SUPREME COURT OF QUEENSLAND

CITATION:	*Lawrie v Hwang* [2013] QSC 289
PARTIES:	**MITCHELL ANDREW LAWRIE** (applicant) **v** **KUMOK HWANG** (respondent)
FILE NO/S:	BS No 8967 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	10 October 2013
JUDGE:	Ann Lyons J
ORDERS:	**1. Pursuant to s 22 of the *Succession Act* 1981 (Qld) ("the Act"), the applicant has leave to apply for an order pursuant to s 21 of the Act authorising a Will to be made for Keith John Lawrie.** **2. Pursuant to s 21 of the Act, a Will is authorised to be made for Keith John Lawrie in terms of the draft Will which is exhibit 'MAL-4' to the affidavit of Mitchell Andrew Lawrie filed on 30 September 2013.** **3. The applicant's costs of and incidental to this application are to be assessed on the indemnity basis and paid out of the assets of Keith John Lawrie.**
CATCHWORDS:	SUCCESSION – MAKING OF A WILL – TESTAMENTARY CAPACITY – LOSS OR LACK OF CAPACITY AND STATUTORY WILLS – where applicant sought leave under s 22 *Succession Act* 1981 (Qld) to apply for an order under s 21 *Succession Act* 1981 (Qld) authorising a statutory will to be made for his father – where the applicant's father suffered from dementia – where the Public Trustee and Adult Guardian had been appointed to act for the applicant's father in all his financial and personal matters –

where the respondent had recently married the applicant's father – where the father's most recent will was revoked by the marriage under s 14 *Succession Act* 1981 (Qld) leaving him with no valid will – where the applicant argued that if his father was able to instruct on the making of a will, he would not want any part of his estate to pass to the respondent given her allegedly dishonest conduct in transferring away his assets – where there respondent sought an adjournment of the proceedings – whether the proceedings should be adjourned – whether the applicant's father lacks testamentary capacity – whether the proposed statutory will is or may be a will the applicant's father would make if he were to have testamentary capacity

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON THE INDEMNITY BASIS – whether costs should be paid out of the estate on an indemnity basis

Banks v Goodfellow(1870) LR 5 QB 594
Lawrie & Anor v Hwang & Ors [2012] QSC 422
McKay v McKay & Ors [2011] QSC 230
Re Keane; Mace v Malone [2011] QSC 49
Sadler v Eggmolesse [2013] QSC 40

Succession Act 1981 (Qld), s 14, s 21, s 22, s 23, s 24, s 25, s 33N, s 41

COUNSEL: R D Williams for the applicant
The respondent appeared on her own behalf
J Walden for the Public Trustee

SOLICITORS: Mitchells Solicitors for the applicant
The respondent appeared on her own behalf
The Official Solicitor for the Public Trustee

ANN LYONS J

Background facts

[1] On 10 October 2013, I made orders and gave extensive *ex tempore* reasons for those orders. These are the reasons I gave on that date, with more extensive references to the *Succession Act* 1981 (Qld) (the **Succession Act**), relevant case law and the medical reports. When I gave the *ex tempore* reasons, I indicated that I would supplement them in this way, given the complex factual and legal background.

[2] On 24 September 2013, the applicant filed an originating application pursuant to the Succession Act for a statutory Will to be made on behalf of his father, Keith John Lawrie (**Mr Lawrie**).

[3] Mr Lawrie is an 82 year old man who has been suffering from dementia. The respondent, Ms Hwang, is a woman of Korean descent whom Mr Lawrie met through an introductions agency during a trip to South Korea in May 2011. Mr Lawrie and the respondent were married shortly after in three separate wedding ceremonies. The ceremonies took place in South Korea on 26 July 2011, in Brisbane on 22 September 2011 and in Las Vegas in November 2011.

[4] At the time of the wedding ceremonies, there was significant concern for Mr Lawrie's mental capacity. On 24 August 2011, an order was made by the Queensland Civil and Administrative Tribunal (**QCAT**) appointing the Public Trustee of Queensland as administrator for all of Mr Lawrie's financial affairs. On 9 October 2012, QCAT appointed the Adult Guardian to act for Mr Lawrie in all his personal matters.

[5] From August 2011 onwards, a number of financial transactions occurred whereby an amount of approximately AUD$3.1 million was transferred from the bank accounts of Mr Lawrie and his asset-holding company, Lawmar Pty Ltd (**Lawmar**), into South Korean accounts in the name of the respondent.

