SUPREME COURT OF QUEENSLAND

CITATION:	*Re: JT* [2014] QSC 163
PARTIES:	**In the matter of an application pursuant to s 21 of the *Succession Act* 1981 on behalf of JT**
FILE NO/S:	3646/14
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	23 June 2014 (ex tempore)
DELIVERED AT:	Brisbane
HEARING DATE:	23 June 2014
JUDGE:	Ann Lyons J
ORDER:	**Order in terms of the draft provided**
CATCHWORDS:	SUCCESSION – MAKING OF A WILL – TESTAMENTARY CAPACITY – LACK OF CAPACITY AND STATUTORY WILLS – where, due to advanced Alzheimer's disease JT lacks testamentary capacity – where the applicant applied pursuant to s 21 of the *Succession Act* 1981 (Qld) for an order authorising a will to be made for JT *Succession Act* 1981 (Qld), s 21, s 22, s 23 *Banks v Goodfellow* (1870) LR 5 QB 549 *Van der Meulen v Van der Meulen* [2014] QSC 33 *Sadler v Eggmolesse* [2013] QSC 40 *SPM v LWA* [2013] QSC 138
COUNSEL:	R Williams for the applicant
SOLICITORS:	CRH Law for the applicant

[1] This is an application pursuant to s 21 of the *Succession Act* 1981 (Qld) ("Succession Act") for an order authorising a will to be made for JT. JT is currently 65 years old, has advanced Alzheimer's disease and no longer has testamentary capacity.

[2] On 23 June 2014 I made orders and gave short reasons in relation to this application for a statutory will and I indicated that to protect the privacy of JT I would de-identify the reasons prior to the publication. These are those reasons.

Factual Background

[3] The applicant GT was appointed as JT's administrator and co-guardian on 14 May 2012 by the Queensland Civil and Administrative Tribunal. He is JT's former husband. The couple met in 1979 and married in 1999. Whilst they separated in 2004 and divorced in 2009, I am satisfied on the basis of the affidavit material, that despite their separation and divorce they have remained close friends. The application is supported by JT's brother and co-guardian IDH. There are also affidavits from SR and KJ who have been friends of JT for some 28 years and they clearly support the application.

[4] The affidavit of Margaret Arthur sworn 30 April 2014 sets out the extensive investigations which have been conducted and which reveal that JT has no will. If a will is not authorised to be made for her she will therefore die intestate. If she dies intestate, under the rules of intestacy, her estate will pass to not only to her brother IDH with whom she has had a close relationship but also to other family members with whom she has never had a close relationship.

[5] JT was born on 24 September 1948. She has no current spouse and no children. The family tree has been exhibited to the affidavit of IDH and that indicates that JT is one of the six children of FH. Throughout her life she has had a close bond with her brother IDH for a number of reasons. In particular, it is clear that IDH and JT were not the children of their mother's marriage to CSH and that whilst they shared the same father his identity was not revealed to them. JT's mother and CSH are both deceased. CSH was the father of the four older children born to their mother during her marriage namely her step brothers CDH, HH, and SH who are all deceased and a stepsister BH. The affidavit material indicates that the fact that CSH was not the father of JT or IDH was openly acknowledged by their mother, CSH, her brother IDH and their step siblings. The affidavit material also indicates that the family was grossly dysfunctional and that both JT and her brother were subject to physical and emotional abuse.

[6] I accept that the closeness of IDH and JT emanates from their early environment, particularly the fact they shared a father who was not the father of the other four siblings. It is also apparent that there is a large age gap between IDH and JT and the other four children.

The consequences of intestacy

[7] If JT dies intestate the rules of intestacy as set out in s 37 and Sch 2 of the Succession Act would mean that her estate would devolve in equal shares to her brother IDH and her half-sister BH, the children of her deceased half-brother CDH, and the children of her deceased half-brother HH. Her stepbrother SH is not survived by any children.

[8] Pursuant to this application, GT applies under s 22 of the Succession Act for leave to apply for an order under s 21 authorising that a will be made for JT, a draft of which has been exhibited to the affidavit of GT.

