SUPREME COURT OF QUEENSLAND

CITATION:	*RKC v JNS* [2014] QSC 313
PARTIES:	**RKC** (applicant) **v** **JNS** (respondent)
FILE NO/S:	10984/14
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	17 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	9 December 2014
JUDGE:	Philippides J
ORDER:	**Order in terms of the draft initialled on 17 December 2014**
CATCHWORDS:	SUCCESSION – MAKING OF A WILL – TESTAMENTARY CAPACITY – LACK OF CAPACITY AND STATUTORY WILLS – where the applicant applied pursuant to s 21 of the *Succession Act* 1981 (Qld) for an order authorising a will to be made for SKC on the basis that SKC lacked testamentary capacity *Succession Act* 1981 (Qld), s 21, s 22, s 23 *Banks v Goodfellow* (1870) LR 5 QB 594 *In Re D(J)* [1982] Ch 237 *Lawrie v Hwang* [2013] QSC 289 *Mace v Malone* [2012] 1 Qd R 319; [2011] QSC 49 *McKay v McKay* (2011) 4 ASTLR 429; [2011] QSC 230 *Re Fenwick* (2009) 76 NSWLR 22; [2009] NSWSC 530 *Re Matsis: Charalambous v Charalambous* (2012) 8 ASTLR 361; [2012] QSC 349 *Re JT* [2014] QSC 163 *Sadler v Eggmolesse* [2013] QSC 40 *Van der Meulen v Van der Meulen* [2014] QSC 33
COUNSEL:	Ms C Brewer for the applicant No appearance for the respondent
SOLICITORS:	McInnes Wilson for the applicant

The application

[1] The applicant, RKC, sought leave pursuant to s 22 of the *Succession Act* (the Act) to apply for an order under s 21 of the Act authorising that a will be made for her daughter, SKC. Orders were made on 17 December 2014 in accordance with the draft provided. The following are the reasons for the orders made.[1]

Relevant legislation

[2] The scheme in relation to statutory wills requires that a person seeking an order under s 21 of the Act must first apply for leave under s 22 which provides:

> "**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."

[3] Section 21 of the Act provides:

> "**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."

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[1] Affidavit material deposed to SKC being alive as the time of the making of the orders as required by s 21(2)(b) of the Act.

[4] Section 23 of the Act specifies the information which must be given to the court on an application for leave under s 22. Unless the court otherwise directs, the following information is required:

(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.

[5] Section 24 sets out the matters which the court must be satisfied in order to grant leave. They are:

(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.

Factual background

[6] SKC was born on 16 October 2002 and is currently 12 years old.

[7] The applicant, together with her mother E, has had the care of SKC since she was born. SKC has one brother, S, who is 10 years old. SKC and S are the applicant's only children.

[8] SKC was delivered by caesarean section due to foetal distress. She suffers primarily from severe spastic quadriplegic cerebral palsy resulting from her difficult birth. She has also been diagnosed with encephalomalacia and microcephy, severe mental retardation, cortical blindness, strabismus and refractory epilepsy, precocious puberty and scoliosis.

[9] A personal injuries action for medical negligence was brought on SKC's behalf in relation to the circumstances of her birth. Settlement of SKC's claim was sanctioned by the Court, resulting in an award of damages of approximately $1.375m. Perpetual Trustee Company Limited (Perpetual) was appointed administrator of the settlement funds.

[10] The respondent, JNS, who is SKC's biological father, was served with the application but did not appear at the hearing. There is no one, apart from possibly the applicant, who is eligible to bring a family provision application in respect of SKC's estate.[2] Should SKC die intestate, her parents would take her estate equally on intestacy (or if only one of them survives, they would take the entire estate).[3]

[11] As at 19 July 2014 the value of SKC's assets managed by Perpetual was approximately $1.173m. Perpetual, as SKC's financial administrator, has been served with the application. Perpetual has advised that it does not intend to appear at the hearing and does not wish to make any submissions in relation to the substantive orders.[4] There is no other person who should be served with the application.

[12] I am satisfied that the applicant is an appropriate person to make the application for leave and that adequate steps have been taken to allow representation as required by s 24(b) of the Act.

[13] The applicant was in a relationship with JNS from May 2001 to December 2005.

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2 Siblings are not eligible and parents are only eligible if they are being "wholly or substantially maintained or supported" by SKC as at the date of her death.: see definition of "dependant" in s 40 *Succession Act*1981.

3 *Succession Act*1981, Schedule 2, Part 2, Circumstance 2.

4 It did seek that the applicant bring the to the court's attention a submission as to the appropriate costs order, which the applicant did.