[6] On 11 October 2012, Mr Lawrie, through his litigation guardian, and Lawmar commenced proceedings BS 9495/12 against the respondent and her company Goldpearl Pty Ltd for engaging in fraud, undue influence and unconscionable conduct to procure the bank transfers.

[7] Following a three day trial, Philippides J found on 18 December 2012 that the respondent had acted dishonestly as she had known and believed that Mr Lawrie did not have the capacity to authorise the bank transfers. The respondent was ordered to pay $3,011,619.61 to Lawmar, together with interest and to transfer all of her right, title and interest in her Korean real properties to Lawmar or its nominee.

[8] The respondent initiated proceedings herself against Mr Lawrie in the Sydney Federal Circuit Court registry, seeking a matrimonial property settlement. However, she filed a Notice of Discontinuance on 13 May 2013.

[9] On 14 June 2013, the respondent was charged with fraud and attempted fraud by the Queensland Police Service and was arrested and remanded in custody on those charges on 15 June 2013.

[10] The respondent came before the court again on 11 July 2013 when Atkinson J found her to be in contempt of court for failing to comply with the orders made by Philippides J on 18 December 2012. Atkinson J ordered that the respondent remain in custody until she complies with the orders made. The respondent is currently detained at the Brisbane Women's Correctional Centre.

[11] The Adult Guardian has since determined that, due to the respondent's actions, she is not a suitable person to have contact with Mr Lawrie.

[12] The applicant seeks leave pursuant to s 22 of the Succession Act to apply for an order under s 21 of the Succession Act authorising a statutory Will to be made for Mr Lawrie.

[13] Currently, Mr Lawrie has no valid Will. His most recent Will was dated 1 December 2006 (the **2006 Will**) and was revoked by his marriage to the respondent by virtue of s 14 of the Succession Act.

[14] The applicant argues that, if his father was able to give instructions as to the making of a Will, he would want no part of his estate to pass to the respondent, given her conduct in relation to him and her actions in transferring away his assets. Furthermore, the applicant argues that Mr Lawrie would want the terms of his current Will to reflect those of the 2006 Will.[1]

[15] On this basis, the applicant has submitted a draft of the proposed statutory Will (**Proposed Will**) on terms that are broadly equivalent to the 2006 Will. The Proposed Will provides for:

- the revoking of all previous testamentary acts;
- the appointment of Mr Lawrie's close friend and solicitor, William Kirby (**Mr Kirby**) as executor and trustee, with the applicant appointed as executor in default;
- a gift of 50% interest in Mr Lawrie's home property to his stepdaughter, Kristin Cosgrove;
- a gift of the shares in Mr Lawrie's company, Keith Lawrie Nominees Pty Ltd, to Mr Lawrie's sons, Tasman Lawrie and the applicant, in equal shares; and
- the residue of the estate to be divided equally between Mr Lawrie's sons, with substitutionary provisions in favour of their children or grandchildren, unless there are no such children or grandchildren, in which case the residue of the estate will vest in Mr Lawrie's stepdaughter, Kristin.

The Proposed Will does not provide for the respondent to receive any of Mr Lawrie's assets upon his passing away.

[16] The applicant also seeks costs on an indemnity basis, to be paid out of Mr Lawrie's assets.

[17] The application is supported by Mr Lawrie's other son, Tasman Lawrie, Mr Lawrie's step-daughter, Kristin Cosgrove, Mr Lawrie's brother, Mitchell Lawrie Snr, and Mr Kirby.

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1 Outline of Submissions on behalf of the Applicant, filed on 2 October 2013, at p 6, para [18].

Legislative framework

[18] Under s 21 of the Succession Act, a court can make an order that a Will be made in circumstances where the proposed testator does not have testamentary capacity. This is the substantive relief sought by the applicant. Section 21 is in the following terms:

> "**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…"

[19] However, a person seeking an order for the making of a statutory Will under s 21 of the Succession Act must first apply for leave under s 22, which reads as follows:

> "**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."

[20] A court may grant leave under s 22 of the Succession Act only if it is satisfied of the matters specified 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."

