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A PLATYPUS IN NSW SUCCESSION LAW:

Statutory Wills in a Managed Society

by

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INTRODUCTION

1 This paper aims to achieve two objects. First, to provide practical guidance for practitioners involved in an application to the Supreme Court of NSW for the making of a "statutory will" pursuant to Chapter 2 (sections 18-26) of the *Succession Act* 2006 NSW. Secondly, to explore the jurisprudential nature of a "statutory will" as an aid to understanding the concept.

2 The second object is approached from two angles. The first explores the extent to which learning about an exercise of protective jurisdiction over an incapacitated person, the prerequisites of a valid will under the general law of probate and the family provision jurisdiction, can inform decision-making about authorisation of a "statutory will". The second interrogates the process of admission of a will to probate and the susceptibility of a statutory will to challenge upon an exercise of probate or family provision jurisdiction.

3 The jurisdiction of the Court to authorise the making of a "statutory will" is little more than a decade old. Anecdotally, the Court has not yet encountered a contest about the operation of a statutory will in the context of either an application for a grant of probate (or a grant of administration with a will

annexed) or an application for a family provision order under Chapter 3 of the *Succession Act* 2006.

4 This paper contemplates the possibility that, whatever care may be taken in the authorisation of a statutory will, a challenge to the validity or operation of such a will, upon exercise of either probate or family provision jurisdiction, cannot be discounted. The Court's statutory will, protective, probate and family provision jurisdictions each have a dynamic of their own, the practical implications of which need to be teased out.

5 Insight into the nature and operation of a "statutory will" may be found in exposing *the text* of Part 2.2 of the *Succession Act* to analysis in *the context* of the protective, probate and family provision jurisdictions in light of which it must be read.

6 This paper discusses issues that arise from that approach. It does not claim to be an exhaustive treatment of the jurisprudence, or practice, governing the making of a statutory will, its admission to probate or its susceptibility to challenge. A broader review of the statutory will jurisdiction can be found in R. Williams and S. McCullough, *Statutory Will Applications: A Practical Guide* (Lexis Nexis Butterworths, Australia, 2014) or GE Dal Pont and KF Mackie, *Law of Succession* (Lexis Nexis Butterworths, Australia, 2nd ed, 2017, chapter 3).

"INCAPACITY" IN A MANAGERIAL SOCIETY

7 An examination of the statutory will jurisdiction requires a reminder that the paradigm underlying each of the protective, probate and family provision jurisdictions is that of an autonomous individual living and dying in community: G.C. Lindsay, "A Province of Modern Equity: Management of Life, Death and Estate Administration" (2016) 43 *Aust Bar Review* 9 at 12-17.

8 In Australia's "managerial society", in which each individual's welfare is managed from cradle to grave, adjustments are made to deal with a person

who, by reason of incapacity, is not able to manage his or her own affairs in whole or part.

9 A person may be unable to engage fully in decision-making about his or her affairs (in the broadest sense) by reason of a physical or mental disability or disablement by death. Our system of law endeavours to accommodate this by the adoption of principles which emphasise the central personality of the incapable person across the spectrum of protective, probate and family provision jurisdictions, recognising that, at different times of a person's life, the demands of community typically vary. Upon an exercise of protective jurisdiction, the welfare and interests of the individual in need of protection are the paramount concern. Upon an exercise of probate jurisdiction primacy is given to the deceased's testamentary intentions (if any can be found) until, in the administration of an estate, the focus shifts to the deceased's beneficiaries, as discussed in *Estate Wight* [2013] NSWSC 1229. On an exercise of family provision jurisdiction, a deceased's testamentary intentions may be afforded respect, but the demands of community may override them.

10 The statutory will jurisdiction is unique. Upon an exercise of that jurisdiction the Court endeavours, by orders affecting a living (incapacitated) person to affect, if not bind, that person's estate upon the happening of a death, whenever it may occur. A natural tendency of mind in the making of a statutory will is to focus attention upon what will, may or should happen *after* death. Care needs to be taken not to lose sight of the paramount importance of serving the welfare and interests of the incapacitated person *as a living person* in need of protection. An exercise of the Court's statutory will jurisdiction can profoundly affect the personal relationships of a person in need of protection and the quality of care available to him or her.

THE UNIQUE CHARACTER OF THE COURT'S "STATUTORY WILL" JURISDICTION

11 The jurisdiction of the Court (under Chapter 2 of the *Succession Act*) to authorise the making of a "statutory will" for a person lacking testamentary capacity occupies a space in the administration of estates located at the

intersection of the Court's protective, probate and family provision jurisdictions, treating the law of wills and intestacy law for this purpose as part of the Court's probate jurisdiction.

12 Although, in practice, common experience suggests that a statutory will, once made, will in due course be admitted to probate, it is important to recognise that the making of a statutory will does not of itself guarantee admission to probate.

13 Equally, although the likelihood of an application being made for a family provision order (under Chapter 3 of the *Succession Act* 2006) in respect of the property of the incapacitated person is one of the topics required to be addressed by an applicant for leave to make an application for a statutory will, an order authorising the making of a statutory will cannot, at least in theory, pre-empt an application for family provision relief after the death of the incapacitated person.

14 The legislative criteria for the making of a statutory will do not, in terms, embrace principles governing an exercise of protective jurisdiction or the logical framework governing the determination of the validity of a will. Nor do they, in terms, empower the Court to authorise the making of a will by reference to the principles (embodied in statutory criteria) governing the making of a family provision order.

15 However, the language of Part 2.2 of the *Succession Act* implicitly requires an understanding of those principles; the institutional framework governing an exercise of the protective, probate and family provision jurisdictions as stand alone jurisdictions; and interconnections between the three types of jurisdiction in operation.

16 The history of the Court's statutory will jurisdiction is laid out in *Re Fenwick* (2009) 76 NSWLR 22. More recent treatments of the topic can be found in *Re Will of Jane* [2011] NSWSC 624 and *Re Will of Alexa* [2020] NSWSC 560.

17 The statutory will jurisdiction is inherently beset by deep philosophical issues yet to be fully explored, let alone understood, in the administration of the estate of an incapacitated person. Because the jurisdiction sits at the intersection of others, the text of the legislation conferring the jurisdiction, in an ideal world, requires an understanding of the broader context. There is a tension between those who implicitly approach the legislation almost as an exercise in administrative law and those who instinctively locate the jurisdiction within a broader context informed by the cultural imperatives of succession law and practice.

18 There is a temptation to read sections 18, 19 and 22 of the *Succession Act* as if a code. A partial antidote to that may be insistence on locating those critical sections in their broader legislative context.

19 That context involves, at least, a consideration of the *Succession Act* as a whole and the *Probate and Administration Act* 1898 NSW; that is, the law of wills, intestacy and probate. In practice, because statutory wills are often made on behalf of an incapacitated person who is a "protected person" within the meaning of section 38 of the *NSW Trustee and Guardian Act* 2009 NSW, that Act (a mainstay of the Court's protective jurisdiction) demands notice as well.

20 Each of sections 18, 19 and 22 of the *Succession Act* is predicated on the existence of a person lacking "testamentary incapacity" (a form of mental incapacity). Such a person is in need of the Court's protection.

21 The concept of a "will" implicitly requires an understanding of the general law concept of a will and the prerequisites for the making of a valid will. Part 2.2 does not speak in terms of "testamentary intention", but section 19 requires disclosure to the Court of "evidence available to the applicant of the [incapacitated] person's wishes" and section 22 requires the Court to be satisfied that a proposed will "is, or is reasonably likely to be, one that would have been made by the [incapacitated] person if he or she had testamentary capacity."

