Administration Act. Mr Winstanley had made a will and lodged it with the Public Trustee and his siblings subsequently brought the application out of concern that the will could be challenged due lack of testamentary capacity.

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13 As noted in Chief Justice P de Jersey AC, *'Court intrusion into testamentary disposition: a beneficial jurisdiction?*' (W A Lee Equity Lecture 2010, Banco Court, 18 November 2010)

14 (unreported, BS 11203 of 2007, Daubney J, 18 January 2008)

[53] Mr Winstanley never had a spouse, de facto, nor issue and otherwise there was no person who would have standing to make an application under section 41 of the Act in relation to his estate

[54] Mr Winstanley was one of ten children and at the time of the application his parents and three of his siblings were deceased. His parents were very poor and had very few assets. A parcel of land was purchased with borrowed moneys in 1961 at Narangba where Mr Winstanley lived with his parents. The property was purchased in his name because he was working as a potato picker at the time and the bank was able to lend money in his name rather than his parents.

[55] When his mother died in 1982, Mr Winstanley's brother, Cecil, moved in to the Narangba property to be the full-time carer for him and another of his sisters Nita who was also intellectually impaired. In 1985 the Narangba property was sold and a house situated at Clontarf was purchased which was also in his name.

[56] The applicants provided evidence that Mr Winstanley had expressed to them that he was concerned for Nita's and Cecil's welfare and he wished the Clontarf property to be left to Cecil.

[57] Daubney J ultimately considered that the proposed will was one which Mr Winstanley would make if he had testamentary capacity;

[58] In *Re Joachim*[15] Dutney J authorised a statutory will to be made for Ms Joachim who had suffered hypoxia at birth and had required an intense level of support all her life. That support had been provided by her grandparents and the Endeavour Foundation. She had also derived benefit over the years from the Riding for the Disabled Inc. (Qld).

[59] Ms Joachim had accumulated modest savings throughout the course of her life. She had not had regular involvement with family members apart from her grandparents. The evidence before Dutney J suggested that Ms Joachim's mother and father supported the proposition that the most appropriate beneficiaries would be the Endeavour Foundation and Riding for the Disabled Inc. (Qld).

[60] His Honour stated:

> "It seems to me that in circumstances where the proposed testator is clearly lacking in testamentary capacity and that that lack of testamentary capacity is permanent, and where she has had the limited contact with members of her family other than her grandmother, and where her parents and grandmother support the application, section 21 ought to be invoked.
>
> I am satisfied that these are the circumstances in which the provision was designed to operate, so that such estate as the proposed testator has will go to those who have assisted her during her life, rather than to virtual strangers with whom she has had no contact. "

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15 (unreported, BS 12325 of 2008, Dutney J, 22 December 2008).

[61] In *Payne v Smyth as Litigation Guardian for Welk*[16] the subject of the application was Mr Welk and the applicant, his mother. MrWelk suffered a severe brain injury as a result of a motor vehicle accident that he was involved in at the age of 6. Apart from a stay in hospital, Mr Welk had always lived with his mother on whom he was dependant. Following the accident he received a significant amount by way of damages which was to meet his future needs.

[62] Mr Welk had never been married or in a de facto relationship and he had no children. His parents' marriage was unstable before his accident, and they permanently separated in about 2003. Subsequently he had irregular contact with his father. However at the time of the application Mr Welk was sometimes staying with his father for several days at a time, and had a key to his father's place to allow him to come and go. He also had a number of siblings and half siblings.

[63] Mr Welk's mother and adult siblings all expressed the opinion that the proposed will was one that he would make if he had capacity to do so himself. His father expressed some disagreement with the proposed dispositions although he did not appear to contest the application. There was evidence the charity Teen Challenge assisted Mr Welk during his adolescence, and Margaret Wilson J considered that "he might well wish to make some small bequest in its favour if he had testamentary capacity"

[64] Therefore, the proposed will gave Mr Welk's golf clubs to his brother Hamish; in the event he had children, 50 per cent of his estate to his surviving child or children in equal shares; if he did not have children who survive him, 40% to his mother, 25% to his father, 33% to his siblings and 2% percent to Teen Challenge.