[21] Pursuant to s 23 of the Succession Act, the applicant must also provide the court with certain information to aid its decision as to whether leave should be granted. Section 23 sets out the extensive material which must be provided to the court. Section 23 provides 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;

(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."

[22] When hearing the leave application and the substantive application for a statutory Will, the rules of evidence are relaxed by s 25 of the Succession Act and the court may have regard to any information given to the court pursuant to s 23 and may inform itself of any other matter in any way it considers appropriate. The court is not bound by the rules of evidence.

"**25 Hearing an application for leave or for an order**

On the hearing of an application for leave under section 22 or for an order under section 21, the court—

(a) may have regard to any information given to the court under section 23; and

(b) may inform itself of any other matter relating to the application in any way it considers appropriate; and

(c) is not bound by the rules of evidence."

The current application

[23] I am satisfied that that all of the information required pursuant to s 23 has been provided to the Court.

[24] In terms of s 24, I must be satisfied that the applicant is an appropriate person to make the application. In this case, the applicant, Mr Mitchell Lawrie, is one of the two sons of Mr Lawrie. I am satisfied that he is the only child living in the jurisdiction as Mr Lawrie's other son, Tasman Lawrie, resides overseas. The applicant was also the applicant in the QCAT proceedings. He will of course be a beneficiary under the Proposed Will and whilst that requires me to exercise caution in determining whether he is an appropriate applicant, that will often be the case in applications of this nature and it is not a disqualifying feature. Having considered the affidavit material, I am satisfied that the applicant is appropriate.

[25] The next matter I must satisfy myself about is whether adequate steps have been taken to allow representation of all persons with a proper interest in the application. I am satisfied that all persons with a proper interest have been served. The evidence indicates that Mr Lawrie's other son, Tasman Lawrie, has been served and indeed that he supports this application. Mr Lawrie's stepdaughter has also been served and similarly supports the application.

[26] I note in particular that Ms Hwang was served with all of the material in support of this application on 26 September 2013. This application was initially listed for a hearing on 2 October 2013 in the Applications List. On that date, Boddice J placed the matter on the Civil List for a hearing on 14 October 2013 to allow Ms Hwang time to prepare for the application and to obtain legal representation should she require it. Ms Hwang was also given a copy of the applicant's submissions in writing as well as the extensive material in support of that application on that date.

[27] The Public Trustee of Queensland has been Mr Lawrie's administrator since 24 August 2011 and as such is appointed to make decisions about all his financial matters which, by definition, include legal matters relating to Mr Lawrie's financial or property affairs. The Public Trustee has been served with the application and the material in support and was represented at the hearing by a legal officer from the office of the Official Solicitor. The Public Trustee supports the application.

Should the application proceed today?

[28] Ms Hwang has again today applied for an adjournment on the basis that she has not be able to obtain legal assistance. Boddice J informed Ms Hwang on

2 October 2013 that the matter needed to proceed urgently and that it would proceed to a hearing today. I am satisfied that Ms Hwang has been given appropriate notice and has had over two weeks to prepare. I also note that she has had no difficulty in the past obtaining legal assistance from a number of legal firms including De Groots and Peter Shields Lawyers.

[29] I am also concerned that Ms Hwang appeared in Court today without any documents or material whatsoever despite being provided with all of that material in advance. Ms Hwang was again provided with the applicant's submissions. Having heard Ms Hwang's oral submission on the adjournment of the application, it is also clear to me that she understands the issues and she has been able to respond to arguments advanced by Counsel for the applicant. I also take into account the findings by previous judges of this Court that Ms Hwang is able to understand the nature of the proceedings. I also take into account the fact that even if the application is successful, Ms Hwang's rights are not extinguished as it would seem that Ms Hwang would still have rights under s 41 of the Succession Act to bring an application for provision out of the estate upon Mr Lawrie's death, although no doubt her conduct would be a very relevant factor.

[30] I am satisfied the matter should proceed today and indeed I am concerned that Ms Hwang is endeavouring to delay the hearing of the application.

Does Mr Lawrie lack Testamentary Capacity?

[31] The third factor that the Court needs to be satisfied about is that there are reasonable grounds for believing that the testator does not have testamentary capacity. In this regard I am satisfied that there is ample evidence that Mr Lawrie does not presently have testamentary capacity. I rely on the previous decisions of this Court, particularly that of Philippides J on 18 December 2012 as well as the QCAT orders which were made on 24 August 2011 and 9 October 2012. Those orders were continued by QCAT on 14 December 2012 for a further two years. All of those decisions indicated that Mr Lawrie did not have capacity for financial or personal matters.

