Court authorised wills in NSW for persons who lack testamentary capacity

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Introduction

Prior to 1 March 2008 the Supreme Court of NSW had no power to authorise a will to be made for a person lacking testamentary capacity. Problems arising from this situation included:

1. A person who had made a will and then lost testamentary capacity was unable to update or change their will as their circumstances changed throughout the balance of their life;
2. A person who lost testamentary capacity before ever executing a will would die intestate and their estate would be distributed in accordance with the intestacy provisions.

The above scenarios can give rise to situations where the recipients of the deceased's estate are not necessarily the persons that the deceased would have intended to benefit from their estate. Further in some circumstances their estate would be received by the Crown.

With increased life expectancy in Australia there has been a correlating rise in the number of people suffering from dementia. The prevalence of dementia has made the above scenarios even more problematic.

Court made wills possible since 1 March 2008

The passing of the Succession Act 2006 in NSW made it possible for the Supreme Court to make, modify, or revoke a will for persons who lack testamentary capacity. The relevant sections of the Act are sections 18 to 26.

Factors to be established

Section 22 of the Act sets out the following elements which must be established to the Court's satisfaction before an order can be made:

1. The subject person is incapable of making a will;
2. 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;
3. It is or may be appropriate for the order to be made;
4. The applicant is an appropriate person to make the application; and
5. Adequate steps have been taken to provide notice to allow representation of all persons with a legitimate interest in the application.

Leave to make an application and supporting documentation required

The leave of the Court must be obtained to make an application and the information that is required in support of the application for leave is as follows:

1. A written statement of the general nature of the application and the reasons for making it.
2. Evidence of the lack of testamentary capacity of the subject person.
3. An estimate of the size and character of the estate of the subject person.
4. A draft of the proposed will, alteration or revocation that is sought by the applicant.
5. Any evidence of the wishes of the person for whom the application has been issued.
6. Any evidence of the likelihood of the subject person acquiring or regaining testamentary capacity.
7. Any evidence of the terms of any previous wills made by the subject person.
8. Any evidence of any persons who might be entitled to claim on the intestacy of the subject person.
9. Any evidence of the likelihood of an application for a family provision order being made in respect of the property of the subject person.
10. 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 subject person.
11. Any evidence of a gift for a charitable or other purpose that the person might reasonably be expected to make by will.
12. Any other relevant facts.

Importantly the Court is not to make an order under Section 18 of the Act unless the person in respect of whom the application is made is alive when the order is made.

The court may make an order under this section on behalf of a person who is a minor and who lacks testamentary capacity.

The Court can hear the application for leave and the substantive application in the one hearing.

If an order is made the registrar signs and seals the will. The will is then held by the registrar until the will is revoked (by Court order) or the person has acquired or regained testamentary capacity.

Case study 1: Small v Phillips [2019] NSWCA 222 and Re MP's Statutory Will [2019] NSWSC 331- a lost capacity case involving a very large estate, a risk of intestacy, and an unresolved draft will.

This case involved a 90 year old woman Mrs Phillips who suffered a stroke in April 2018 and lost testamentary capacity. Mrs Phillips had assets worth between 62-92.5 million dollars.

Mrs Phillips had three children but one of her daughters had died. Her son Robert and daughter Sharonne were appointed as her financial managers after her stroke. Robert had five children and Sharonne had one son Anthony who was the plaintiff in these proceedings.

Mrs Phillips executed a will in 2001 the original of which could not be located. Mrs Phillips stated on several occasions in 2017 when she was taking steps to prepare a new will that she had no will. She was also warned by her legal advisors in 2017 that if she had no will then on her death she would be intestate and her two children would receive all of her estate.

These background facts could have given rise to an inference that she had destroyed her will and in those circumstances the copy of this will might not have been probated and she would have been intestate.

The **terms of Mrs Phillips' 2001 will** left the majority of her estate to a charitable trust for Jewish causes with relatively modest legacies to family members. The terms in brief were as follows:

1. Daughter- $750,000
2. Son - $500,000
3. 6 grandchildren- $660,000 each
4. Sister- $200,000
5. Housekeeper and her husband $300,000.
6. Residue to charitable trust for Jewish causes.

