SUPREME COURT OF QUEENSLAND

CITATION:	*Re: D* [2014] QSC 164
PARTIES:	**In the matter of an application pursuant to s 21 of the *Succession* Act 1981 on behalf of "D"** **JAMES RODERICK BYRNE** (applicant)
FILE NO/S:	5166/14
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	Ex tempore 23 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	23 June 2014
JUDGE:	Ann Lyons J
ORDER:	**The applicant is authorised to make the proposed will**
CATCHWORDS:	SUCCESSION – MAKING OF A WILL – TESTAMENTRY CAPACITY – LACK OF CAPACITY AND STATUTORY WILLS – where the applicant applied pursuant to ss 21 and 22 of the *Succession Act* 1981 (Qld) for a statutory will for Miss "D" - where Miss D lacks testamentary capacity due to cerebral palsy *Succession Act* 1981 (Qld), s 21, s 22, s 23 *Banks v Goodfellow* (1870) LR 5 QB 549 *Re JT* [2014] QSC 163 *SPM v LWA* [2013] QSC 138 *Van der Meulen v Van der Meulen* [2014] QSC 33
COUNSEL:	R Williams for the applicant
SOLICITORS:	James Byrne & Company for the applicant

[1] On 23 June 2014, I made orders and gave short reasons in relation to this application for declarations in relation to the making of a will for Miss D. I indicated that I would give more detailed reason at a later date. These are those reasons.

[2] This is an application pursuant to the *Succession Act* 1981 (Qld) ("Succession Act") for a will to be authorised to be made for "Miss D". She is 63 years of age and she has had cerebral palsy from birth. She is totally debilitated from her condition and is unable to communicate verbally or in writing. She is wheelchair bound and has resided permanently at a nursing home in Brisbane since August 1994.

[3] The applicant is Mr James Roderick Byrne, who is a solicitor who acts as D's legal guardian. He is one of two guardians who were appointed on the death of D's father, on 28 August 2008 under his will dated 31 May 2005. The other appointed legal guardian was Mr Stephen Rudz, who was a former partner in the firm of James Byrne & Rudz Solicitors. He left the partnership in 2011, and since that time, Mr Byrne has carried out the function of acting as D's legal guardian solely.

[4] It is clear that D has no will.

Family background

[5] Miss D was born in November 1950 and is an only child. D's mother died on 8 August 2001 and D's father died on 28 August 2008. D has no spouse and no children and no likelihood of ever marrying. On her mother's side, she has an aunt AAM who is her mother's only sibling. She is 84 years of age, is in poor health and has dementia. She resides at a nursing home in Pottsville and is in permanent high care. She has five children, PAS, GJD, KMT, TMM and LMD.

[6] On her father's side, she has three cousins: IDG, GFD, and GRD. Their father DRAJ, who died on 6 January 2003, was the only sibling of D's father.

[7] Mr Byrne deposes in his affidavit that the only visitors D receives at the nursing home, apart from himself, are her cousin IDG and his wife, who visit monthly. Mr Byrne spoke to GJD, and he informed Mr Byrne that his siblings have had no contact with D since their early childhood. Mr Byrne also deposes that he has spoken with AAM's daughter PAS who informed Mr Byrne that she holds her mother's enduring power of attorney and that her mother agreed wholly with the proposed will.

The application

[8] Mr Byrne therefore applies pursuant to s 22 of the Succession Act for leave to apply for an order pursuant to s 21 of the Act authorising that a will be made for D.

[9] A draft of the proposed will is exhibited to Mr Byrne's affidavit. That will provides for Mr Byrne to be appointed as executor and trustee or, in default, the will appoints another solicitor at his firm, Barbara Hoolahan. D's estate is to be divided equally between IDG and his wife on the one hand and Southern Cross Care Queensland Incorporated with a wish expressed that the gift be applied for the general purposes of the [Named] Nursing Home. There is also an accrual provision that if the gift to IDG and his wife were to fail that half share of the estate is to accrue to the half share that is to pass to Southern Cross Care Queensland Incorporated. There are then the usual clauses in standard form.