22 The statutory will jurisdiction does not lend itself in all (if any) cases to an unqualified assessment of the probability that an incapacitated person would, if possessed of testamentary capacity, make a particular will expressive of a particular intention. The necessity to take into account the prospect of an application for a family provision order, and the making of such an order, after the death of the incapacitated person may, at least in some cases, require the Court's reflection, not only on the person's presumed *actual* intention, but also upon a fully informed, appropriately instructed intention which might be attributed to him or her upon an exercise of family provision jurisdiction, taking into account what is wise and just (*Scale's Case* (1962) 17 CLR 9 at 19-20) in the context of contemporary community standards (*Andrew v Andrew* (2012) 81 NSWLR 656). Section 22(b) is silent as to what (if any) assumption should be made about an incapacitated will-maker's knowledge of, or access to advice about, the operation of chapter 3 of the *Succession Act* vis-a-vis a will, and the general community perception that a will should be drafted to anticipate, and to minimise the risk of, an application for a family provision order after death.

23 These observations focus attention on the criterion of "reasonable likelihood" for which section 22(b) provides. It appears in a section directed to the question whether an application for leave under section 19 must be refused, not directly to the question of what, if any, order should be made under section 18, although section 20(1)(b) confers on the Court a discretion to make a section 18 order "if satisfied of the matters set out in section 22". The word "satisfied" in each of section 20(1)(b) and the introductory words to section 22 is indicative of a degree of persuasion in the making of an evaluative assessment about inherently uncertain facts rather than proof of an actual testamentary intention as a fact.

24 Although section 18 does not, in terms, define particular criteria for the making of an order under the section, sections 19(2) and 22 point to factors which (in the case of section 19) may and (in case of section 22) must be taken into account in the making of a determination under section 18. Subject to section 22, the discretionary power for which section 18 provides may be regarded as

confined only by the subject matter, scope and purpose of the *Succession Act* (*Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505), not forgetting that the *Succession Act* locates the Court's statutory will jurisdiction within a context that includes provisions governing formal wills, informal wills, intestacy rules and the Court's family provision jurisdiction.

25 Section 22(b) is directed to the existence of a probability, not the fact of an actual intention, and is unqualified by reference to the time (is it "now" or at some future time at or before the time of death?) at which the likelihood that a proposed will "would have been made" by the incapacitated person is to be assessed. A fair inference from the terms of section 19(2) is that information there described as mandatory (unless the Court otherwise directs) can have a bearing upon a determination under section 22(b) of the "reasonable likelihood" that a proposed will "would have been made" by the incapacitated person.

26 Section 19(2) does not, in terms, rank the topics upon which information is generally required. Inclusion in the list of a reference to the incapacitated person's "wishes" (not necessarily the same as testamentary intention) and "the likelihood" of a family provision application suggests that, in an appropriate case, an assessment (for the purpose of section 22(b)) of the "reasonable likelihood" that a proposed will "would have been made" by the incapacitated person can accommodate a consideration of what, if any, testamentary provision "ought" to be made for a person eligible to apply for family provision relief as well as what might, but for the existence of the family provision jurisdiction, would have been the incapacitated person's actual intention. This conclusion is consistent with the observation in *Banks v Goodfellow* (1870) LR 5 QB 549 at 565 that a competent testator must "be able to comprehend and appreciate the claims to which he ought to give effect".

27 The search in the legislation for a deemed testamentary intention may aspire to an approximation of an incapacitated person's actual intention but, perhaps

more importantly, it may more often be a search for an intention informed by a consideration of the person's place in his or her community. The references in section 22 to a consideration of what is, or may be, "appropriate" reinforce this.

28 The correctness of this approach may be tested against the question whether the Court could properly authorise the making of a statutory will which, although approximating an incapacitated person's actual (uninstructed) intention, denies testamentary provision for a member of family who is dependent upon him or her and is, in the eyes of their community, the only person with a call on his or her bounty?

29 An answer to this question probably depends on an exercise of discretion by the Court turning upon what is perceived (by analogy with an exercise of the Court's inherent protective jurisdiction) to be best calculated to be in the interests, and for the benefit, of the incapacitated person bearing in mind his or her family obligations and care arrangements. It is in that light that a choice may have to be made about whether to accommodate family provision considerations in the making of a statutory will or to decline to consider them in the absence of a family provision application, however inevitable.

30 In most cases, the search for a deemed testamentary intention is not merely a search for an actual intention uninstructed by what is wise and just according to contemporary community standards. It is more subtle than that. It necessarily involves an evaluative judgment about an incapacitated person's personal circumstances, living and dying in community.

31 An exercise of the court's statutory will jurisdiction is often non-contentious, and able to be dealt with administratively in chambers: *Re Fenwick* (2009) 76 NSWLR 22 at 67-68. That is because the parameters of an incapacitated person's social relationships are objectively well settled, and the nature and value of his or her estate is not such as to excite adversarial claims. However, implicit in any exercise of statutory will jurisdiction is a need to make

evaluative judgements in a potentially complex environment reminiscent of an exercise of protective, probate or family provision jurisdiction.

32 **The Perspective of the Protective Jurisdiction**. Although the Court's jurisdiction to authorise the making of a statutory will is generally recognised to be "protective" in nature, there is room for debate about what that means. On the one hand, an exercise of protective jurisdiction generally requires that everything done, or not done, in management of the affairs of an incapacitated person be in the interests, and for the benefit, of that person, whose welfare is the paramount concern: *GAU v GAV* [2014] QCA 308; [2016] 1 Qd R 1. On the other hand, a statutory will must be a will that an incapacitated person would have been "likely" to make if not lacking testamentary capacity: *Small v Phillips* [2019] NSWCA 222; *Small v Phillips (No 2)* [2019] NSWCA 268; 18 ASTLR 608; *Small v Phillips* [2020] HCA Trans 96. And, before an order authorising a statutory will can be made, the Court must be satisfied that the applicant, the proposed will and the giving of notice of the proceedings to "interested persons" all satisfy a test of what is "appropriate".

33 The protective character of the statutory will jurisdiction is implicit in the concept of a will being made *on behalf of a person who lacks testamentary capacity*.

34 The concept of "incapacity" is generally regarded as relative to a task to be performed (*Gibbons v Wright* (1954) 91 CLR 423 at 437-438); the question whether a person has "capacity" invites the further question, "capacity for what, to do what?" A person who is incapable of managing his or her affairs generally (*CJ v AKJ* [2015] NSWSC 498 at [27]-[43]), or is the subject of an order for his or her estate to be managed upon an exercise of protective jurisdiction, may nevertheless have testamentary capacity: *Perpetual Trustee Company Ltd v Fairlie-Cunninghame* (1993) 32 NSWLR 377. However, leaving aside an exceptional case of "temporary insanity", experience teaches that a person who lacks testamentary capacity is likely also to lack capacity for self management.

35 An applicant for a statutory will is sometimes more focused on the welfare of the living upon the death of the incapacitated person. As is often said: “in any two horse race, back self interest”.

36 The Court needs to be on guard against applications which serve the interests of others rather than the interests of the person in need of protection.

37 Ordinarily, a proposed statutory will should be no more complex than an incapacitated person might have been expected to make for himself or herself. In most cases, a statutory will should be as short, and as simple, as appropriate to cater for beneficiaries who have a substantial call on the incapacitated person’s bounty. If the person has a track record of making wills involving complex testamentary trusts, a comparable form of will may be appropriate; but, absent such a track record, a complex will is generally inappropriate. The incapacitated person is unlikely to have made a will beyond personal experience.