[32] I also rely on the affidavit of Mr Kirby who has been Mr Lawrie's solicitor for over 30 years and knows him well. Mr Kirby's affidavit indicates that, in his view, Mr Lawrie has lacked capacity to make a Will since early 2011. He states this on the basis that he has had a longstanding professional relationship with Mr Lawrie and has been able to observe changes in his mental state over this time. As a solicitor, Mr Kirby states he is also familiar with the tests for testamentary capacity as set out in *Banks v Goodfellow*.[2] He states:

> "10. The decline in Keith's mental state has reached the point where, at least for the last 12 months, he appears to remember me when I meet with him, but does not appear to me to remember some other persons we have both known for many years, without being prompted as to who they are. I have noticed in particular that he can ask me repeatedly, sometimes up to approximately 20 times in the course of a meeting, how

[2] (1870) LR 5 QB 594.

> old I am, how old he is, and how long he has known me. He cannot recall past events without being prompted…
>
> 12. Given the decline in Keith's mental state, I would not feel able now to accept instructions from him for the preparation of a will. I have no hesitation in saying that, in my opinion, he clearly lacks testamentary capacity according to the test in *Banks v Goodfellow*."[3]

[33] I also note the applicant's affidavit in which he states that Mr Lawrie frequently repeats himself after about 15 minutes and "He does not appear to remember who Ms Hwang is or what she has done".[4]

[34] I also take into account in particular the report of Dr Nick John dated 16 November 2011 which was prepared in relation to the QCAT hearings. Dr John concluded:

> "In summary, Mr Laurie (sic) has significant short term memory problems which I suspect are due to a combination of vascular disease in that he has two cerebral infarcts, both in parts of the brain that would affect day to day cognitive function. The frontal infarct would affect frontal executive function, such as planning, judgement and insight, and the parietal lesion would affect visiospatial skills and also memory."[5]

[35] Dr John considered that the infarcts had been there for some time and concluded:

> "With regards to his capacity, I would have significant concerns about Mr Laurie's (sic) capacity to make complex decisions based on his physical and cognitive assessments. The frontal lobe infarct would certainly impact on his insight and his ability to plan for the future…
>
> … I would suspect that his cognition has been impaired for some time however particularly looking at the degree of atrophy on his brain scan which would suggest that there has been a pre-existing neurodegenerative disease for some time. With regards to his future, it is very likely that his cognition will continue to deteriorate."[6]

[36] Mr Lawrie was also seen by Dr Chris Davis, Director of Geriatric Medicine and Rehabilitation at the Prince Charles Hospital on 5 December 2011. In a report dated 22 December 2011, Dr Davis stated:

> "In summary, Mr Lawrie's cognitive decline satisfies the criteria for a clinical diagnosis of dementia. Noting the CT findings of old cerebro-vascular events in Dr Nick John's report, together with poor short term memory suggestive of

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3 Affidavit of William Kirby, sworn 24 September 2013, at [10] and [12].

4 Affidavit of Mitchell Andrew Lawrie Volume 1, sworn 25 September 2013, at [17].

5 Outline of Submissions on behalf of the Applicant, filed 2 October 2013, at p 17, para [52].

6 Ibid, at p 17, para [52].

> co-existing Alzheimer pathology, his dementia is of probable mixed aetiology. It is interfering with his ability to make complex decisions as he cannot adequately retain, evaluate and manipulate relevant facts in a reliable manner."[7]

[37] In that report Dr Davis noted that, in relation to testamentary capacity almost two years ago, at that time Mr Lawrie did understand the nature of his assets and those who had a claim on his estate. In particular, he responded to Dr Davis that he had two sons and a wife and that he wanted to distribute his assets equally between those parties. As I have already indicated, the reports of Dr Davis and Dr John were taken into account at the QCAT hearing and it was found that Mr Lawrie did not have capacity for financial matters or for personal matters. I have also indicated that I rely in particular on the affidavit of Mr Kirby who has indicated he has a long term professional relationship with Mr Lawrie and he has been able to observe the changes in his mental state. I also accept that, as he is a solicitor, he is familiar with the test in *Banks v Goodfellow*.[8]

[38] Given the extensive material and the findings of QCAT and this Court in relation to the previous applications, I am satisfied that Mr Lawrie currently lacks testamentary capacity and that he will not regain testamentary capacity.