The proposed will

[9] That proposed will provides for:

(i) the appointment of GT as executor;
(ii) a gift of a antique gold necklace to AT, who is a niece of GT;
(iii) a gift of $10,000 to the RSPCA Australia Incorporated;

(iv) a gift of JT's interest in her house property at Eastern Heights, Ipswich to her nephew, JH, and niece, SH, or, if that property has been sold, a gift to them of a cash amount equal to the net proceeds of sale;

(v) a gift of residue to GT.

[10] It is clear that the applicant solicitors have served JT's stepsister BH copies of the originating application and the affidavits. In his affidavit IDH deposes that he discussed the application with BH and she informed him that she was not going to oppose the application and would support IDH in whatever decisions he made in relation to JT's care and in relation to the application.

The Legislation

[11] Statutory wills were introduced into the Succession Act by amendments in April 2006. Under the scheme in the Act a person who seeks an order under s 21 of the Act must first apply for leave under s 22 of the Act. Sections 21 and 22 provide as follows:

21 Court may authorise a will to be made, altered or revoked for person without testamentary capacity

(1) The court may, on application, make an order authorising—

(a) a will to be made or altered, in the terms stated by the court, on behalf of a person without testamentary capacity; or

(b) a will or part of a will to be revoked on behalf of a person without testamentary capacity.

(2) The court may make the order only if—

(a) the person in relation to whom the order is sought lacks testamentary capacity; and

(b) the person is alive when the order is made; and

(c) the court has approved the proposed will, alteration or revocation.

(3) For the order, the court may make or give any necessary related orders or directions.

(4) The court may make the order on the conditions the court considers appropriate.

(5) The court may order that costs in relation to either or both of the following be paid out of the person's assets—

(a) an application for an order under this section;

(b) an application for leave under section 22.

(6) To remove any doubt, it is declared that an order under this section does not make, alter or revoke a will or dispose of any property.

(7) In this section—

person without testamentary capacity includes a minor.

22 Leave to apply for s 21 order

(1) A person may apply for an order under section 21 only with the court's leave.

(2) The court may give leave on the conditions the court considers appropriate.

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

[12] As was discussed in *Sadler v Eggmolesse*,[1] the procedure which requires that leave first be obtained prior to the substantive application being heard is designed to screen out unmeritorious applications however it is clearly appropriate for the substantive application to be made at the same time as the leave application, when all of the evidence that should be put before the court is available.

[13] Section 21 is the substantive provision, and it provides that the court may authorise a will to be made, altered, or revoked for a person without testamentary capacity. The court may, on application, make an order authorising such a will. However, the court may only make the order if the person in relation to whom the order is sought lacks testamentary capacity, that person is alive when the order is made, and the court has approved the proposed will, alteration or revocation. The court can then make the order on conditions it considers are appropriate.

[14] Section 23 then sets out the information which must be given to the court on a leave application as follows:

> **23 Information required by court in support of application for leave**
> On the hearing of an application for leave under section 22, the applicant must give the court the following information, unless the court directs otherwise—
> (a) a written statement of the general nature of the application to be made by the applicant under section 21 and the reasons for making it;
> (b) satisfactory evidence of the lack of testamentary capacity of the person in relation to whom an order under section 21 is sought;
> (c) any evidence available to the applicant, or that can be discovered with reasonable diligence, of the likelihood of the person acquiring or regaining testamentary capacity;
> (d) a reasonable estimate, formed from the evidence available to the applicant, of the size and character of the person's estate;
> (e) a draft of the proposed will, alteration or revocation in relation to which the order is sought;
> (f) any evidence available to the applicant of the person's wishes;
> (g) any evidence available to the applicant of the terms of any will previously made by the person;
> (h) any evidence available to the applicant of the likelihood of an application being made under section 41 in relation to the person;
> (i) any evidence available to the applicant of a gift for a charitable or other purpose that the person might reasonably be expected to give by will;

[1] [2013] QSC 40.

(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.

