SUPREME COURT OF QUEENSLAND

CITATION:	*Re RD* [2021] QSC 65
PARTIES:	In the matter of an application by DD pursuant to Part 2 (sections 21 to 28) of the *Succession Act* 1981 (Qld) for the authorisation of the making of a will on behalf of RD
FILE NO:	BS No 12102 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	31 March 2021
DELIVERED AT:	Brisbane
HEARING DATE:	26 March 2021
JUDGE:	Bowskill J
ORDERS:	**The Court proposes to make the following orders:** **1. Pursuant to s 21 of the *Succession Act* 1981 (Qld) a will be made for RD in terms of the draft will that is exhibit 1 in these proceedings.** **2. In the event that the applicant is appointed by QCAT as administrator for RD for all financial matters except management of his settlement funds for personal injuries, pursuant to s 33(2) of the *Guardianship and Administration Act* 2000 (Qld), the applicant may execute on RD's behalf a non-lapsing nomination pursuant to clause 6.3CA of the Perpetual Super Wrap Trust Deed and Rules of Fund dated 30 September 2011 (as amended) directing the trustee of the Perpetual Super Wrap Trust to pay 100% of RD's death benefits to his legal personal representative appointed by his last will.** **3. A copy of the court's reasons in these proceedings published on the court's judgment website or in any other publication made to, or accessible by, the general public or a section of the public, be in an anonymised form.** **4. The parties' names appearing on the court's electronic file of these proceedings be anonymised.** **5. All parties' costs of this application be paid out of the assets of RD on the indemnity basis.**
CATCHWORDS:	SUCCESSION – MAKING A WILL – TESTAMENTARY CAPACITY – LOSS OR LACK OF CAPACITY AND STATUTORY WILLS – where the applicant applies for an order authorising a will to be made on behalf of her son, a young man who lacks testamentary capacity as a consequence

	of suffering a severe traumatic brain injury – whether the proposed will is or may be a will the young man would make if he had testamentary capacity – whether an alternative form of will, as proposed by the litigation guardian for the young man, under which five testamentary discretionary trusts would be created, is or may be a will he would have made
	Succession Act 1981 (Qld), ss 21 and 23
COUNSEL:	C Brewer for the applicant T Grau for the litigation guardian for RD M Crofton for RD's father K Kluss for the litigation guardian for RD's younger siblings
SOLICITORS:	McInnes Wilson for the applicant The Will And All for the litigation guardian for RD Indigo Law for RD's father Murdoch Lawyers for the litigation guardian for RD's younger siblings

[1] RD is a young man, presently aged 21. He suffered a severe traumatic brain injury when he was very young, about five months old, as a result of a traffic accident. He has substantial assets, consequent upon receiving an award of compensation for his injuries, but he has no will. RD's mother applies under s 21 of the *Succession Act* 1981 (Qld) for an order authorising a will to be made on behalf of RD.

[2] The information relevantly required by s 23 is before the court.

[3] I am satisfied on the material before the court (and it was not controversial) that RD lacks testamentary capacity, and is alive (s 21(2)(a)). I am also satisfied that the applicant is the appropriate person to make the application and that adequate steps have been taken to allow representation of other persons with a proper interest in the application, including persons who have reason to expect a gift or benefit from the estate of RD (s 21(2)(b)(i) and (ii)). Some of those persons were represented at the hearing (RD's father (now divorced from his mother) and his two younger sisters, by a litigation guardian); in respect of others (in particular, RD's older brother) the evidence demonstrates that he is aware of the application, did not wish to attend, and supports the applicant's proposed will.[1]

[4] RD appeared by a litigation guardian at the hearing of the application. RD's litigation guardian proposed a different will to the will proposed by the applicant.[2] The main difference is that RD's litigation guardian proposes a will which creates five testamentary discretionary trusts, for each of the five proposed beneficiaries (RD's

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1 RD's older brother indicated his support for an earlier version of the will proposed by the applicant. There are some changes reflected in the version which is exhibit 1, the most significant being that under the will which is exhibit 1 the applicant has a right of first refusal to purchase RD's home, to be appropriated as part of her share of the estate, rather than in addition to it. However that does not call into question the older brother's previously communicated position. There is also evidence of the service of the material on the applicant's de facto partner, as legal guardian for his child, who also lives with RD and his mother, on the basis of a possibility that this child may be a person who could bring a family provision application. He indicated he did not intend to appear on the hearing of the application.