In early 2017 Mrs Phillips sought advice in respect of the preparation of a will. A draft will was prepared by a number of specialist wills and estate solicitors after consultation with accountants and the proposed executors and trustees. This draft was sent to Mrs Phillips on 22 May 2017.

The terms of the draft 2017 will were as follows:

1. Daughter- $5,000,000 plus the gift of her 25- acre property at Kurrajong (which had a house and elaborate gardens) as joint tenant with her son Anthony, and various artworks and personal effects.
2. Son- nil. (Mrs Phillips had fallen out with her son over a business venture in 2004)
3. Son's five children- $1,000,000 each.
4. Grandson Anthony- a commercial property at Kelso which was leased to Bunnings upon turning 28 years, plus the gift of her 25 acre property at Kurrajong as joint tenant with his mother, and various artworks and personal effects.
5. Sister- $500,000
6. Housekeeper- $250,000
7. Sydney Jewish Museum- $1,000,000
8. Honour previous pledges and donations
9. Residue to charitable trust for Jewish causes.

Mrs Phillips did not execute the draft will and immediately raised a number of complaints with her solicitors which were also relayed to Sharonne, and Anthony that the terms did not accord with her instructions. However these complaints did not go to the legacies and gifts as stated in the draft will or that the majority of her estate was to be gifted to a charitable trust. Her complaints centered on perceived errors and misstatements in the will, costs that would be associated with the administration of her estate under the terms of this will, the composition of the board of the charity, terms relating to its ongoing operation, and the choice of executors.

Discussions with her other solicitor, Ms Deigan

Since 2015 Mrs Phillips had from time to time been having discussions about her testamentary intentions with another solicitor, Ms Deigan who acted for her in relation to various other matters. On 25 June 2017 Mrs Phillips told Ms Deigan that she was reconsidering all aspects of her will and the charitable trust. Further she was not happy with the draft will. In August 2017 Mrs Phillips told Ms Deigan that she had decided not to go ahead with the will and the trust.

In late September 2017 Mrs Phillips had a further fall and was hospitalised. In October 2017 Mrs Phillips requested Ms Deigan come to see her at the hospital. At this meeting she asked Ms Deigan to prepare her will and the terms of the charitable trust. Mrs Phillips told Ms Deigan that she was worried about not having a will and that she was still undecided as to who to appoint as trustees and executors but would probably still appoint the trustees named in the draft will. Mrs Phillips did not want to give Ms Deigan the draft will as she stated that she was not happy with the draft. She also indicated reservations about giving Anthony the Bunnings property and stated that she was still not sure who to leave her things to and how the artwork would be valued. As a result of these instructions Ms Deigan was not in a position to draft any will at this time.

On 3 October 2017 Mrs Phillips executed a deed to pledge $15 million dollars to Tel Aviv university.

In November 2017 Ms Deigan sought further instructions from Mrs Phillip about her will but Mrs Phillips responded that she was still undecided. She also indicated further reservations about Anthony. Mrs Phillips subsequently had a discussion with Anthony in December 2017 or January 2018 where she told him that there were problems in giving him the Bunnings property and she was considering whether to buy him another property.

In April 2018 Mrs Phillips suffered a stroke and lost testamentary capacity. Her children were appointed as her financial managers.

Application for statutory will made by Mrs Phillips' grandson Anthony

The application for a court authorised will for Mrs Phillips was made by Mrs Phillips' grandson, Anthony who proposed terms for a will that were along the lines of the 2017 draft will. Mrs Phillips' son and daughter were joined as defendants in their capacity as their mother's financial managers and secondly as defendants in their personal capacity.The court ordered that a tutor be appointed to represent Mrs Phillips.

During the course of the hearing several draft wills were put to the Court by the different parties to the proceedings but each will "was the subject of effective criticism directed towards undermining its plausibility as an expression of MP's testamentary intentions".

Decision of trial judge- 15 April 2019

Lindsay J determined that he was not satisfied that any of the proposed wills were wills which would have been reasonably likely to have been made by Mrs Phillips if she had testamentary capacity. He also ruled that he was not satisfied that it was appropriate for leave to be given for Anthony to make this application.