[15] Pursuant to s 24 the court may only give leave if satisfied of a number of factors as follows:

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.

[16] The court must therefore be satisfied that the applicant for leave is an appropriate person to make the application, that adequate steps have been taken to allow representation of all persons with a proper interest in the application, that there are reasonable grounds for believing that the person does not have testamentary capacity, and the proposed will, alteration, or revocation is or may be a will, alteration, or revocation that the person would make if the person were to have testamentary capacity, and it is or may be appropriate for an order under s 21. Clearly s 24(d) sets out the core test.

[17] On hearing an application the court may have regard pursuant to s 25 to any information given to the court under s 23 and that the court may inform itself of any other matter relating to the application in any way it considers appropriate and is not bound by the rules of evidence. The court is not restricted to approving or rejecting the proposed will, and may require adjustments to be made. If an order is to be made by the court under s 21 authorising the making of the will, the will must be executed in accordance with s 26 which requires it to be signed by the registrar and sealed with the seal of the court.

[18] In terms of the matters I must be satisfied about, it is clear that the affidavit material clearly establishes that JT has substantial assets but no will and should she die without a will the rules of intestacy would mean that her assets would pass to relatives with

whom she has never had a close relationship. In terms of testamentary capacity, the test is well known and was set out in the decision of *Banks v Goodfellow*[2]. I accept that JT does not currently have capacity to make a will. Dr Alison Cutler, a geriatrician, has provided a medical report in relation to JT's capacity. In that material, Dr Cutler states that JT was an inpatient under her care at the Ipswich Hospital whist awaiting residential aged care placement. Dr Cutler opines that JT has advanced Alzheimer's disease and that whilst she attempted to conduct an assessment of her testamentary capacity on 8 April 2014 she was unable to have any meaningful discussion around the nature of a will and its effects. Dr Cutler considers that JT lacked capacity to make a will and due to the progressive nature of her condition she would not regain testamentary capacity in the future.

[19] It is also clear that JT has lacked capacity to make personal or financial decisions for herself since at least 2012 as since 14 May 2012 GT has managed all of her finances as her administrator and he is a co guardian with her brother IDH for personal matters. Those orders were renewed by QCAT on 26 August 2013. The affidavit material sets out the size and character of JT's estate which is extensive. She has a property at Eastern Heights, Ipswich valued at approximately $350,000, a property at Maleny valued at approximately $400,000, a property at Booval valued at approximately $350,000, and a unit at Ascot valued at approximately $465,000. She also has household contents as well as superannuation in excess of $400,000, a share portfolio in excess of $200,000, and a bank account in excess of $27,000. Accordingly, JT therefore has a substantial estate which totals in excess of $2 million.

[20] The real property searches indicate that JT is the sole registered owner of the properties at Eastern Heights, Maleny, Booval, and Ascot. The draft of the proposed will has been exhibited. The draft has been settled by counsel, and GT has confirmed that he is willing to act as executor. In determining whether he is an appropriate person to be appointed as executor I have taken into account the affidavits of SR and KJ who are independent and do not stand to receive any benefit under the will. Those affidavits also set out their view as to JT's wishes. In her affidavit, SR states:

> "6. [JT] told me, on various occasions, that:
> (a) If it weren't for [GT], she wouldn't have had the property she owned or have been in the financial position she was in, and she wanted her property to go back to [GT]. She often mentioned how hard [GT] had worked, and how much she loved him.
> (a) (sic) She wanted her jewellery to go to one of [GT's] nieces. I cannot recall the name of the niece.
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> 7. These matters were something that [JT] brought up quite regularly in her conversations with me, as on her conversations with me, she quite often reflected on her relationship with [GT].
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> 8. I don't know whether [JT] meant that she wanted just the property [GT] was involved in buying with her to go back to [GT] or all of her property. [JT] was not specific on this, in her conversations with me.

[2] (1870) LR 5 QB 549.