[65] Margaret Wilson J expressed concern that the proposed will did not provide for the possibility of Mr Welk having children, none of whom survived him, but one or more grandchildren who survived him so this was included. Her Honour concluded that the amended proposed will "is or may be one which Mr Welk would make if he had testamentary capacity. It is appropriate that an order be made authorising the making of a will on his behalf.

The pre-empted capacity cases

[66] In *Deecke v Deecke*[17] Ms Deecke had cystic fibrosis and a history of epilepsy. She developed insulin dependent diabetes at age 13 and she then sustained a major brain injury which affected her condition and functioning when she was around 20 years of age. She had a significant estate due to a settlement sum received in respect of her claim for medical negligence against the State of Queensland.

[67] The proposed will provided a small bequest to Cystic Fibrosis Queensland Limited who had assisted Ms Deecke, with the residue going to the applicant, Ms Deecke's mother and care-giver. There was evidence before Mullins J that the second respondent, Ms Deecke's father, and her mother had a volatile relationship. The proposed will did not include Ms Deecke's father as a beneficiary. Ms Deecke's father had remarried and lived in China. There was evidence that he disputed certain factual allegations.

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16 [2010] QSC 45.

17 [2009] QSC 65.

[68] Nevertheless Justice Mullins stated:

> "I accept that there is evidence that the first respondent's relationship with the applicant, before her injury, was much stronger and closer (and with less friction) than her relationship with the second respondent. If the first respondent did have testamentary capacity, it would be relevant to her consideration of how to dispose of her assets that her primary carer since sustaining the brain injury has been her mother."

[69] In *Re Weick*[18] Applegarth J authorised a statutory will in respect of Ms Weick which benefited her sister and mother, who were her carers and the only two members of the family with whom she had a close relationship. Ms Weick was born in 1982 and suffered a severe brain injury as the result of a motor vehicle accident in 2001. Her mother did not recall ever having a conversation with Ms Weick about making a will before the accident.

[70] There was evidence that Ms Weick had a poor relationship with her father and he had indicated he had no objection to the terms of the proposed will. Applegarth J observed "… he would have no moral claim upon her assets. He certainly was not dependent upon her." Ultimately his Honour considered that the proposed will was in a form that Ms Weick would have been likely to make if she had testamentary capacity.

[71] In *Re Bock*[19] Mr Bock, at the age of 14 suffered serious physical injuries which led to hospitalisation and eventually to severe brain damage and acquired cerebral palsy due to the negligence of the hospital. Mr Bock had been awarded significant damages.

[72] Mr Bock's father and siblings did not oppose the terms of the proposed will. Under an intestacy, Mr Bock's parents would share equally in his estate. They were estranged, substantially because his father had not participated in the 24 hour care which Mr Bock required. Mr Bock's mother had always been his primary carer and they lived together in a purpose-built home. Under the proposed will, Mr Bock's mother was appointed executor, she would receive the home and, of the residue, she would take 60 per cent, Mr Bock's father 10 per cent and the balance of 30 per cent to Mr Bock's three siblings. The Chief Justice indicated that he was satisfied the will was or may be a will Mr Bock would likely have made if possessed of testamentary capacity.

[73] In *Hickson v Humphrey*[20] the application concerned a young woman whose parents had separated some years earlier. The father argued that the proposed will be amended to give him a 30 per cent share rather than a 10 per cent share and that a litigation guardian should be appointed. The Chief Justice noted however that this would be pointless as she could not give instructions. The father also argued that there was no need for a statutory will. The Chief Justice stated:

> "In my view, a will should be made because of Jessica's considerable assets and because distribution on an intestacy would be

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18 (unreported BS 7033 of 2009, Applegarth J, 27 August 2009).

19 (unreported BS 8794 of 2010, de Jersey CJ, 23 September 2010).