2 Exhibit JDF1 to the affidavit of Ms Frizzo filed 17 March 2021 (CFI 20).

mother, father and three siblings), with the respective beneficiary's share to be held on such a trust, after payment of a specific pecuniary gift to each of them.

[5] Otherwise, as far as the proportionate distribution of RD's estate is concerned, there is no disagreement. In that regard, in broad outline, what is proposed is that RD's mother would receive the household contents and 60% of the estate (including, should she wish to do so, the ability to purchase RD's home out of her share of the estate), RD's father would receive 20%, and the remaining 20% would be shared equally between RD's three siblings. This division recognises the care that RD's mother has provided for him, and will continue to provide in the future and the fact that she is financially dependent on him, having not been able to work outside the home since he was injured as a baby.

[6] I accept, having regard to the evidence before the Court, that a will reflecting a distribution of this kind is or may be a will RD would make if he had testamentary capacity. The central issue for the Court's determination is whether RD would probably make a will in the terms proposed by the applicant (under which each of the beneficiaries receives a direct, tangible interest in the residuary estate) or a will in the terms proposed by RD's litigation guardian (under which each of the beneficiaries receives an interest in a percentage of the residuary estate, after payment of a specific gift, to be held on a testamentary discretionary trust).

[7] For the following reasons, I am satisfied the will proposed by the applicant (**exhibit 1**) is or may be a will RD would make if he had testamentary capacity (s 21(2)(b)(iii)) – or, put another way, that a will in the form of exhibit 1 is the will that RD probably would have made if he had testamentary capacity – and that it is appropriate to approve that will (s 21(2)(c)). This will is also supported by RD's father, his younger siblings (by their litigation guardian) and his older brother (who did not appear at the hearing, but indicated this position in correspondence).

[8] The evidence of RD's litigation guardian, Ms Frizzo, based on conversations she had with RD for the purpose of trying to ascertain what wishes he might have in relation to this application, is that she formed the view that RD "has no particular wish regarding his estate other than that it go to his family, *and would not want it to go to strangers*" [my emphasis]. On the basis of that, and what Ms Frizzo describes as her experience advising high net worth estate planning clients, she considers that "a properly advised person in possession of a substantial trust fund, would be concerned to ensure that the substantial inheritance they leave be held in a protected testamentary trust structure for the protection of their chosen beneficiaries", which would include "asset protection from third parties such as other spouses, or from other sources, whether during the beneficiary's lifetime, or after their death, if they have already inherited".

[9] Ms Frizzo refers to a comment made by RD during one of their conversations, to the effect that, if all of his money went to his Dad, and "then he died, then his girlfriend would get his [Dad's] money, plus mine". Having regard to that, Ms Frizzo says that noting RD's general wish that "family" inherit, the appropriate course is to pass his wealth to testamentary trusts for the primary benefit of each of his beneficiaries, so as to ensure that his trust fund does not pass to people who are, effectively, strangers to him and who have not contributed in any way to his well-being.

[10] According to the notes of the conversations, in asking RD who he would like to get his money if he died, and not really receiving a clear answer, Ms Frizzo said to RD that normally people chose members of their family. She also explained to him that if he did not have a will, and he died, everything he owns would be divided up with half each between his Mum and Dad, if they were still alive. RD said he thought that "sounds even". It is in that context that Ms Frizzo went on to say that if Mum died before him, it would all go to Dad, and asked what he thought about that. RD said he didn't know what Dad would do with it, and would prefer not knowing, and went on to make the comment about Dad's girlfriend. Again in response to prompting from Ms Frizzo, RD said maybe he should give some to his sisters and brother.

[11] When asked what he would like Ms Frizzo to tell the judge (hearing the application), RD said he would probably split it between his family, adding that family to him is not just the people who raised you, but the people who have been there with you through thick and thin. He identifies his Mum in particular, but then also his Dad, older brother and younger sisters. He shook his head "no" when asked if there was any organisation that he would want to leave any money to.

[12] Having regard to the notes of Ms Frizzo's conversations with RD, I accept her evidence that RD was not able to say what he wants to happen with his money except that he would want it to go to his family, and that he has no particular wish other than that it go to his family. Having regard to the notes, the words in italics above are Ms Frizzo's analysis of the effect of what RD said, not something RD actually said. In context, I am not persuaded that RD's comment about what could happen if all his money was left to his Dad, and then his Dad died, should be interpreted as a wish to exercise strict control over what his family members may do with any part of his estate to which they may become beneficially entitled.