> 9. The last time that [JT] discussed these matters with me was in around August 2012 when we were having lunch together at a club in Ipswich. At that time, she seemed to me to be unaffected by dementia.
> 10. At that lunch, in her discussion with me, [JT] reflected on her marriage to [JT] and then stated that she intended to make a will at some stage but wasn't sure who she would choose as her executor. She told me that she intended to have [GT] as "her beneficiary". She did not discuss with me to what extent, so far as I can recall.
> …
> 16. In my discussions with [JT], I do not recall her mentioning anything about wanting her property to pass to anyone other than [GT's] niece (as far as her jewellery was concerned), and otherwise to [GT].

[21] In her affidavit, KJ states:

> "10. I do not recall talking with [JT] specifically about her intentions in relation to her estate however I do recall that she mentioned that she wanted jewellery given to her by [GT] to go to [GT's] niece or nieces.
>
> 11. Based also on my discussion with [JT] and my knowledge of her, I consider that if she were able now to express herself, she would want to make [GT] her principal beneficiary."

[22] That material therefore indicates that JT's view was that if it were not for GT she would not have had the properties she owned or had been in the financial position she was in and that she wanted her property to go back to GT. I am also satisfied that it was JT's wish that a particular piece of jewellery which GT had given her was to go to one of GT's nieces.

[23] I note that the draft will that is proposed does not contain a gift to GT of all of her estate but rather there is a gift of a property to one of her nieces and one of her nephews, the children of her brother IDH. The affidavit of GT states the following:

> "47. Since about 2005, [JT] has said to me on a number of occasions that:
> (a) She wanted to make a Will.
> (b) She wanted "her home" to pass to her brother [I's] younger children, being her niece [S] and nephew [J].
> (c) She wanted the necklace that I had given her, which is a unique 1920's antique heavy gold necklace and [J's] most valuable piece of jewellery, to go to my niece [AT].
> (d) She wanted the rest of her property to go to me.
> 48. I have a number of nieces, and [JT] had got to know them during our relationship. [JT] expressed to me on a number of

> occasions that she wanted the necklace to go to [A] for the reason that she was particularly fond of [A].
>
> 49. The last time [JT] discussed these matters with me was approximately 3 years ago."

[24] Accordingly it is clear that JT told GT on a number of occasions that she wanted to make a will and she wanted the home she lived in to pass to her brother IDH's two youngest children, namely, her niece "S" and her nephew "J". She also indicated to him that she wanted a necklace GT had given to her, which was a 1920s antique gold necklace, to go to GT's niece "A". She also indicated that she wanted the rest of the property to go to him.

[25] I am satisfied that there is some good evidence as to what JT's wishes would be.

[26] In terms of whether there are any previous wills, I have considered the affidavit material, and I am satisfied that extensive inquiries have been made through CRH Law, including inquiries in New South Wales and with the public trustee, with her former solicitors, and it is clear that there is no information to indicate that JT has made a previous will. In particular, it would seem that at the QCAT hearing in 2013 it was discussed that she did not have a will and that she had been unable to make one due to rapid onset dementia. I am satisfied that the inquiries that have been made have indicated that there is no will that has been found.

[27] In relation to whether there is a likelihood of a family provision application, I am satisfied there is no eligible person who could make a claim against her estate for family provision. In relation to a gift that JT might make or be reasonably expected to make, GT states that JT has been an animal lover for as long as he has known her, and if she were able to make a will he considers that she would want to make a small bequest to a charity to do with animal welfare such as the RSPCA.

[28] In relation to evidence of any circumstances of a person for whom provision might reasonably expected to be made by a will, having considered the affidavit material and also the further inquiries that I asked to be made I am satisfied that there are no other persons for whom provision might reasonably be expected to be made. I was initially concerned that IDH's older children and some of the children of CDH and HH were unaware of the application. The affidavit of Margaret Arthur sworn 23 June 2014 sets out the steps taken to bring the current application to their attention including electoral roll searches and advertisements in the Australian newspaper. The affidavit of GT sworn 20 June also provides as follows:

> "5. I instructed my solicitor Margaret Arthur of CRH Law to conduct searches to locate these persons. Ms Arthur informed me and I believe that these enquiries have led to contact being made with one of the nephews, [PH] but that it has not been possible to locate the other nieces and nephews.
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> **Jennifer's intentions in relation to her home**
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> 6. As stated at paragraph 47 (b) of my previous affidavit, [JT] informed me in about 2005 that she wanted her home at […], Ipswich, to pass to the younger children of her brother, [IH], being her niece and nephew, [S] and [J].