The Proposed Will – is it or may it be a Will that Mr Lawrie would make if he had testamentary capacity?

[39] In relation to the fourth matter about which I must be satisfied pursuant to s 24, I have to be satisfied that the Proposed Will is, or may be, a Will that Mr Lawrie would make if he were to have testamentary capacity. In this regard, I note that the applicant argues that if his father were able to give instructions as to the making of a Will, he would not want part of his estate to pass to Ms Hwang given her conduct in relation to him and her actions in transferring away his assets. In this regard, I rely on the following findings of Philippides J in *Lawrie & Anor v Hwang & Ors*:[9]

> "[146] I find that in respect of transactions occurring after 24 August 2011, Ms Hwang was well aware that the Public Trustee of Queensland had been appointed administrator for Mr Lawrie for financial matters as a protective measure and, *inter alia*, in order to prevent her from taking advantage of his mental impairment, to take his or Lawmar's money for herself.
>
> [147] I am also satisfied that dishonesty established on the basis that Ms Hwang well knew and believed that Mr Lawrie did not have capacity to make decisions about his assets or finances at the time of each of the impugned transactions from 27 June 2011.

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7 Ibid, at p 18, para [53].
8 (1970) LR 5 QB 594.
9 [2012] QSC 422.

> [148] I am satisfied that Ms Hwang implemented a scheme to orchestrate and effect the transfer of moneys to her and Goldpearl. …
>
> [149] From the totality of the evidence, I am prepared to infer that a scheme was implemented, not lacking in sophistication, to achieve an outcome that the moneys be transferred for Ms Hwang's benefit and in part utilised by Goldpearl. …"

[40] Furthermore, the applicant argues that his father would want the terms of his current Will to reflect those of his 2006 Will.

[41] In this regard, I note that Ms Hwang today has submitted that there are a number of factors that the Court should be aware of. In particular, she argued that Mr Lawrie promised her $2,000,000 if she would marry him and that he desperately wanted a wife so that he could be happy. Ms Hwang also indicated that Mr Lawrie wanted her to have the house and in fact argued that he made an appointment to see a solicitor and indeed executed documents to transfer the house into her name. In this regard, however, I note that the appointment with that solicitor was after the QCAT hearing which appointed the Public Trustee to manage all of Mr Lawrie's financial affairs and I also note that the documents were executed in front of a solicitor who was not Mr Lawrie's usual solicitor.

[42] Ms Hwang also argued that Mr Lawrie would not want to make a Will in terms of the 2006 Will, as he did not wish his stepdaughter to have part ownership of the house. In this regard, I note Mr Kirby's affidavit where he states that Mr Lawrie has not, since 2000, given him instructions to prepare a new Will and that in his view, there has been no alteration to Mr Lawrie's wishes to provide for his stepdaughter. Mr Kirby states that there have been no communications of a change of Mr Lawrie's views about making a Will.

[43] In terms of Ms Hwang's argument that she has been a good wife and lived happily with Mr Lawrie for 18 months and cared for him, I note that this may well be the case. However, there is not sufficient evidence before me to determine the matter. I accept Ms Hwang's submission that she has been good to Mr Lawrie and has cared for him. It is undeniable however that the findings of Philippides J were that in excess of $3,000,000 was transferred out of the jurisdiction into accounts owned by Ms Hwang. I note Ms Hwang denies financial abuse but as I have indicated I cannot look behind the findings of Philippides J. Whilst Ms Hwang has been arrested, no indictment has been presented and I am unsure of the current status of the criminal proceedings. I note Ms Hwang argued that not all of the transactions alleged to have been undertaken by her were in fact undertaken by her as others had access to Mr Lawrie's credit cards. It would seem to me that that is a matter for the criminal prosecution and that can be determined in the course of those proceedings.

[44] In terms then of what Mr Lawrie would have done in making a Will, it would seem that there is a 2006 Will currently before the Court. The draft which has been submitted as the Proposed Will is, broadly, in terms equivalent to

that 2006 Will. The draft which has been submitted revokes all previous testamentary acts. It appoints Mr Lawrie's close friend and solicitor, Mr Kirby, as executor and trustee with the applicant appointed as executor in default. In all of the circumstances, I consider that it is appropriate for the applicant to be appointed as executor in default and I note that his brother, Tasman Lawrie, has not objected to that appointment.