[13] Both RD's mother (the applicant) and his father say in their evidence that they do not believe that RD would wish for his family to have any entitlement he gifted to them "tied up" in a testamentary trust with no fixed entitlement. Each of RD's mother, his father, and the litigation guardian for his two younger siblings submit that a will such as proposed by RD's litigation guardian, which would leave RD's estate to trustees pursuant to five testamentary discretionary trusts, is not a will that RD would or may make, if he had testamentary capacity because:

(a) whilst everyone agrees that RD's wishes are that his will benefit his family (his mother, father and three siblings), the will proposed by RD's litigation guardian does not benefit his immediate family – because the testamentary trusts are wholly discretionary, any benefit that would flow to RD's immediate family is "merely an expectation or hope";[3]

(b) the "potential beneficiaries" of the testamentary trusts are much broader than RD's immediate family – so, contrary to the litigation guardian's articulation of RD's wish, to ensure that people who are effectively strangers to him, and who have not contributed in any way to his well-being, do not benefit, the "potential beneficiaries" as defined (cl 17) are much broader than this and include spouses, the children of a grandparent of a primary beneficiary or their spouse; a trust

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3 *Bowers v Bowers* [2020] NSWSC 109 at [267].

company or other entity in which one of those persons has an interest and charitable or religious entities;

(c) although there may be some asset protection benefits that might be afforded to RD's estate, and therefore his beneficiaries, under the will proposed by the litigation guardian, that will involves:

(i) unnecessary complexity in its administration over the lifetime of the beneficiaries;

(ii) significant costs incurred by the estate over the lifetime of the trusts, by reason of the fees incurred by the executor and trustee, Perpetual Trustee, in its management of the trusts over a prolonged period of time;

(iii) uncertainty as to what the beneficiaries might receive from the estate, given the discretionary nature of the trusts, such that they might not receive any more than the specific pecuniary gifts; and

(iv) uncertainty as to whether there will be sufficient funds in the estate on RD's death to give effect to the specific pecuniary gifts;

(d) the complexity, additional cost and uncertainty as to what the beneficiaries might receive under the will proposed by RD's litigation guardian outweigh any potential asset protection benefits that might be achieved through such a structure; and

(e) in contrast, the applicant's proposed will provides for a simple distribution on RD's death; will not require the incurring of significant fees or costs in order to finalise its administration, given that it provides for direct gifts to beneficiaries; and provides certainty as to what proportion of the residuary estate each beneficiary would receive.

[14] In addition, counsel for the applicant identified a number of anomalies with the will proposed by RD's litigation guardian which it would be necessary to address had I formed the view that the will proposed by RD's litigation guardian is the will RD probably would make if he had testamentary capacity. Given the conclusion I have reached, it is not necessary to do so.

[15] Importantly, the task for the Court is to consider whether it is satisfied the proposed will is or may be a will that the relevant person – that is, RD – would make if he had testamentary capacity.

[16] In support of the will she contends is the will RD probably would make if he had capacity, RD's litigation guardian relies upon two authorities in which statutory wills incorporating testamentary trusts have been approved. But, as submitted by each of the applicant, RD's father and the litigation guardian for RD's younger siblings, those cases are distinguishable both because of the facts involved, and because in each case the approval of a will incorporating testamentary trusts was supported by the putative beneficiaries.

[17] So, for example, in *Doughan v Straguzi & Ors* [2013] QSC 295, the Court approved a will for a person who had lost capacity due to dementia which established testamentary trusts. Her assets together comprised what was described as the "family farm". The evidence before the court demonstrated a long-standing history of family connection

with the property and it was accepted that there was "an undoubted intention on the part of the testatrix and each of her children that it [was] a property which should remain for the benefit of future generations just as it [had] benefitted past generations". This decision does not provide support, as a matter of principle, for what RD's litigation guardian proposes here.

[18] The other case relied upon is *Re Matsis; Charalambous v Charalambous & Ors* [2012] QSC 349. This was an application for a statutory codicil to be made, in respect of the will of a 90 year old man who no longer had capacity. The essence of the codicil was to vary the will so that the gift of the residuary estate, being a very substantial estate in excess of $13 million, would be held on three testamentary trusts for his three grandsons, instead of passing to them outright. The beneficiaries all supported the application. Two of the grandsons were engaged in their own businesses. There was evidence before the court from the testator's solicitor of the testator's entrepreneurial approach to financial and property matters, including a "very strong emphasis" on keeping the wealth, which the testator had amassed from his earnings from a small barber shop, within the family. The solicitor's evidence went so far as to say he was strongly of the view that if the testator had capacity and could understand the protection that a testamentary trust can give to a person who is self-employed quarantining assets, he would be strongly supportive of the concept and would have wished to execute a codicil in the terms proposed.