38 The Court’s protective jurisdiction (sometimes described as *parens patriae* jurisdiction) is commonly described as an inherent jurisdiction to do what is for the benefit of an incompetent person, the limits (or scope) of which have not, and cannot, be defined: *Secretary, Department of Health and Community Services v JWB and SMB (Marion’s Case)* (1992) 175 CLR 218 at 258-259. Despite its width, it must be exercised in accordance with general principles.

39 It is concerned with management of the affairs of an incompetent person (by whatever name known) during his or her lifetime. It appears never to have been thought to extend to the making of a will. There is no suggestion to the contrary in Sir Henry Studdy Theobald’s *The Law Relating to Lunacy* (London, 1924). The text treats will-making by an incapable person as a personal act of the person, permissible if he or she has testamentary capacity by reference to the criteria discussed in *Banks v Goodfellow* (1870) LR 5 QB 549: pages 225, 230, 391.

40 This is not altogether surprising because succession law texts generally subscribe to the view that it is "trite law" or "axiomatic" or "a fundamental principle of the law of succession" that the power to make a will must be personally exercised and cannot be delegated to another person: Hutley, Woodman & Wood, *Succession: Commentary and Materials* (Law Book Co, 4th ed, 1990), page 61; GL Certoma, *The Law of Succession in New South Wales* (Law Book Co, 4th ed, 2010), paragraph [4.270]; GE Dal Pont and KF Mackie, *Law of Succession* (Lexis Nexis Butterworths, Australia, 2nd ed, 2017), paragraphs [2.78]-[2.82].

41 Textbook discussion of any "rule" or "principle" against the delegation of testamentary power is commonly associated with an expression of doubt about the jurisprudential foundation of such a "rule" or "principle", followed by a discussion (based in large part on *Chichester Diocesan Fund and Board of Finance Inc v Simpson* [1944] AC 341, *Tatham v Huxtable* (1950) 81 CLR 639 and *Lutheran Church of Australia South Australia District Inc v Farmers' Co-operative Executors and Trustees Limited* (1970) 121 CLR 628), and a confinement of the topic to discussion, of the validity or otherwise of powers of appointment in an otherwise valid will.

42 The necessity for such a discussion has been diminished by enactment of section 44 of the *Succession Act* 2006 NSW. The section is introduced by a marginal note that asks a question: "Can a person, by will, delegate the power to dispose of property?" The text of the section answers the question thus: "A power or trust to dispose of property, created by will, is not void on the ground that it is a delegation of the testator's power to make a will, if the same power or trust would be valid if made by the testator by instrument during his or her lifetime." As Certoma (*op cit*, page 63) notices, section 44 deals with questions about the validity of a power of appointment, but does so "based on the assumption that the non-delegation rule exists".

43 How (if at all) the "non delegation rule" might interact with an enduring power of attorney, expressed as a general power, appears not to have been the subject of consideration. By virtue of the *Powers of Attorney Act* 2003 NSW,

a general power of attorney executed in the prescribed form (section 8, together with schedule 2 of the *Powers of Attorney Regulation* 2003 NSW) confers on the attorney (by virtue of section 9) "the authority to do on behalf of the principal anything that the principal may lawfully authorise an attorney to do". Statutory restrictions on an attorney's authority to give gifts, to receive property or to confer benefits on third parties are subject to the terms of the attorney's appointment: sections 9(2), 11(1), 12(1) and 13(1). Although it might arguably be possible for an enduring attorney to be given an express power to execute a will, or codicil, on behalf of an incapacitated principal, the better view is that the legislation governing an enduring power of attorney (and, equally, that governing an enduring guardianship appointment) would be held, as a matter of construction, not sufficiently clear to displace the non-delegation rule.

44 The powers conferred on the manager of a protected estate (whether appointed pursuant to the *Guardianship Act* 1987 NSW or the *NSW Trustee and Guardian Act* 2009 NSW) are generally regarded as limited to management of a protected person's estate during his or her lifetime. Section 93 of the *NSW Trustee and Guardian Act* 2009, and ancillary provisions which follow it, are based upon the proposition that management of a protected estate is terminated on the death of the protected person. The legislation governing protected estate management is silent about the existence or otherwise of a power in a manager to make a will, or codicil, for the protected person. Nevertheless, the common assumption is that there is no such power. If the point were to be litigated, the likelihood is that the legislation would be construed as not intending to abrogate the non-delegation rule.

45 The existence of jurisdiction in the Court to authorise the making of a statutory will militates against recognition of a power to make a will vested in some form of "agent" (using that expression in a loose colloquial way) such as an enduring attorney, an enduring guardian, a financial manager or a guardian. The fiduciary obligations these office-holders have are difficult enough to supervise and enforce without an abrogation of the non-delegation rule which,

more probably than not, would serve as a stimulus to financial abuse of persons in need of protection.

46 Problems have arisen in recent days in connection with managers of protected estates who have given, or purported to give a "death benefit nomination" to the trustee of a superannuation fund in which a protected estate has been invested. The view that has been taken is that a manager has no authority (and can be given no authority by the NSW Trustee in the exercise of its statutory powers) to give such a nomination or, at least, a nomination that purports to divert property of a protected person away from his or her estate on death: *G v G (No 2)* [2020] NSWSC 818 at [56] and [62].

47 There is a tension here between what may be perceived by superannuation specialists as simply an *inter vivos* act and what is necessary to protect an incapable person from exploitation by a person who seeks to divert property away from the person's estate. As a matter of policy, superannuation benefits payable on death are best dealt with within the context of probate law (including the law of wills) or an exercise of family provision jurisdiction, supplemented by the law governing statutory wills. That way the affairs of a person in need of protection can be managed openly, fairly and without risk of a breach of fiduciary obligations.

48 Perhaps the closest an exercise of the Court's protective jurisdiction comes to application of an incapable person's property for the benefit of others is the jurisdiction to authorise voluntary allowances to be made out of an incapable person's estate (including, if thought fit, allowances out of capital) for the maintenance or benefit of the person's family: *Theobald*, pages 462-467. That jurisdiction is well established in NSW: *Protective Commissioner v D* (2004) 60 NSWLR 513 at 540[149]-542[165], 543[165]-[166] and 544[171]-545[173]; *Griffin v Union Trustee Co of Australia Ltd* (1947) 48 SR (NSW) 360 at 363; 65 WN (NSW) 5 at 7; *Re DGR and the Mental Health Act 1958* [1983] 1 NSWLR 557 at 564E-G; *Re ES and the Mental Health Act 1958* [1984] NSWLR 341 at 343B-344D.

49 Perhaps the most instructive of the foundational cases is the judgment of Lord Eldon reported as *Ex parte Whitbread in the Matter of Hinde, a Lunatic* (1816) 2 Mer 99; 35 ER 878, extracted in *W v H* [2014] NSWSC 1696 at [38]-[40]. With emphasis added, the headnote reads as follows:

> "*Practice of making an allowance* to the immediate relations of a Lunatic, other than those whom the Lunatic would be bound to provide for by law, extended to the case of brothers and sisters and their children, and *founded not on any supposed interest in the property, which cannot exist during the Lunatic's life-time, but upon the principle that the Court will act with reference to the Lunatic and for his benefit, as it is probable the Lunatic himself would have acted if of sound mind. The amount and proportions of such an allowance are, therefore, entirely in the discretion of the Court*."