[10] Statutory wills were introduced into the Succession Act by amendments in 2006. The scheme requires a person who seeks an order under s 1 of the Act to first apply for leave under s 22. The procedure requiring leave is designed to screen out

unmeritorious applications, and it is 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:

> **"22 Leave to apply for s 21 order**
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> (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."

[11] The substantive provision is s 21, which provides that the court may authorise a will to be made, altered or revoked for a person without testamentary capacity. That section provides the court may on application make an order authorising a will to be made or altered in the terms stated by the court on behalf of a person without testamentary capacity or for a will or part of a will to be revoked. The court may make the order only if the person in relation to whom the order is sought lacks testamentary capacity and the person is alive when the order is made and the Court has approved the proposed will, alteration or revocation. Those requirements are 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—
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> person without testamentary capacity includes a minor."

[12] Section 23 then sets out the information the court must be given pursuant to the application:

> **"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;

(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."

[13] I am satisfied that each of the matters required by s 23 have been addressed in the affidavit material.

[14] On hearing the leave application the court may give leave only if the court is satisfied of several matters which are specified in s 24. In particular, the court must 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 and that there are reasonable grounds for believing that the person does not have testamentary capacity. Section 24(d) then sets out the core test, which states that 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 (e) then provides that it is or may be appropriate for an order to be made under s 21 in relation to the person.

[15] As I have stated, the requirement in s 24(d) is the core test central to the court's consideration. It is also clear that pursuant to s 25 the court can have regard to any information given to the Court under s 23 and may inform itself of any other matter relating to the application in any way it considers appropriate, and the court is not bound by the rules of evidence. Pursuant to s 21(1)(a), the court may make an order authorising a will to be made in the terms stated by the court, and the court is not restricted to approving or rejecting a proposed draft will, and the court can require that adjustments be made to the draft. If an order is made by the court pursuant to s 21, it must be executed in accordance with s 26, which requires that it be signed by the Registrar and sealed with the seal of the court.

[16] In terms of the information that I am required to consider pursuant to s 23, I am satisfied that there are good reasons for making the application. In terms of whether D lacks testamentary capacity, the classic test is well known and was set out in *Banks v Goodfellow*: [1]

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

[17] I have considered the material in the affidavits, and Dr Flynn, who is D's medical advisor, has provided a report in relation to her capacity dated 28 May 2014. Dr Flynn states that D has severe disabilities due to cerebral palsy and she does not have testamentary capacity. I am satisfied that D does not have testamentary capacity as she has suffered from cerebral palsy from birth and does not communicate.

[18] In terms of the size and character of her estate, that is set out in the affidavit of Mr Byrne. He deposes to a Westpac term deposit of $85,072 (invested through Mr Byrne's firm's Trust Account) and an amount of approximately $8,746 held in a trust account. D has no outstanding liabilities, and her needs are met by her disability pension and by the Reserve Bank Officers' Hospital Fund.

[19] There is also a trust fund which was established under her father's will of which Mr Byrne and Mr Rudz are the trustees. From that trust fund distributions are made if needed for D's care. That fund currently holds a substantial amount of money. On D's death the corpus will pass under the terms of her father's will to three charities, which includes the [Named] Nursing Home. I have considered the draft of the proposed will, and it has been settled by counsel. Mr Byrne and Ms Hoolahan have confirmed that they are willing to act as executor and substitute executor. Because D has never been able to communicate she has not been able to express her testamentary wishes, I am satisfied she has never had a will.

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1 (1870) LR 5 QB 549 at 565.

[20] In relation to s 41 of the Succession Act I am satisfied no person is eligible to make a family provision application in relation to D's estate.