[19] This too is a very different case from the present. Although the size of RD's estate, today, is substantial, he has a life expectancy of about another 44 years (to age 65); accordingly, the circumstances at the time of RD's death may be very different; none of the proposed beneficiaries, who are his close family members – including his mother and his father – support the proposal for testamentary trusts; and there is no evidence, in my view, from which I would infer an intention on the part of RD to prefer a will of the kind proposed by his litigation guardian, as opposed to the direct and straightforward will proposed by the applicant.

[20] Having considered the evidence, and the submissions of all represented parties (and noting the support of RD's older brother for the will proposed by the applicant) I am persuaded that the will proposed by the applicant, forming exhibit 1, is or may be a will that RD would make if he had testamentary capacity. In so far as the proportionate distributions are concerned, that is well supported by the evidence, and not disputed by anyone. In so far as the structure of the will is concerned, I am not persuaded that RD would make a will in the complicated and convoluted form proposed by RD's litigation guardian. Although the fairly limited weight that can be put on RD's expression of wishes is acknowledged, I do not consider that anything he is recorded as having said in his conversations with Ms Frizzo supports that form of will. What is left, then, is the fact that, at present, the estate is substantial (although of course it may not be at the time of RD's death, given his life expectancy and the purpose of the settlement fund) and Ms Frizzo's opinion as to what, in her experience, clients with substantial wealth prefer to do. As against that, there is also evidence from the applicant's solicitor, Mr Smith, also a very experienced solicitor in this area of practice, who expresses the opinion that many clients who have suffered a disability would generally look to benefit family members who provide significant gratuitous care to enable that person to remain living at home or as independently as possible, and expressing the view that the

will proposed by the applicant is or may be a will that RD would make in all the circumstances.

[21] The court is not tasked with considering what a generic "person with substantial wealth" would or might do. The court is tasked with considering what RD would, or may, do – a young man, whose mother has devoted her life to caring for him since he sustained a serious traumatic brain injury as a baby, and has undertaken to continue to do so, and who would also wish to make some provision for his father and his siblings. In that regard, I consider RD would take into account and give considerable weight to the views expressed by his mother and his father, if he were able to, as to the form of his will. I consider it is unlikely that a reasonable person, in RD's position, with capacity, would favour a convoluted will under which five testamentary trusts are imposed on his favoured beneficiaries, his family members, as opposed to a straightforward, simple will, benefiting those family members.

[22] Being satisfied, for the purposes of s 21(2)(b)(iii), that the proposed will which is exhibit 1 is or may be a will that RD would make if he had testamentary capacity, and that it is appropriate to approve that will, I will make an order under s 21(1)(a) authorising that a will be made for RD, in terms of the draft which is exhibit 1.

[23] The applicant has made an application to the Queensland Civil and Administrative Tribunal to be appointed as RD's administrator for his affairs, excluding the settlement fund for which Perpetual Trustees Ltd is the administrator. In the context of the present application, the court is also asked to make an order that will permit the applicant, in the event that she is appointed by QCAT as the administrator for RD, to execute on his behalf a non-lapsing nomination under the superannuation trust deed (clause 6.2 and 6.3CA),[4] under which the bulk of RD's assets are held. This would enable 100% of his superannuation death benefits to be paid to his legal personal representative and be dealt with in accordance with the statutory will.

[24] Under s 33(2) of the *Guardianship and Administration Act* 2000 (Qld), unless QCAT orders otherwise, an administrator is authorised to do, in accordance with the terms of their appointment, anything in relation to a financial matter that the adult could have done if the adult had capacity for the matter when the power is exercised. I am satisfied that execution of a non-lapsing nomination under clause 6.3CA of the trust deed is an act in relation to a financial matter within the meaning of s 33(2),[5] and that it is appropriate to make an order to the effect of the order sought in this regard, to give proper effect to the statutory will. There was no opposition to an order of this kind being made. The trustee of the superannuation fund, Perpetual Superannuation Limited, was served and aware of the application.

[25] I am also satisfied it is appropriate to make an order for the payment of all parties' costs to be paid out of the estate, and to order that the names of the parties in this judgment and on the court's file be anonymised.

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4 See exhibit DLD-17 to DD's affidavit filed 11 November 2020 (CFI 3).

5 See *Re SB; Ex parte AC* [2020] QSC 139 at [35]-[46].