> 7. In relation to relation to [I's] older children, [R] and [M], when [JT] spoke to me of them, she expressed a view that she had helped them both in the past and that they had not been very appreciative. I recall that [JT] also expressed annoyance and disappointment that [R] and [M] rarely went to see her."

[29] I am also satisfied in relation to all of the persons who might be entitled to make a claim on intestacy.

[30] It would seem clear that, notwithstanding their divorce, JT and GT remained close friends, and GT is continually involved in JT's life. In relation to the core test laid down in s 24(d), the test is that the proposed will is or may be a will that JT would make were she to have testamentary capacity. The applicant therefore does not have to satisfy the court that this is the will JT would make were she to have capacity, but rather that it *may* be a will she would make.

[31] That test has been referred to in a number of decisions, and particularly by Atkinson J in *Sadler v Eggmolesse*[3] and most recently Jackson J in *Van der Meulen v Van der Meulen*[4] where the nature of the court's discretionary power to authorise the making of a will under s 21 was discussed:

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

[32] I will accordingly adopt the approach that I have taken in the previous decisions of *McKay v McKay*[5], *Lawrie v Hwang*[6] and *Re Matsis; Charalambous v Charalambous & Ors*[7] where I indicated that one should consider the words of the section.

[33] In the circumstances of the present case, I am satisfied that there is evidence that the draft will is, or may be, a will that JT would make if she were to have testamentary capacity because it is clear that her views were well known to IDH and GT, who has remained the principal contact in her life. I am satisfied that the proposed will is one that she would be likely to make if she had testamentary capacity. That conclusion is supported by specific evidence of discussions she had some three years ago with GT and her previously expressed wishes to her brother IDH and two of her friends, SR and KJ.

[34] In all of the circumstances, then, I am satisfied that leave should be granted. The applicant is an appropriate person. He is her current administrator and co-guardian and has remained a close friend. I am satisfied that adequate steps have been taken to allow representation of all persons with a proper interest in the application. In particular, BD, who is JT's only surviving sibling or half-sibling other than IDH, has

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3 [2013] QSC 40.
4 [2014] QSC 33.
5 [2011] QSC 230.
6 [2013] QSC 289.
7 [2012] QSC 349.

been served and has informed IDH that she does not oppose his application and would support IDH in whatever decisions he makes in relation to JT's care. I have noted the additional steps that have been taken since the last hearing.

[35] From the affidavit material it is clear that JT has not maintained a close relationship with the children of her deceased half-siblings, and, in fact, there is evidence that she has not had contact with her half-brother HH's sons for more than 15 years, and she disapproved of the fact that her half-brother DHC's daughters did not attend his funeral. She last saw them some five or six years ago and has not maintained contact with them. I am satisfied adequate steps have been taken to notify all persons of this application. It is clear that there is no close relationship between JT and the children of her half-brothers and sisters, and similarly there is now no close relationship between the older children of her brother IDH. It is clear for the reasons set out in the affidavit material why she has not maintained a close relationship with them.

[36] In all of the circumstances, then, I am satisfied that JT does not have testamentary capacity and will not regain testamentary capacity. I am satisfied the proposed will is or may be one that she would make were she to have testamentary capacity. I am satisfied that there are circumstances which indicate it is appropriate for an order to be made for the authorisation of the will. Section 26 sets out the relevant requirements in this regard:

> **"26 Execution of will or other instrument made under order**
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> (1) A will or other instrument made under an order under section 21 is properly executed if—
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> (a) it is in writing; and
>
> (b) it is signed by the registrar and sealed with the seal of the court.
>
> (2) A will or other instrument made under an order under section 21 may only be signed by the registrar if the person in relation to whom the order was made is alive."