[21] In terms of whether there is any evidence of a gift for charitable or other purposes that D might reasonably expected to give by a will, Mr Byrne in his affidavit has expressed the view that as D's legal guardian he would expect that if she were able to make a will today she would want a substantial gift to the charity that operates the [Named] Nursing Home in gratitude for the care that she has received there over many years. She has resided in that nursing home since 1994 and both of her parents were cared for at that nursing home in their later years. There is no evidence of any person for whom D might reasonably be expected to make provision by a will.

[22] In terms of the persons who might be entitled to claim on intestacy, if D were to die intestate the persons who might be entitled to claim under Sch 2 and s 37 of the Succession Act are her aunt as to one half of the residuary estate and her cousins as to one sixth each of the residuary estate.

[23] In terms of the application for leave, the core test is set out in s 24(d). I must be satisfied that the proposed alteration is or may be a will that D would make were she to have testamentary capacity. The applicant does not, therefore, have to satisfy the court that this is the will D would make were she to have capacity, but rather that it *may be* a will that she would make. The relevant test has been referred to in a number of decisions; in particular in *Sadler v Eggmolesse*[2] and more recently *Van der Meulen v Van der Meulen.*[3] I would adopt the approach of Jackson J in that case as follows:[4]

> "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."

[24] I would therefore follow the approach that I have taken in previous decisions such as *McKay v McKay*[5], *Re Matsis*[6] and *Lawrie v Hwang*[7] that one should simply focus on the words of the section.

[25] I am satisfied, having considered the affidavit material in this case, and in particular the affidavit of Mr Byrne, who has been apprised of the factual background for a long time, that there is sufficient evidence that the draft will is or *may be* a will that D would make if she were to have testamentary capacity. Mr Byrne knows her well and has been involved with the family since 1972. The children of her aunt have not seen her for many years. The only visitors are her cousin IDG and his wife, and Mr Byrne deposes that D receives excellent care at the nursing home.

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2 [2013] QSC 40.
3 [2014] QSC 33 .
4 [2014] QSC 33 at [55].
5 [2011] QSC 230.
6 [2012] QSC 349.
7 [2013] QSC 289.

[26] I am therefore satisfied that leave should be granted. I am also satisfied Mr Byrne is an appropriate person to make the application, being D's guardian. He is not a beneficiary and he does not have a personal interest.

[27] I am also satisfied that in all of the circumstances adequate steps have been taken to allow representation of all persons with a proper interest in the application. Mr Byrne has written to all of the cousins of D. I have considered that letter. In that letter he sets out the nature of the application and explains why the application is being made and the current entitlements on intestacy were D to die without making a will.

[28] In relation to the children of her aunt AAM, five of the children have responded to Mr Byrne and confirmed that they support the application. Whilst one cousin has not responded, I am satisfied that he has been informed of the application and Mr Byrne has made every reasonable attempt to contact him.

[29] I am therefore satisfied of all of the matters I am required to be satisfied of in relation to the application. I am satisfied that D does not have testamentary capacity, will never gain testamentary capacity. The proposed will is or may be one that she would make were she to have testamentary capacity. I am satisfied it is appropriate for an order to be made for the authorisation of a will for her.

[30] I am also satisfied in the circumstances of this case that it is appropriate that the reasons for judgment be de-identified for the reasons which I have set out in the decision of *Re JT*[8] where I referred to the General Principles which apply in relation to persons with impaired capacity under the *Guardianship and Administration Act* 2000 as follows:

> [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.
>
> **…**
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> [40] Further, [the *Guardianship and Administration Act* 2000 (Qld)] 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

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8 [2104] QSC 163

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*[9] 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*[10] 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:[11]

> **"**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.
>
> 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.
>
> The proper balance between these competing considerations can be struck by a non-publication order going only to protection of the identification of the individual rather than preventing the public's knowledge of the general nature and circumstances of the proceeding.
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> 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."

[31] I am also satisfied that it is also appropriate that costs be paid out of D's estate.

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9 [2013] QCA 116 at [34] – [37].
10 [2013] QSC 138.
11 [2013] QSC 138 at 6 – 7.