50 **The perspective of the probate jurisdiction**. Implicit in the concept of a court authorising the making of a "will" for a person lacking testamentary capacity" is a need for the Court to view the world from the perspective of the person for whom a will is to be made. In a simple case this might be done summarily. However, in the case of any complexity the criteria for assessment of testamentary capacity found in *Banks v Goodfellow* (1870) LR 5 QB 549 at 565 point to a need for informed, and nuanced, reasoning, for example, about "the claims to which [the prospective testator] *ought* to give effect".

51 Under the general law, the primary object in assessing the validity of a will, or in determining the validity or otherwise of competing wills, is to identify "the last will of a free and capable testator": *Tobin v Ezekiel* (2012) 83 NSWLR 757 at [44]. Although the concepts of "testamentary capacity" and "knowledge and approval" are conceptually distinct, their fields of operation may overlap: the question whether a testator had the understanding requisite to make a will interacts with questions about whether he or she understood, and approved, the terms of a particular will. Upon an exercise of statutory will jurisdiction, the concepts of "knowledge and approval", "undue influence" (as understood in probate law or in equity) and "fraud" might never be expressly articulated but they may implicitly inform an assessment of what is "appropriate" in a particular case. The Court cannot authorize the making of a statutory will if it is not satisfied that it is "appropriate" to do so.

52 The probate concepts of ”knowledge and approval”, “undue influence” and “fraud” do not, in terms, present themselves as relevant to the criteria for which sections 19 and 22 of the *Succession Act* 2006 provide for the authorisation of a statutory will. However, they all bear upon an assessment of any form of testamentary intention that may be imputed to an incapacitated person.

53 In practice, importance may attach to this because a person lacking testamentary incapacity, or on the verge of incapacity, might well be vulnerable to influences which, if the person had capacity, would sound alarm bells about testamentary intention if viewed through the prism of the standard probate concepts. An experience not uncommon is that, as a person descends into dementia, somebody close to the person captures his or her “person” as a carer and (through an enduring power of attorney of doubtful validity) takes control of his or her property, all the while making self-serving representations to him or her so as to generate public declarations of support. This form of influence may be viewed with concern by an objective bystander (if detected), all the more so because it may muddle the mind of a vulnerable person.

54 Although there has been little take-up of the idea that the operation of a will admitted to probate might be liable to challenge on the basis that execution of the will was procured by an exercise of “undue influence” recognisable in equity (*Bridgewater v Leahy* (1998) 194 CLR 457 at [62]-[63]; *Boyce v Bunce* [2015] NSWSC 1924), the focus of equity’s jurisdiction on the maintenance of standards of propriety might inform an assessment of what is “appropriate” for the purpose of section 22 of the *Succession Act* 2006.

55 **The perspective of the family provision jurisdiction**. Section 59 of the *Succession Act 2006* mandates that an application for a family provision order be assessed, and (if the application is granted) made, in light of the facts known to the Court at the time the application is determined.

56 That feature of the family provision jurisdiction of itself opens the possibility that the Court's determination of what is "adequate and proper provision", and what (if any) provision "ought" to be made for an eligible person, will differ from the intention of the testator at the time he or she made his or her last "will".

57 The existence of a statutory will may not affect an assessment by the Court of whether (for the purpose of section 59(1)(c) of the *Succession Act*) an applicant for a family provision order has been left without adequate provision for his or her proper maintenance, education and advancement in life; not, at least, if the focus for attention is limited to the quantum of provision (if any) made for the applicant in the will or during the deceased's lifetime.

58 In the abstract, the normative question (identified by reference to section 59(2) of the Act) whether an order for provision "ought" to be made in favour of an applicant might be more likely to focus attention on a tension between the Court's statutory will jurisdiction and an exercise of family provision jurisdiction.

59 That is because, even if the order authorising the making of a statutory will is not directly challenged by an application for it to be set aside or varied, the Court might be urged to go behind the statutory will order in addressing the question of what "ought" to be done. The field of operation of a customary restraint on the making of a family provision order (namely, as emphasized in *Sgro v Thomson* [2017] NSWCA 326 at [83]-[87], respect for the testamentary intentions of the deceased) might be thought to be much diminished (especially if the incapacitated person's circumstances have changed between the making of a will and death) in a case in which an attribution of testamentary intention to the deceased, in the form of a statutory will, is a construct of the Court, not a finding of fact about actual intention.

60 Sections 19 and 22 of the *Succession Act* do not mandate or justify an order for the making of a statutory will in terms that anticipate the outcome of a family provision application. However, in taking into account the prospect of a

family provision application being made after the death of an incapacitated person, the Court must, at least, decide whether that prospect militates against the making of a statutory will or whether, in assessing what is "likely" to have been a will that the person would have made and what is "appropriate", there is scope for the family provision jurisdiction to inform decision-making under sections 19 and 22. The Court's decision making might legitimately take into account the desirability of a decision being made that favours an orderly, final determination of all family disputes.

61 In terms of section 22(b), a will that minimises the prospect of post-death disputes within his or her family (or, more particularly, the class of persons defined in section 57 of the *Succession Act* as entitled to apply for a family provision order) just might be the form of will that an incapacitated person, properly informed, would have been "likely" to make if able to do so.

NSW LEGISLATION

62 Division 2 of Part 2.2 of Chapter 2 (comprising sections 18-26) of the *Succession Act*, by section 18, empowers the Supreme Court, on application by any person, to order that a will, in specific terms approved by the Court, be authorised to be made or altered on behalf of a living person, of any age, who lacks testamentary capacity.

63 Although section 18 permits an application to be made "by any person", section 19(1) mandates that an applicant must obtain "leave of the Court" to make an application for an order under section 18. The requirement that leave be obtained is an important filter designed to minimise the risk of inappropriate applications: *GAU v GAV* [2014] QCA 308; [2016] 1 Qd R 1. In combination with the jurisdiction to order that an unsuccessful applicant pay the costs of proceedings, it represents a disincentive for unmeritorious applications.

64 Section 19(2) provides that, in applying for leave, an applicant must (unless the Court otherwise directs) give the Court information on several topics, including "satisfactory evidence of the lack of testamentary capacity of the

person" on whose behalf an order for a statutory will is sought, a written statement of the general nature of the application and the reasons for it, and a draft of the proposed will, alteration or revocation for which the applicant is seeking the Court's approval. Together with section 22, this checklist is indispensable to an understanding of the statutory will jurisdiction and its operation.

65 The information *prima facie* required by section 19(2) to be given to the Court by an applicant for leave is described in the following terms:

> "(a) a written statement of the general nature of the application 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 18 is sought,
>
> (c) a reasonable estimate, formed from the evidence available to the applicant, of the size and character of the estate of the person in relation to whom an order under section 18 is sought,
>
> (d) a draft of the proposed will, alteration or revocation for which the applicant is seeking the Court's approval,
>
> (e) any evidence available to the applicant of the person's wishes,
>
> (f) any evidence available to the applicant of the likelihood of the person acquiring or regaining testamentary capacity,
>
> (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, or that can be discovered with reasonable diligence, of any persons who might be entitled to claim on the intestacy of the person,
>
> (i) any evidence available to the applicant of the likelihood of an application being made under Chapter 3 of this Act in respect of the property of the person,
>
> (j) any evidence available to the applicant, or that can be discovered with reasonable diligence, of the circumstances of any person for whom provision might reasonably be expected to be made by will by the person,
>
> (k) any evidence available to the applicant of a gift for a charitable or other purpose that the person might reasonably be expected to make by will,

(l) any other facts of which the applicant is aware that are relevant to the application."