In relation to the first point he stated "**In combination, her disavowal of the 2017 draft will, her disinclination to sign any alternative form of will; her apparent acceptance that, absent a newly executed will, she would die intestate; and her contemporaneous pledge to charity, all operate, objectively as impediments to any satisfaction by the Court that a particular, proposed will "is or is reasonably likely to be" one that would have been made by her if she had testamentary capacity. A further factor operating in the same direction can be found in doubts expressed by her about whether conferral of substantial benefits on the plaintiff, beyond the assistance she had to that time provided to him, was wise. On the evidence viewed as a whole, I cannot be satisfied (as I must be) of the element of intention for which section 22(b) provides."**

In relation to the second point as to not giving leave to Anthony to make this application Lindsay J referred to the fact that it was not clear that the 2001 will was revoked by Mrs Phillips and secondly that as the Court lacked clarity about the value and composition of Mrs Phillips' estate where her affairs were conducted through a complex arrangement of companies and trusts this reinforced the artificiality of attributing any particular intention to her.

Court of Appeal overturns Lindsay J's decision- 11 September 2019

The Court of Appeal found that it was more likely than not that, while Mrs Phillips was disenchanted with aspects of the 2017 draft will, she did not intend her estate to shared between her two children to the exclusion of the other objects described in the draft 2017 will. Further Mrs Phillips did not deliberately refrain from making any will and was not content to embrace intestacy. It was quite likely that she would have made a will along the lines of the draft 2017 will. The Court considered that the draft 2007 will reflected to a considerable extent Mrs Phillips wishes as to the disposition of her estate.

In considering each of the bequests in the draft 2017 will the court made reference to Mrs Phillips intentions as set out in her 2001 will and in her subsequent discussions with Ms Deigan, explaining how her intention in relation to each term had essentially remained unchanged from the preparation of the draft will up to the time of her incapacity.

Interestingly the court included the gift of the Bunnings property to Anthony in the terms of the statutory will, notwithstanding that there was clear evidence that Mrs Phillips had a change of mind about gifting this property to Anthony and had told him of that decision. Further the court authorised will makes no provision whatsoever for Mrs Phillips' son notwithstanding that there had been some thawing in their frosty relationship and he was now involved in the financial management of her financial affairs.

In relation to the costs of both sets of proceedings it was ordered that the legal costs of Anthony, the tutor for Mrs Phillips, and Mrs Phillips' two children in their capacity as financial managers for Mrs Phillips be paid on the indemnity basis out of Mrs Phillips' estate. The personal legal costs of Mrs Phillips' two children were ordered to be paid on the ordinary basis out of Mrs Phillips' estate.

Access to documents subpoenaed relating to the testator's testamentary intentions

The applicant issued subpoenas on the testator's legal and financial advisors. Notices to produce were issued to the testator's children personally and in their capacity as the testator's financial managers to obtain documentation that related to the testator's testamentary intentions. No objections were raised by the parties as to access being allowed to these documents.

Rather than allow the applicant access to these documents Justice Lindsay directed that Mrs Phillip's tutor provide a report to the Court in relation to these documents and identify whether any such documentation was likely to be the subject of a claim for privilege or confidentiality.

Senior counsel for Mrs Phillips' tutor prepared a summary of the materials produced but indicated difficulties with determining whether claims of privilege or confidentiality applied to these documents.

Justice Lindsay provided the parties with a copy of this summary but ultimately did not allow any of the other parties access to the documents produced. On appeal the issue of lack of procedural fairness was raised by Anthony.

The Court of Appeal allowed Anthony's appeal without needing to deal with the issue of procedural unfairness, but noted that this decision was inappropriate as the request for these documents was for a legitimate forensic purpose, the material was directly relevant to the central issue of testamentary intention, no privilege claim was propounded, no party opposed access to the documents, the summary provided did not fully describe the contents of these documents, and Anthony had offered to bear his own costs of inspecting the documents which made the issue of the cost of allowing access irrelevant.

Case study 2: Re The Will of [name removed] [2020] NSWSC 560- nil capacity case where there was agreement by all interested parties on the terms of the proposed will.