[14] In November 2001, the applicant was a passenger in a car driven by JNS which was involved in a serious motor vehicle accident. JNS was subsequently convicted of dangerous driving causing grievous bodily harm. He was imprisoned in July 2002 and released in April 2003. As a result of the accident, RKC sustained brain injury (a right cerebral contusion subdural haemorrhage), fractures to the pubic bone and traverse processes of the L1-L5 vertebrae. She was in a coma for several weeks and spent some months in hospital recovering from the accident.

[15] The affidavit evidence indicates that the relationship between the applicant and the respondent was one that was riddled with domestic violence. There was consistent physical, sexual and emotional abuse by JNS towards the applicant, as well as, general lack of care for SKC's wellbeing. In December 2005 with the assistance of Child Safety Services and the Queensland Police the applicant, SKC and S were removed from the home. They did not return and the applicant's relationship with the respondent ceased.

[16] On 30 August 2006, the Family Court awarded the applicant sole custody and parental responsibility for SKC and S. The respondent is only allowed supervised contact or communication (which he has not accessed). He has only seen SKC on two occasions since December 2005, when she was accompanying the applicant.

[17] SKC lives with her mother, with whom she has a close relationship. She also has a close relationship with her maternal grandmother, E, who has assisted significantly with SKC's care. In addition, SKC has a close relationship with certain cousins as outlined in the affidavit material.

[18] JNS has never paid any money to help look after either of the children by way of child support.

[19] In the years after SKC's birth, the applicant's acquired brain injury and back injury made caring for SKC difficult. There were periods when the applicant was unable to cope and E would take over sole care for SKC.

[20] For the majority of time between 2005 and 2013, E provided high levels of support to assist the applicant in caring for SKC. The applicant continued to care for S during that period, but was not always able to provide for all of SKC's needs. The applicant described the situation as a co-parenting arrangement between herself and E.

[21] Since March 2013, E became ill and was unable to help with the care for SKC. The applicant developed the confidence that she could take care of SKC on her own. E still assisted the applicant when she needed to attend appointments or was suffering from pain or tiredness.

[22] In June 2014, the applicant separated from her then partner. During the period following, E assisted the applicant in taking care of SKC and S. The applicant and E are now co-parenting the children again.

[23] SKC has attended a school for special education in various capacities for most of her life. She currently attends from 9.00 am to 12.00 pm Monday to Friday, unless she is unwell or has another appointment.

[24] SKC and the applicant receive respectively 16 hours and 6 hours of respite care a week from Community Respite Options South Burnett (CROSB). The care assists the applicant in the most stressful periods of the day, which include taking SKC to school and picking her up, as well as, preparing the children for dinner and bed. CROSB also provides care in relation to the periods during which E assists with the children.

[25] S has a strong relationship with SKC and is very caring towards her. SKC also interacts with the applicant's siblings who live close by. The applicant now has a robust support network to assist in caring for SKC. SKC spends time with her cousins on a weekly basis. They provide a lot of joy in her life. Two of her cousins have health problems and the applicant deposes to her belief that SKC would want to provide some assistance with the medical bills they will face over their lifetimes.

Lack of testamentary capacity

[26] SKC has no existing will. She is possessed of a large estate as a result of the settlement of her court proceedings.

[27] The classic statement of what constitutes testamentary capacity was set out by Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 594 at 565 as follows:[5]

> "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 unsound, would not have been made."

[28] SKC's birth resulted in extremely severe injuries. I am satisfied on the basis of the medical reports that SKC lacks testamentary capacity and, given the extent of the impairment in her brain function that there is no likelihood of her acquiring such capacity.

[29] In that regard, I note that Dr Harbord, Paediatric Neurologist, stated in his report of 3 August 2011 that clinical findings in relation to SKC "are entirely consistent with the brain damage identified on her MRI head scan, which diffuse abnormality of the white matter and cortical grey matter". He also opined that SKC "is likely to have a moderate to severe intellectual disability, and therefore her impairment for cognitive ability is in the severe category that is Class 4 at 70%". He additionally observed that SKC's "severe cerebral palsy and likely moderate to severe intellectual disability will be lifelong abnormalities which will severely affect her learning ability at school, as well as cognitive and physical development".

[30] Dr Ryan, Paediatric Neurologist, in her report of 30 August 2011, stated that SKC had evidence perinatally of severe hypoxic-ischaemic brain injury manifesting with a severe encephalopathy and seizures. Over time this has evolved to severe mental

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5 See also *Frizzo v Frizzo* [2011] QCA 308.

retardation with minimal language development. It appears that SKC's level of functioning will remain essentially stable from this point, but that she will have persisting and prolonged cognitive and physical deficits for the rest of her life. She will continue to require one-to-one assistance and supervision into adolescence and adulthood. She will need maximal levels of attendant care for the provision of all her physical needs.