66 Section 22 mandates that the Court must refuse leave to make an application for an order under section 18 unless the Court is satisfied of five elements: namely, that:

(a) there is reason to believe that the person in relation to whom the order is sought is, or is reasonably likely to be, incapable of making a will;

(b) the proposed will, alteration or revocation is, or is reasonably likely to be, one that would have been made by the person if he or she had testamentary capacity;

(c) it is or may be appropriate for the order to be made;

(d) the applicant for leave is an appropriate person to make the application; and

(e) adequate steps have been taken to allow representation, as the Court considers appropriate, of persons with a legitimate 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 the relation is sought.

67 Section 23 provides that a will that is made or altered by an order under section 18 is properly executed if: (a) it is in writing; and (b) it is signed by the Registrar (in practice, a Deputy Registrar working in the Probate Registry) and sealed with the seal of the Court. After amendment, the section also provides that a will may be signed by the Registrar even if after the death of the person in relation to whom the order was made. Before amendment, the section required the incapacitated person to be alive at the time the Registrar signed and sealed the instrument authorised by a judge.

68 Once duly executed, a statutory will is deposited with the Registrar and remains there unless an order is made under section 18 authorising the whole of the will or the incapacitated testator has acquired or regained testamentary capacity: section 24.

69 Section 25 empowers the Court to order that the incapacitated person be separately represented in proceedings for a statutory will; but, in practice is rarely made.

AN APPLICATION FOR A STATUTORY WILL

70 Succession law must accommodate a wide range of cases, ranging from those that are uncontentious and essentially administrative in character to those that are hotly contested and, in practice if not in theory, adversarial.

71 *Re Fenwick* (2009) 76 NSWLR 22 remains a useful starting point for understanding the law and practice governing the making of a statutory will. A reflection of its continued authority is that it is customary for practitioners to describe a particular case as "a lost capacity case" (76 NSWLR 22 at [154]-[170]) or "a nil capacity case" ([171]-[176]), although not so frequently as "a pre-empted capacity case" ([177]-[188]). Distinctions between these cases focus attention on the availability or otherwise of evidence of an incapacitated person's "subjective" intention and the need for any "intention" attributed to him or her to be determined by reference to "objective" considerations.

72 Characterisation of an application for a statutory will as an exercise of protective jurisdiction invites characterisation of proceedings on the application as essentially inquisitorial rather than adversarial. This is consistent with the inquisitorial character of probate proceedings.

73 There is a strong public interest element in the purposive character of both the protective jurisdiction and the probate jurisdiction. Their different historical antecedents (the protective jurisdiction on a delegation to the Lord Chancellor by the Crown as *parens patriae*, the probate jurisdiction as the legacy of

ecclesiastical jurisdiction) have in common that neither can be simply equated with the determination of competing claims of right at common law.

74 Of course, labels are not everything and the character of particular proceedings may defy a binary choice between "inquisitorial" and "adversarial".

75 In practice, most applications for a statutory will are the product of a consensus between members of an incapacitated person's close community (including, particularly, family members) actively, socially engaged with him or her. The prospect of securing the Court's approval of a proposed statutory will are greatly improved if all persons who might be regarded as having an interest in the incapacitated person's estate (whether as a beneficiary or as a person eligible to apply for a family provision order) provide written evidence of their fully informed consent to the proposed will.

76 An application for a statutory will is generally made by a Summons (or, where proceedings have earlier been commenced in the Court's Protective List, by a notice of motion) which simply claims as relief: (1) an order under section 19 of the *Succession Act* that the plaintiff be granted leave to make an application under section 18 in respect of a named person; and (2) an order, under section 18 of the Act, authorising the making of a will in terms of a draft proposed will annexed either to the Summons or to an affidavit filed in support of the Summons.

77 Although the person in respect of whom a statutory will is sought to be made should, prudently, be named as a defendant (at least where there is the possibility of a contest about testamentary capacity), and section 25 of the *Succession Act* empowers the Court to order that such a person be separately represented, in common practice, where testamentary incapacity is patent, the incapable person is not joined as a party to the proceedings or, whether joined or not, not served with notice of the proceedings. If there is any utility at all in service of the person, it should be effected; however, the Court does not generally insist upon the empty formality of a futile act.

78 Whether or not the incapacitated person plays an active role in proceedings for a statutory will, the criteria specified by sections 19 and 22 of the *Succession Act* implicitly require engagement with the incapacitated person in the preparation of evidence about his or her testamentary intentions, or preferences, if any. An exercise of protective jurisdiction independently requires an empathetic engagement with the person in need of protection in management of his or her affairs. An incapacitated person should be involved in the will-making process so far as that is reasonably practicable.

79 Where time and circumstance permit, the best evidence of an incapacitated person's wishes might take the form of a transcript of one or more interviews with him or her (by a transparently independent interviewer) during which his or her understanding of: (a) the nature of a will; (b) the nature and value of his or her estate; and (c) his or her family and social relationships are explored, and any testamentary wishes are recorded, by an interrogation using open (non-leading) questions.

80 The draft of a proposed will is sometimes annexed to the Summons by which section 18-19 orders are sought. Sometimes it is placed before the Court as an annexure to an affidavit in support of the Summons. Sometimes it is tendered in evidence or provided to the presiding judge on a less formal basis. Not much turns on how the draft is put before the Court. As in protective proceedings (illustrated by section 41(3) of the *NSW Trustee and Guardian Act* 2009 NSW), in considering an application for authorisation of a statutory will the Court (by virtue of section 21 of the *Succession Act* 2006 NSW) is empowered to "inform itself … in any manner it sees fit".

81 Best practice requires that the plaintiff's Summons be accompanied by an affidavit, written submissions and draft orders. Copies of draft orders and a proposed will should be emailed to the presiding judge's chambers in "word". Logistically, this facilitates consideration of amendments to a proposed will and speeds up the process of making orders incorporating the terms of an approved will.

82 An affidavit in support of a Summons should ideally, specifically and expressly, address each of the topics enumerated in sections 19(2) and 22.

83 Detailed written submissions are not generally required, but there is utility in submissions that, by reference to sections 19(2) and 22, explain the terms of any draft will proposed by the plaintiff, and draw to attention the nature of the incapable person's estate, the nature and scope of his or her personal relationships, any expression of preferences by him or her, and such (if any) legal submissions as may be made.

84 They should also address the critically important question of who should be given notice of the proceedings and, perhaps the even more important question, whether anybody (and, if so, who) within the family circle of the incapacitated person should not be given notice of the proceedings having regard to the need to protect the incapacitated person from clambering claimants on his or her bounty, or persons who, if informed of the prospect of testamentary provision being made for them, might treat the incapacitated person differently in whatever remains of his or her life.

85 Although proof of "testamentary incapacity" is required, and medical evidence can be an important factor upon consideration of an application for a statutory will, there is generally no necessity for the sort of medical evidence that would be adduced in a contested probate suit. What is required is the evidence of an experienced medical practitioner (preferably two of them) deposing to a recent examination of the incapable person and, with a statement of reasons, an expression of an opinion as to the person's testamentary capacity.

86 In considering whether a statutory will can, or should, be made on behalf of an incapacitated person, respect for the person's autonomy requires consideration of the possibility that he or she, if consulted with the requisite capacity, would express an intention to die intestate. A proper exercise of the Court's jurisdiction may be to refuse to authorise the making of a will.