[37] The affidavit material indicates that JT is currently alive and the requirements of the section have therefore been satisfied.

[38] JT is currently suffering from advanced dementia and accordingly given that incapacity she is a person who falls within the parens patriae jurisdiction of this Court because of that incapacity. I consider that in any reasons that are published all reference to JT should be in a manner which will not enable her to be identified. The current proceeding relates to her will which is normally a document the contents of which would not normally be revealed until after her death. Furthermore the Court is required to consider extensive personal information including medical and financial information which would normally be information which is kept private. The potential for identity fraud is well recognised and such potential is greatly increased when extensive details of medical, financial and banking information are published in relation to a clearly identified person particularly one who does not have the capacity to be vigilant in relation to the management of their own affairs.

[39] JT has both a guardian and administrator appointed pursuant to the provisions of the *Guardianship and Administration Act* 2000. Section 114A of that Act prohibits the publication of information about a guardianship proceeding to the public if that publication is likely to lead to the identification of the relevant adult by a member of

the public or a member of the section of the public to whom the information is published. Whilst I acknowledge that the section does allow the court to make an order authorising publication of this information, I am not satisfied that this would be in JT's interest, or the public interest.

[40] Further, that Act stipulates a number of underlying principles in relation to adults with impaired capacity. In particular the requirement in Principle 3 that "An adult's right to respect for his or her human worth and dignity as an individual must be recognised and taken into account" and the requirement in Principle 11 that "An adult's right to confidentiality of information about the adult must be recognised and taken into account." In my view those general principles should be taken into account in applications of this nature. I am cognisant of the importance of the principles of open justice as discussed by Fraser JA in the decision of *Dovedeen Pty Ltd & Anor v GK*[8] and significantly this application was heard in open court. Whilst the publication of the factual background and the legal issues in this case accord with the principles of open justice I do not consider those principles require publication of the identity of JT in the circumstances of this case. I consider that JT's dignity, privacy and vulnerability should be recognised and respected by referring to her by de-identifying any reference to her. In this regard I note the confidentiality provisions in s 525 of the *Mental Health Act* 2000 (Qld) which require that decisions involving the Mental Health Review Tribunal and appeals to the Mental Health Court from the Tribunal be de identified if a report of those proceedings is to be published. I also note the routine practice of de-identifying decisions from the Family Court of Australia.

[41] In this regard I agree with the approach taken by Henry J in *SPM v LWA*[9] where a non publication order was sought in relation to the actions of an attorney appointed pursuant an enduring power of attorney. His Honour stated:[10]

> "The order is more so sought for the protection of the individual's dignity and privacy, and it is premised on the very nature of the jurisdiction being exercised. As Lord Shaw observed, the parens patriae jurisdiction involves something of an exception to the general principle favouring publication because it is concerned with truly private affairs. The reference to the breadth of that principle as applying to lunatics in *Scott v Scott* I am persuaded in modern parlance embraces a reference to those with a want of mental capacity - see, for example, Fenwick, Re; Application of J.R. Fenwick &Re Charles [2009] NSWSC 530.
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> In this case the strong public interest in knowledge of proceedings which occur in respect of powers of attorney is self-evident. It is an interest likely to increase with the increasing practice of the use of powers of attorney with our aging population. However, the dignity and privacy of those who seek protection in respect of their private affairs through the holder of their power of attorney is a significant consideration against the public's interest in knowledge of the players in the proceedings.
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> The proper balance between these competing considerations can be struck by a non-publication order going only to protection of the

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8 [2013] QCA 116 at [34] – [37].

9 [2013] QSC 138.

10 [2013] QSC 138 at 6 – 7.

> identification of the individual rather than preventing the public's knowledge of the general nature and circumstances of the proceeding.
>
> In all of the circumstances therefore I propose to grant the application in a way limited only to an order which will prevent the identification of the respondent but not the circumstances or nature of the proceeding."

[42] Accordingly there will be orders in terms of the draft, which has been initialled by me and placed with the file.