In this case the incapacitated person was a young adult (who I will refer to as Bob) who had a severe intellectual disability all of his life and functioned at the level of a toddler. Bob required assistance with all personal care and was non-verbal.

Bob's father and mother separated a few years after he was born. Bob lived with his mother after the separation and she was his primary carer.

Bob's father re-married and had two children with his second wife. Bob's father had limited involvement in Bob's ongoing care and visited him about 4 times a year. Bob's father's two children from his second marriage accompanied him on about half of these visits in the period up until they finished school.

After Bob's mother separated from Bob's father she was Bob's primary carer up until he was 18 years of age. Thereafter Bob lived in a group home and his mother continued to provide extensive and ongoing support for him.

Bob's mother re-married and had two children with her second husband. Bob lived in their household for many years before moving into the group home at the age of 18. Although Bob's mother was his primary carer, his step-father and two siblings provided ongoing care and assistance to him.

Bob has a substantial amount of funds under financial management through a trustee company arising from a compensation payment. If Bob was to die intestate these monies would be shared equally between her mother and father.

This application for a court authorised will was brought by Bob's mother and supported by the trustee company that managed Bob's financial affairs in support of the application. Evidence was also filed by Bob's father in support of this application.

The terms of the proposed will were that Bob's mother would receive 65% of Bobs estate, Bob's mother's second husband would receive 15%, Bob's father would receive 5%, the children of Bob's mother and her second husband were each to receive 5%, and the children of Bob's father and his second wife were each to receive 2.5%.

None of the interested parties or Bob's financial manager had any objection to the terms of the proposed will.

The court approved the terms of the proposed will with Hallen J stating "The Court has made an evaluative and intuitive judgment as to what, objectively, [Bob] would have been reasonably likely to have decided, had he been capable of doing so, as to the appropriate shares in his estate to be received by the members of his family and respectfully agrees with what has been included in the statutory will."

Case study 3 - Re K's Statutory Will [2017] NSWSC 1711 – nil capacity case with disagreement over the terms of the proposed will.

In this case the NSW Trustee & Guardian which was managing the financial affairs of an incapacitated 7 year old boy, applied to the Court for a statutory will. The child's parents were joined as defendants.

The child's sizeable assets arose from a compensation claim and included the house in which he lived with his mother and his grandparents, and investment monies.

The child's mother had been his principal carer since his birth and was assisted by her parents in these caring duties. The child's mother was estranged from the child's father and he had little involvement in his son's life other than to pay child support. The father chose not to appear formally in the proceedings or participate in the decision- making processes of the court.

If the child was to die without a court ordered will being made his estate on the intestacy basis would be divided equally between his parents. This scenario could have a significant impact on the circumstances of the child's mother and grandparents.

The will that was proposed by the NSW Trustee & Guardian named the child's mother, his maternal grandparents, and people within his immediate social orbit as the beneficiaries of the child's estate.

The will proposed by the NSW Trustee & Guardian would in the normal circumstances have been dealt with in chambers in accordance with the practice established by Palmer J in (Re Fenwick). However the child's mother contended that the will should include a testamentary trust for the benefit of a range of people and institutions beyond those engaged in her son's everyday life. This required the matter to be dealt with in court.

Justice Lindsay did not consider that there was any justification to confer these future benefits on persons or institutions who had no involvement in the child's life, and approved the will that was proposed by the NSW Trustee & Guardian.

In Justice Lindsay's decision he said:

"The Court’s discretion is not at large. It is, at least, confined by the subject matter, scope and purpose of the protective jurisdiction".

"the specific terms of a will approved by the Court should ordinarily be approved by reference to the guiding principle that whatever is done, or not done, for or on behalf of an incapacitated person must be for the benefit, and in the interests, of that person. There may be an exceptional case (eg, where an incapacitated person has expressed a strong preference, albeit not altogether wisely so) but this is not such a case.".

Orders for further review of the statutory will

Justice Lindsay made further orders to guard against the possibility that the statutory will may cease to answer the needs of the incapacitated child by ordering that the manager of his protected estate provide to the court a report shortly after the child attains the age of 18 years or on the death of his mother, whichever occurs first, addressing whether the statutory will should be revised at that time.