20 (unreported BS 384 of 2011, de Jersey CJ, 11 April 2011).

> inappropriate as it would not reflect the realities of the sad situation which has developed in relation to her care."

[74] The Chief Justice found it significant that a Federal Magistrate had previously awarded Jessica's mother her sole custody. His Honour also acknowledged her mother's vast commitment to her care and noted "I believe Jessica could reasonably be expected, if possessed of testamentary capacity, to commit the lion's share of the residue to her mother, while also allowing a portion to her loving sister Rebecca, albeit a much lesser portion."

The "lost capacity" cases

[75] In *Re Keane; Mace v Malone*[21] the applicant Josephine, was the sister of Patrick who was 91 and lacking testamentary capacity. Significantly he had made a will when he had capacity which was contrary to the proposed will. Daubney J refused the application to make a new will noting;

> "[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."

[76] In coming to that decision his Honour held that the approach when considering s 24 (d) should be informed by the five principles articulated by Megarry V-C in *In Re D(J).*[22] His Honour noted:

> " [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).
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> [74] Accordingly, adapting the principles enunciated by Megarry V-C to the present case, the approach which I adopt in considering

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21 [2011] QSC 49.

22 [1982] Ch 237.

> 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."

[77] In the present case we have evidence of a clear testamentary intention and to date there have been no subsequent events which would lead me to believe that Mrs McKay would make a different will in the circumstances which now exist. The only new fact, apart from Mrs McKay's loss of capacity, is that Mrs McKay "might" leave a large estate if she dies prematurely.

[78] Clearly Mrs McKay is still in a relationship with her husband and is living with him and is cared for by him. Whilst she does have a large damages award that fund is required to pay for her care. There is no evidence however that if Mrs McKay knew that she might have significant assets at her death that this would cause her to alter her testamentary wishes. If Mrs McKay's circumstances however should change in the future for example if Mr McKay were to become estranged or if he separated from his wife I consider that there would then be new or supervening circumstances which would prompt a new application for a statutory will. It is clear that pursuant to s 21 a court can authorise that a will be "made, altered or revoked". Such an application could be brought by an "appropriate person" and clearly her children would be appropriate.

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

[80] In the present case the evidence indicates that the proposed will is in the terms of a previous will made by Mrs McKay which has been misplaced. Furthermore each family member gave clear evidence as to Mrs McKay's intentions prior to her injuries. Therefore when considering whether the proposed will is or may be one which Mrs McKay would make if she were to have testamentary capacity I am necessarily influenced by Mrs McKay's clearly expressed previous wishes and

indeed by the evidence that the missing "will kit" will clearly set that out. In my view each of the members of Mrs McKay's immediate family concur as to Mrs McKay's testamentary intentions before she suffered personal injuries. The proposed will appears, on the individual evidence of each family member, to be a will that Mrs McKay would make if she were to have testamentary capacity at the date of the Orders. There is nothing to suggest that despite the terrible injuries Mrs McKay has suffered circumstances have significantly changed to warrant a diversion from the wishes Mrs McKay expressed when most recently of full cognitive capacity.

[81] Section 21 (2) provides that 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."

[82] As I have already indicated I am satisfied that Mrs McKay lacks testamentary capacity. I was also satisfied that Mrs McKay was alive when the Orders were made on 30 June 2011 and I understand she remains so. I consider that the proposed will is entirely appropriate when considered in light of the material before the Court and the provisions of the Act. Accordingly there should be leave to make the application and the proposed will.

[83] Accordingly, the following Orders are made:

1. Pursuant to s 22 of the *Succession Act* 1981 (Qld) the applicant be granted leave to apply for an order pursuant to s 21 of the *Succession Act*;

2. Pursuant to s 21 of the *Succession Act* a will is authorised to be made on behalf of Cecily Maureen McKay in the terms set out in Exhibit IRMI of the affidavit of Ian Ronald McKay filed 3 May 2011.

3. The parties' costs of the originating application be assessed on the indemnity basis and paid out of the estate of the first respondent.