[45] The draft also provides for a gift of a 50 per cent interest in Mr Lawrie's home to his stepdaughter, Kristin Cosgrove. I note that this was broadly equivalent to the 2006 Will and I note the affidavit material which supports such a gift. Otherwise, the draft provides for a gift of shares in Mr Lawrie's company to his two sons in equal shares and the residue of the estate to be divided equally between Mr Lawrie's sons. I also note the substitutionary provision in favour of their children or grandchildren which would also be appropriate. I note that the draft Will in this form is supported by Tasman Lawrie, Kristin Cosgrove, Mr Lawrie's brother, as well as Mr Kirby and the Public Trustee. I note also that the draft has been settled by counsel. Mr Kirby has prepared all previous Wills for Mr Lawrie and is not aware of any other Wills. He states that given his close relationship with Mr Lawrie and his past involvement in the preparation of Wills in 1989 and 1986, he considers it unlikely that Mr Lawrie would have made any Will subsequent to the 2006 Will without informing him. I note Mr Kirby's affidavit which sets out the instructions he took in relation to the 2006 Will where Mr Lawrie asked him to act as executor as his wife Patricia had died in 2004. I also note that Mr Lawrie explained to Mr Kirby the reason for giving a half share in the house to his stepdaughter was that following the death of his wife, Patricia, the ownership of the property they lived in in McDowall passed to him as joint tenant, but he wanted to recognise the modest contribution that Patricia had made to that property by gifting a half share of it to her daughter Kristin. Mr Kirby indicated in his affidavit that Mr Lawrie made it clear he wanted the remainder of his estate to be divided equally between his sons. There is no evidence that Mr Lawrie might reasonably be expected to make any gift by his Will for charitable or other purposes and I note that no such gift was contained in his previous Wills. The applicant states that Mr Lawrie has never been active in supporting charities or making substantial donations to charities.

[46] In terms of whether the application should succeed, it would seem to me that the central requirements are set out in s 24(d) of the Succession Act. I must be satisfied that the Proposed Will "is or may be a will" that Mr Lawrie would make were he to have testamentary capacity. The test has been considered by a number of decisions in this Court including most recently by Atkinson J in *Sadler v Eggmolesse.*[10]

[47] The test was also considered in *Re Keane; Mace v Malone*[11] and *McKay v McKay & Ors.*[12] In *McKay v McKay &* Ors, I took the following approach:

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10 [2013] QSC 40.
11 [2011] QSC 49.
12 [2011] QSC 230.

> " [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."

That approach was also endorsed by Atkinson J in *Sadler v Eggmolesse*.[13] I am satisfied that the focus of the test should be on the words of the section.

[48] In all of the circumstances, I am satisfied that Mr Lawrie does not currently have testamentary capacity. In coming to a determination in this matter, I have taken into account in particular the extensive affidavit material, particularly the affidavit of Mr Kirby, who was well acquainted with Mr Lawrie's testamentary intentions and the evolution of his intentions over the years.

[49] I am satisfied that, in all of the circumstances, the requirements of the Succession Act have been met and an order should be made authorising a Will to be made for Mr Lawrie in the terms of the draft Proposed Will. In particular, in terms of s 21(2) of the Succession Act, I am not only satisfied that Mr Lawrie lacks testamentary capacity, but it was also confirmed this morning that Mr Lawrie is still alive. Accordingly, there should be an order in terms of the draft.

[50] I am also satisfied that in the circumstances, costs should be paid out of the estate on an indemnity basis.

ORDERS:

1. Pursuant to s 22 of the *Succession Act* 1981 (Qld) ("the Act"), the applicant has leave to apply for an order pursuant to s 21 of the Act authorising a Will to be made for Keith John Lawrie.

2. Pursuant to s 21 of the Act, a Will is authorised to be made for Keith John Lawrie in terms of the draft Will which is exhibit 'MAL-4' to the affidavit of Mitchell Andrew Lawrie filed on 30 September 2013.

3. The applicant's costs of and incidental to this application are to be assessed on the indemnity basis and paid out of the assets of Keith John Lawrie.

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13 [2013] QSC 40.