87 That possibility reinforces a necessity to inquire as to the existence of an existing will or earlier wills and the scheme of distribution (found in Chapter 4 of the *Succession Act* 2006 NSW) governing an intestate estate. Evidence of a thorough search for an existing will is important on an application for a statutory will because, should a pre-existing will later be found, the existence of that will might ground a challenge to the statutory will's admission to probate.

88 A standard form of "short minutes" of orders routinely made on the making of a statutory will is in the following terms:

> (1) NOTE the Summons filed …
>
> (2) NOTE the draft will for (the incapable person) propounded by the plaintiff (and other drafts, if any);
>
> (3) NOTE the written submissions dated … signed by … on behalf of …
>
> (4) NOTE the following affidavits read in support of the Summons:
>
> (a) Affidavit of … sworn …;
>
> (b) Affidavit of … affirmed …
>
> (5) NOTE the following affidavits read by … in response to the Summons:
>
> (a) Affidavit of … sworn …;
>
> (b) Affidavit of … affirmed …
>
> (6) ORDER, pursuant to section 19 of the *Succession Act* 2006 NSW, that the plaintiff be granted leave to make an application for an order under section 18 of the Act on behalf (the incapable person).
>
> (7) ORDER, pursuant to section 18 of the *Succession Act* 2006, that a will be authorised to be made on behalf of (the incapable person) in terms of the draft will that is (identified by reference to an exhibit or annexure).
>
> (8) ORDER that the Registrar be authorised and directed to sign, and seal with the seal of the Court, pursuant to section 23 of the *Succession Act*, a will in the terms of the draft will that is (the identified exhibit or annexure).
>
> (9) [Where the incapable person is a "protected person" within the meaning of the *NSW Trustee and Guardian Act* 2009 NSW, section 38]:
>
> (a) NOTE that the NSW Trustee on … authorised the plaintiff to apply for a statutory will;
>
> (b) ORDER, subject to further order, that the manager of the protected estate of (the incapable person), … provide to the Court, no later than six months after (the incapable person) attains the age of …, or the death of (one or more identified significant persons in the life of the incapable person),

whichever first occurs, a report as to whether (the incapable person's) will should be revised;

(c) NOTE that that order is not intended, of itself, to require or prevent a further application for authorisation of a will, or codicil, for (the incapable person).

(10) ORDER that the plaintiff's costs of these proceedings be paid out of the estate of (the incapable person) on the indemnity basis (or other orders for costs as may be appropriate in the particular case).

(11) RESERVE to the incapable person, and any other person with a sufficient interest, liberty to apply generally.

(12) NOTE that these orders have been made at … am/pm on …

(13) ORDER that these orders be entered forthwith.

89 The form of these short minutes implicitly acknowledges some of the practical constraints on the making of a statutory will. First, because a statutory will might be the subject of reconsideration, the evidence upon which an order for the making of a will should be identified so as to facilitate a later examination of the evidentiary foundation of the will authorized to be made or any change in circumstances. Secondly, consideration should be given to whether there is a practical means (as there may be in the management of a protected estate) for reconsideration of the terms of a statutory will if the incapacitated person's circumstances change. Thirdly, recognition needs to be given to the making of costs orders on a basis broader than the simple general rule that "costs follow the event". Fourthly, a reservation of liberty to apply is generally appropriate to help to inform an incapacitated person, and others within his or her community, that a statutory will is open to review. Fifthly, because section 18(3) of the *Succession Act* 2006 NSW precludes an order for a statutory will being made "unless the person in respect of whom the application [for a court-authorised will] is alive when the order is made", the precise time at which a section 18 order is made should be recorded so as to minimise disputation.

DO DIFFERENT TYPES OF WILL REQUIRE DIFFERENT PRINCIPLES FOR ADMISSION TO PROBATE?

90 With the possible exception of one case (*Estate of Scott; Re Application for Probate* [2014] NSWSC 465) of doubtful relevance because of section 23's amendment, existing NSW case law on statutory wills has been concerned only with the making of a statutory will, not its admission to probate.

91 In contemporary practice in NSW, there are three types of "will" recognised in their creation and admission to probate: a "formal will" (governed principally by section 6 of the *Succession Act*), an "informal will" (governed by section 8 of the Act) and a "statutory will" (governed principally by sections 18, 19 and 22 of the Act).

92 There is, in NSW legislation, no exhaustive definition of a "will". Section 3(1) of the *Succession Act* defines a "will" to *include* "a codicil and any other testamentary disposition". The Act does not define a "codicil" or the expression "testamentary disposition". Section 3(1) of the *Probate and Administration Act* 1898 provides that "'will' *extends* to a testament and to a codicil and to any appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child by virtue of the Imperial Act twelfth Charles the Second, chapter twenty-four, and to any other testamentary disposition." The basic concept of a "will" remains a matter of common assumption or understanding.

93 The common, enduring features of a "will", under current NSW law, are that: first, there must be a documented declaration of an intention, ascribed to a testator, providing for the distribution or administration of property (or for other business consequent upon death such as funeral arrangements or the guardianship of an infant) after the testator's death; secondly, that declaration must be ambulatory, in that it is intended to take effect only on the death of the testator, and is revocable in the meantime; and, thirdly, it can make a person (an executor) a post-death representative of the testator.

94 Upon an application for a will to be admitted to probate the Court's task, at the highest level of abstraction, is generally to identify, and to give effect to, the last will of a free and capable testator (*Tobin v Ezekiel* (2012) 83 NSWLR 757 at [44]; *Estate Rofe* [2021] NSWSC 257 at [105] *et seq)*, a function necessarily modified where the last testamentary instrument attributed to a deceased person is a "statutory will".

95 The three types of will encountered in contemporary NSW differ in the nature of their creation; but, by virtue of section 30 of the *Succession Act*, and subject to a contrary intention appearing in a will, each type of will "takes effect, with respect to the property disposed of by the will, as if it had been executed immediately before the death of the testator", a formula that follows reforms effected in England by the *Wills Act* 1837 (Eng).

96 A "formal will" is a private instrument save for public interest considerations that inform proof of due execution upon admission to probate: *In the Estate of Fuld* [1965] P.405 at 409-411; *Re Estate Pierobon* [2014] NSWSC 387; *Boyce v Bunce* [2015] NSWSC 1924.

97 An "informal will" may, or may not, be an entirely private instrument in its creation, becoming public only in the course of an application for admission to probate.

98 A "statutory will" differs from both a "formal will" and an "informal will" because in its creation, no less than in its admission to probate, it is a public instrument, the effect of which depends upon an order of the Court.

99 Whereas the touchstone of both a "formal will" and an "informal will" is the *actual* intention of a testator, the touchstone of a "statutory will" is the *presumed* intention of an incapable person, by a legal fiction, deemed to be recorded in a court-authorised document.

100 The validity of a "formal will" is determined by reference to criteria, established by the general law, which inform identification of a will as the last will of a free and capable testator. In the context of statutory provisions governing due execution, those criteria focus on standard questions about "testamentary capacity", "knowledge and approval", an absence of "undue influence" and an absence of "fraud": *Estate Rofe* [2021] NSWSC 257 at [104] *et seq*. Within the framework of those criteria "testamentary capacity" is customarily assessed by reference to *Banks v Goodfellow* (1870) LR 5 QB 549 at 564-566, especially at 565.

101 *Banks v Goodfellow* provides a logical framework for an assessment of testamentary capacity with identification of the following elements:

(a) a competent testator must understand *the nature of a will and its effects*;

(b) a competent testator must understand *the extent of the property of which he or she is disposing*;

(c) a competent testator must be *able to comprehend and appreciate (that is, to weigh) the claims to which he or she ought to give effect*; and

(d) a competent testator must be *free of any medical condition that prevents him or her from having, or duly exercising, those faculties in the making of a will*.