Draft will

[31] As SKC suffered her injuries at birth, there is no direct evidence available of her testamentary wishes; given SKC's disability, she has little to no ability to understand and communicate her wishes.

[32] A draft of the proposed will was provided (see exhibit FPS-3 to the second affidavit of Fredric Smith). In its terms the proposed will is a relatively simple. It:

(a) appoints Perpetual as her institute executor (which is appropriate given it has been managing the funds since they were received);
(b) appoints the applicant as substitute executor (which is also appropriate as Perpetual cannot advise at this stage that they will accept the appoint of executor – that will depend upon circumstances as at the date of death);
(c) appoints other close family members as further substitute executors;
(d) gifts SKC's estate:
    (i) 50% to her mother (with a gift over to the gifts in (ii) and (iii) below should her mother predecease her);
    (ii) 20% to her brother, S;
    (iii) 10% to her paternal grandmother E, to whom she is very close and who has assisted significantly in her care, as I have already indicated;
    (iv) gives two gifts of 3% to cousins to whom she is particularly close;
    (v) gives two gifts of 2% to another two cousins to whom she is particularly close;
    (vi) provides for certain charitable gifts, being gifts of 5%, 3%, 1% and 1% respectively to a respite care organisation she attends and charities with which she relates to and those who she receives assistance from; the Cerebral Palsy League of Queensland, Make-A-Wish Foundation and Canteen (an Organisation for Young People Living with Cancer).

[33] It was submitted that, in considering the draft will, it is to be noted that in the context of s 24(d) the court must be satisfied that the proposed will "is or may be a will" that SKC would make were she to have testamentary capacity. It is not necessary to be satisfied that the draft will is the will SKC would make were she to have capacity, but rather that it "may be" a will that she would make.

[34] Counsel for the applicant referred to a number of decisions concerning s 24(d). In *Mace v Malone* [2011] QSC 49 Daubney J had regard to the decision of Palmer J in *Re Fenwick* [2009] NSWSC 530, concerning the New South Wales equivalent to Queensland's s 24(d), which provides consideration as to whether the proposed statutory will "is, or is reasonably likely to be" one that would have been made by the incapacitated person if he or she had had capacity. Daubney J held that, given

that the Queensland legislation does not specify a "reasonably likely" test, the principles enunciated by Palmer J in *Re Fenwick* were not applicable. His Honour stated at [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)."

[35] The five principles articulated by Megarry V-C in *In Re D(J)* [1982] Ch 237 are as follows:

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

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

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

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

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

[36] In *McKay v McKay* [2011] QSC 230, A Lyons J adopted a different approach at [79]:

> "[I]n 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."

[37] That approach was also taken by A Lyons J in *Re Matsis: Charalambous v Charalambous* [2012] QSC 349 and *Lawrie v Hwang* [2013] QSC 289 and by Atkinson J in *Sadler v Eggmolesse* [2013] QSC 40. It was more recently adopted by A Lyons J in *Re JT* [2014] QSC 163.[6]

[38] In the circumstances of the present case, nothing turns on which approach is taken, given that, in my view, on the facts of this case, the result is the same. I am satisfied that, on either approach, the draft will is or may be a will that SKC would make had she had capacity, having regard to the following considerations:

(a) SKC's father has not participated in her care or been involved with it in any real way and given the nature of his past relationship with the applicant and SKC she would not have wished him to benefit;
(b) SKC's mother, assisted by E, has had the primary care of SKC since birth;
(c) SKC's close relationship to E and S;
(d) SKC's close relationship to her cousins to whom minor gifts are lef ;
(e) The proposed charitable gifts are all to entities with which SKC has had a close relationship over her lifetime. The applicant sets out in her affidavit the basis of her belief that SKC would wish to provide for the charitable gifts in the proposed will.

Orders

[39] In the circumstances of this case, it is appropriate to grant leave to apply for an order under s 21 and to approve a will for SKC in the terms proposed. It is appropriate to make orders in accordance with the draft provided. The orders made include an order that the applicant's costs to be ordered to be paid out of SKC's assets in accordance with s 21(5) of the Act. It also includes an order for de-identification, following the approach taken in *Re JT* and *SPM v LWA* [2013] QSC 138, and for the reasons expressed in those cases. There is an additional factor which supports such an order in the present case, being the evidence of domestic violence, at the hands of the respondent, directed to both the applicant and SKC.

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[6] See also *Van der Meulen v Van der Meulen* [2014] QSC 33. Although the Court of Appeal recently considered court made wills in *GAU v GAV* [2014] QCA 308, it did not address this issue.