Case study 4: Re Charles [2009] NSWSC 530 - nil capacity case where the objective of the application was to avoid the child's parents receiving her estate on intestacy.

This was an application brought by the Minister for Community Services for a minor aged approximately 11 years.

At the age of about 4 months Charles was admitted to hospital with severe head injuries consistent with "shaken baby syndrome". Although Charles' parents denied that they injured him, he was removed from his parent's care and placed under the care of the Minister for Community Services.

As a result of these injuries Charles had a very severe intellectual disability, was essentially non-verbal, legally blind, and had no testamentary capacity.

Charles subsequently received a compensation payment under the Victims of Crime legislation. Were he to die he would be intestate and his parents would receive all of his estate.

The Minister was of the view that Charles' parents should not benefit on intestacy and sought a court made will whereby his estate would pass to his sister then aged 13 years, but if she predeceased Charles, the estate to pass to two charities who cared for disabled children.

His Honour posed the question to be asked in the nil capacity case, is there a fairly good chance that a reasonable person, faced with Charles' circumstances, would choose to die intestate, leaving his assets to Charles' parents?" His Honour decided that the answer to that question was no.

Although Charles' parents were never charged with causing his injuries His Honour indicated that the surrounding circumstances undeniably raised a suspicion against them. He went on to state that although in the criminal law the parents are presumed innocent, testators do not make decisions as if they were jurors in a criminal trial, they decide according to the standards by which we are all accustomed to make decisions in ordinary everyday life.

Charles' parents were served with notice of the Minister's application and the court documents. They communicated to the Crown Solicitor their intention not to appear at the hearing and indicated that they did not oppose the proposed will. They also maintained their innocence in regards to their son's injuries.

There was evidence that Charles had a full-time carer who had devoted herself to looking after Charles for about 8 years. She made it clear that she did not want any part of Charles' estate. His Honour stated that but for her express renunciation of any share of Charles' estate he would have required some provision to be made for her in Charles' Will.

His Honour determined that there was a fairly good chance that a reasonable person faced with Charles' circumstances would make the Will proposed by the Minister.

Case study 5: Re Fenwick (2009) 76 NSWLR 22- lost capacity case where objective was to avoid the risk of intestacy with the estate being received by the Crown.

In 1997 Robert Fenwick (then aged 48) sustained a severe brain injury following an accident at work. At the time of the application he was unable to talk, read anything other than a simple sentence, or write.

Robert had executed a will ten years earlier in 1987 in which he left his entire estate to his only sibling John Fenwick but if John predeceased him he left his estate to his cousins Rae and Joan provided they survived Robert. There was no gift over to Rae or Joan's children if they both predeceased Robert, as such there was a risk that Robert could be intestate.

After Robert's accident, his brother John was appointed his financial manager and became his principal carer.

Robert never married and he had no children. Both of his parents were deceased by 1997.

The problem with Robert's 1987 will was that the three potential beneficiaries were about Robert's age (ie about 60) and suffered from various life threatening health issues. John's concern was that if all the of beneficiaries of the 1987 will were to predecease Robert, he would die intestate and the estate would be received by the Crown bona vacantia. (This assumed that Robert's then 84 year old uncle who had dementia did not survive the three named beneficiaries)

An application was made by John for an alteration to Robert's 1987 Will providing that if John, Rae, and Joan predeceased Robert, that the children of Rae and Joan would receive their parent's share of Robert's estate in equal shares.

Amongst other matters evidence was adduced to suggest that Robert was closest to Rae and Joan and he would have wanted their children to benefit from his estate rather than any of his other cousins or their children.

His Honour considered that in the circumstances of the estate being substantial and the terms of the 1987 Will that he wanted to avoid intestacy if he could. His Honour concluded that it was reasonably likely that Robert would have selected further beneficiaries rather than leave his estate to be distributed on an intestacy basis. His Honour was also satisfied on the evidence that it was reasonably likely that Robert would have selected the children of the two cousins named in the will, rather than his other cousins or their children.

Leave was granted to bring the application and an order was made authorising the alteration of Robert's 1987 Will in the terms proposed by his brother.