102 A person who lacks one or more of these capabilities is a person who is generally understood to lack "testamentary capacity".

103 The validity of a "formal will" is generally able to be tested only at the time of death (or admission to probate), when it takes effect: *Succession Act* 2006, section 30; William Blackstone, *Commentaries on the Laws of England* Book II, page 502; William Sheppard, *The Touchstone of Common Assurances* (London, 1648), page 401. Save possibly in an exceptional case, there is no utility in a judicial determination of a will liable to be revoked before death. Validity is assessed as at the date of execution of the will, but at the time of an application for a grant of probate or administration with the will annexed.

104 The criteria for determination of the validity of an "informal will" are directed, in express terms, to whether the document, in whole or part, "purports to state the testamentary intention of a deceased person" such that "the Court is satisfied that the person intended it to form his or her will". There are, of course, variations on this theme, depending on whether the focus is on a will,

an “alteration” of a will or a “revocation” of a will. However, the central theme of section 8 of the *Succession Act* is that one looks for the existence of a deceased person’s “testamentary intentions”, if any.

105 Section 8 does not, in terms, import the criteria traditionally used to test whether a “formal will” is the last will of a free and capable testator. However, the object of section 8 is to permit “the last will of a free and capable testator” to be admitted to probate even if the formalities of “due execution” have not been observed. An experienced succession lawyer would be likely, at least implicitly, to have regard to the same criteria in assessing the existence or otherwise of a statement of testamentary intentions amenable to admission to probate under section 8. The criteria for assessment of whether a “formal will” is the last will of a free and capable testator provide a logical framework of decision-making that readily informs the criteria prescribed by section 8 of the *Succession Act*.

106 An informal will could not properly be admitted to probate if the testator were to be found to have lacked testamentary capacity or knowledge and approval of the contents of the document propounded as a will, or if he or she were to be found to have been the subject of undue influence or fraud (in the sense understood upon an exercise of probate jurisdiction) in creation of the document. A finding of any such character would preclude a finding of testamentary intention necessary to satisfy section 8.

107 Part 2.2 (comprising sections 18-26) of the *Succession Act* governs the making, and validity as made, of a court-authorised “statutory” will. An order under section 18, made with leave granted under section 19, is inherently “interlocutory” in character in the sense that a statutory will (like other wills) is revokable. Subject to principles governing an abuse of the processes of the Court in cases where multiple applications are made absent a change in circumstances, it is amenable to amendment or revocation by another section 18 order at any time before the death of the incapable person in respect of whom it is made. Under the present legislation (section 18 in particular) the incapacitated person must be alive at the time a section 18 order is made (so

that such an order could not be varied in the course of an application for probate); but, in common with other types of will, the statutory will does not take effect until the time of death of the incapacitated person.

108 The "interlocutory" character of a section 18 order has been used, on occasion, to permit a will to be authorised in the shadow of an impending death and to be reviewed after allowing interested persons an opportunity to be heard shortly thereafter: *cf*, *A Ltd v J* [2017] NSWSC 736; *A Ltd v J (No 2)* [2017] NSWSC 896. Use of the expression "interlocutory" here may be a misnomer because any statutory will duly made has operative (and, upon death, "final") effect. The point is, rather, that the making of a statutory will does not, of itself, preclude another being made.

DIFFERENT TYPES OF "INTEREST LITIGATION", "NOTICE OF PROCEEDINGS" AND THE ADMISSION OF A STATUTORY WILL TO PROBATE

109 An area of the law yet to be explored is whether the nature of a statutory will requires a distinctive approach on an application for its admission to probate. A common assumption is probably that it does not.

110 A clue as to whether different considerations apply to admission to probate of the different types of will may be found in different principles governing the giving of "notice" to persons who have, or may have, an "interest" in the Court's decision-making.

111 Probate litigation is distinctly "interest litigation": *Gertsch v Roberts* (1993) 35 NSWLR 631 at 634B-C. A person has to have an interest (usually a property interest) in the outcome of probate proceedings in order to participate in them, and notice of the proceedings should ordinarily be given to everybody who is reasonably suspected of having such an interest: *Boyce v Bunce* [2015] NSWSC 1924 at [51]. Publication of notice of an intention to apply for a grant of probate or administration is a routine requirement of the Court, even on an application for a grant in common form. A grant in solemn form requires service of notice of the proceedings on all interested persons, allowing them a

reasonable opportunity to intervene in the proceedings should they be so advised: *Estate Kouvakas* [2014] NSWSC 786 at [258].

112 Protective proceedings are not "interest proceedings" in the same sense as probate proceedings. The focus for attention is the welfare of a living person as the paramount consideration. Nevertheless, they are "interest proceedings" in so far as all persons within the incapacitated person's social circle should ordinarily be given notice of the proceedings. Such notice is not intended to serve *their* interests, but to assist the Court to assess what is in the best interests, and for the benefit, *of the incapacitated person*.

113 If there has earlier been a grant of probate or administration in family provision proceedings, the focus for attention is on ensuring that notice of the proceedings is given to all persons who are, or may be, "eligible persons" within the meaning of section 57 of the *Succession Act*, enabling them to consider their own position vis-a-vis administration of a deceased estate. If there has been no grant of representation independently of the family provision proceedings, the Court may be concerned to ensure that all persons interested in the proceedings (in the probate sense) have notice of the proceedings before their final determination.

114 A distinctive feature of statutory will proceedings is that different considerations may govern the concept of "interest" and the giving of "notice":

(a) at the time the will is created (by an exercise of jurisdiction under Part 2.2 of the *Succession Act*); and

(b) at the time of an application for admission of the will to probate.

115 In addressing questions (arising under section 22(e) of the *Succession Act*) about allowing representation of "persons with a legitimate interest" in a statutory will application, the Act invites an approach to the concept of "interest" and the giving of "notice" different from experience of the probate jurisdiction, in particular. Not uncommonly, there is objective evidence led in

support of an application for a statutory will that a member of the incapacitated person's family is estranged from the whole family, that he or she has had no contact with the incapacitated person for many years, and that there is a well-grounded fear of domestic violence within the family, or inappropriate attempts to influence the incapacitated person or to press the inappropriate person for financial benefits, if the estranged person is given notice of the proceedings. In cases of that character, the welfare of the incapacitated person, as a living person in need of protection, can militate against notice of the proceedings (including notice of the incapacitated person's wealth) being given to the estranged family member.

116 The same considerations do not apply upon an application for a statutory will to be admitted to probate because, in the nature of such an application, the incapacitated person has died and, by reason of death, is no longer in physical need of protection. His or her welfare ceases to be the paramount concern. Does an excluded, estranged family member, at this point, have a basis for challenging the validity of the will by reason of his or her exclusion from the will-making process? This is a moot point.

117 The Court's statutory will jurisdiction is still young. As the young people in respect of whom statutory wills have been made age, the Court may in the future be confronted by cases in which there has been a profound change in circumstances affecting an incapacitated person's welfare and preferences between the date a statutory will is made and the time at which an application is made for its admission to probate. There is no clear system in place for a periodic review of the terms of a statutory will. And the fact that a will has been made pursuant to an order of the Court may mean that a grant of probate or administration in respect of a will can be opposed on the ground that the order made authorising execution of the will ought to be discharged or varied.

118 An order authorising the making of a statutory will may operate most effectively if made in the shadow of the death of an incapacitated person, allowing little time to elapse between execution of the will and death, before

the intervention of new developments. Nevertheless, it is now common place for statutory wills to be made for young people who are recipients of compensation arising from common law personal injury claims.

119 An unexplored feature of statutory wills is the potentiality for engagement of the Court at two distinct times and for related but not identical purposes. In the ordinary case of a capable testator, the intervention comes only once (if at all) on an application for a grant of probate or a grant of administration with the will annexed. In the case of a person for whom a statutory will is made, the Court's intervention may be required, not only at the time the will is made, but also at the time a grant of probate or administration is sought.

120 A common assumption is that a statutory will can and should be admitted to probate in the same manner as any other form of will. That appears to have been the intention of the NSW Law Reform Commission in its recommendation of what became Part 2.2 of the *Succession Act*. However, what is required to "prove" a will must ultimately depend upon the nature of the will to be proved.

121 When we think of "a will" *simpliciter*, most of us think of a "formal will" compliant with section 6 of the *Succession Act*. That is even though, in practice, the admission to probate of "informal wills" (governed by section 8 of the Act) is now common place and different principles govern admission to probate of the two types of will. Note, for example, how much probate law, expressed in terms of presumptions, flows from "due execution" of a formal will, by definition a feature absent in the creation of an "informal will". It is in the context of an "informal will" that there is most life in debate about whether the rebuttable presumptions of probate law and practice are better viewed as inferences of fact drawn from common experience.

122 One cannot exclude the possibility of a need to view admission to probate of a statutory will as a distinct, third category of will governed by its own distinctive principles. An entitlement to have a statutory will admitted to probate (or to resist an application for a grant of probate or administration in respect of the

will to be revoked) might rise no higher than the susceptibility of the order authorising the making of the will to be discharged or varied. An application for the discharge or variation of a section 18 order might be grounded upon:

(a) late discovery of a will executed by the deceased before the section 18 order was made;

(b) a failure to give due notice of the application for a statutory will to a person who ought to have been given notice; or

(c) proof that the order authorising a statutory will was procured by fraud or attended by some other vitiating factor.

123 Could a statutory will executed by a Registrar of the Court subsist if the foundational order of the Court were to be displaced? Would it matter that the impugned will had come into effect by operation of section 30 of the *Succession Act* upon the death of the incapacitated person? In a world increasingly sensitive to the need to ascertain, and to give effect to, the preferences of an incapable person the subject of protective management orders, can a recent (albeit informal) expression of a protected person's preferences realistically be ignored?

124 By analogy with the jurisdiction of the Court to revoke a grant of probate (*Estate Kouvakas* [2014] NSWSC 786 at [284] *et seq*), the Court may, by a refusal to admit a statutory will to probate, implicitly revoke the will. Whether (and, if so, upon what terms) this might be done remains to be seen; but the possibility that it might be done cannot be dismissed as fanciful.

STRATEGIC OPPORTUNITIES INVOLVING THE STATUTORY WILL JURISDICTION

125 The opportunities presented by the statutory will jurisdiction in administration of the estate of a person lacking testamentary capacity probably cannot be defined exhaustively. However, four are worthy of notice.

126 First, an application for the making of a statutory will can be an integral part of an application to the Court for the approval of a family settlement (including approval, under s 95 of the *Succession Act*, of a release of rights to apply for family provision relief) in anticipation of the death of the incapacitated person: *W v H* [2014] NSWSC 1696; *Re RB*, *a protected estate family settlement* [2015] NSWSC 70.

127 Secondly, because an application for a statutory will can be made (subject to a grant of leave) by "any person", a person who is not, and is not likely ever to be, an "eligible person" within the meaning of section 57 of the *Succession Act* 2006 NSW, and so unable to make an application for a family provision order, might be able to persuade the court that he or she should be named as a beneficiary in a statutory will. A grandchild who has never been dependant upon an incapacitated person, and never likely to be, is a prime candidate for consideration of a statutory will application: *Small v Phillips (No 2)* [2019] NSWCA 268; 18 ASTLR 608; *Small v Phillips* [2020] HCA Trans 96.

128 Thirdly, a person with an “interest” in the estate of a deceased incapacitated person, but who was not given notice of the application for a statutory will for the incapacitated person, might apply to the Court for an order that the order authorising the making of a statutory will be set aside or varied. Such an application might, or might not, involve a complaint of a want of procedural fairness, upon an assumption that the applicant can be shown to have had a “legitimate interest” (within the meaning of section 22(e) of the *Succession Act*) in the making of a statutory will: *cf*, *Small v Phillips (No 2)* [2019] NSWCA 268; 18 ASTLR 608.

129 Fourthly, the foundation of a statutory will might similarly be undermined upon an application for its admission to probate by fresh evidence of a will made by the deceased, or a declaration of an intention to die intestate, before the statutory will was made.

COSTS

130 A point of entry in any discussion about the costs of statutory will proceedings remains the general discretion conferred on the Court by section 98 of the *Civil Procedure Act* 2005 NSW, read together with the general rule (embodied in rule 42.1 of the *Uniform Civil Procedure Rules* 2005 NSW) that, unless the court otherwise orders, "costs follow the event".

131 The standard approach to costs orders in protective proceedings is that such orders for costs are made as seem proper in all the circumstances of the case: *CCR v PS (No 2)* (1986) 6 NSWLR 622 at 640; *P v NSW Trustee and Guardian (No 2)* [2015] NSWSC 676 at [9]-[10]; *Small v Phillips (No 3)* [2020] NSWCA 24.

132 This approach is informed by a need, on the one hand, not to discourage *bona fide* applications made in the perceived best interests of an incapacitated person and, on the other hand, to protect the estate of the incapacitated person from unmeritorious applications.

CONCLUSION

133 Any application for a statutory will should be prepared, and must be determined, by reference to the criteria set out in Chapter 2 (particularly sections 19 and 22) of the *Succession Act* 2006 NSW.

134 In the application of those criteria, the foundational concepts of "incapacity," "will" and testamentary "intention" may inform decision-making, not by way of a "gloss" on the legislation but as a means of understanding and giving effect to it.

135 Upon an exercise of statutory will jurisdiction, care needs to be taken to stand in the shoes of an incapacitated person, to adopt his or her perspective in making decisions affecting him or her, and to recognise that any decision made on an application for a statutory will might (because it is made during the person's lifetime) have practical implications for the person's care. The

protective character of a statutory will application is nowhere on show as much as when consideration must be given to what, if any, effect it may have on the welfare of a living person in need of protection.

136 A statutory will is not to be regarded as something that simply impacts upon an incapacitated person at the time of his or her death, posthumously. An application for a statutory will, on notice to anybody within the incapacitated person's community, or the fact that a statutory will has been authorised or refused, or the terms of any statutory will that is made, might fundamentally affect personal relationships bearing acutely on the nature and extent of care given to the incapacitated person. It is not too dramatic to say that, in some cases at least (and who can know which cases they are?) a failure to realise this could be fatal or, at least, harmful to a person in need of protection. For that reason, the statutory will jurisdiction is likely to operate most effectively when the court can take comfort from a consensus within an incapacitated person's caring community.

137 The courts have yet to grapple with how to deal with a challenge to the operation of a statutory will at the time of an application for its admission to probate or in response to an application for the making of a family provision order. In the nature of succession law, such a challenge (if and when it comes) is likely to require a fact-sensitive decision, informed by an understanding of a context broader than the text of sections 18-26 of the *Succession Act* 2006 NSW.

GCL

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