INFORMAL & STATUTORY WILLS: RECENT DECISIONS & THEIR IMPLICATIONS FOR ADVISING CLIENTS

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This is a revised version of a Paper delivered on 10 March 2021 at the 10th Annual Legalwise Succession Law Symposium

Introduction

1. The nature of the jurisdiction of the Supreme Court of New South Wales to admit to probate a will that does not satisfy the formal requirements of the *Succession* Act (2006) (the "Act") is now well established, and the subject of a substantial number of judicial decisions, including many appellate decisions. But despite the increasing body of case law on the subject, the requirement regarding informal wills under s. 8(2) of the Act continues to pose difficult questions, both of interpretation and application. This paper will examine recent consideration of that issue in the decision of the Court of Appeal in *Rodny v Weisbord.* The paper will further consider the implications of decisions such as *Rodny v Weisbord* for the practice of solicitors in preparing wills.

2. Less well established is the jurisdiction of the Supreme Court of New South Wales to make what is usually referred to as a "statutory will" being, a will the Court authorises to be made on behalf of a person lacking testamentary capacity. The provisions relating to statutory wills are contained in Division 2 of Part 2.2 of the Act. The provisions were considered for the first time by the New South Wales Court of Appeal in *Small v Phillips* (2019) NSWCA 222, and *Small v Phillips (No. 2)* (2019) NSWCA 268. The High Court refused special leave in *Small v Phillips* [2020] HCA Trans 96 on 3 July 2020. The extent and nature of the statutory will jurisdiction continues to evolve, and the paper will examine its current outlines.

3. The recentdecisions in regard to both informal and statutory wills not only state the applicable law in those fields, they suggest options for the consideration of legal practitioners, and have significant implications for the conduct of those advising clients

and their families in regard to wills, and the disposition of property on death. This paper will explore some of those implications.

General Principles in Regard to Informal Wills

4. Chapter 2 of the *Succession Act* provides in Division 1 of Part 2.1 for the rules governing the making of formal wills. Among the critical requirements are that the will be in writing, signed by the testator in the presence of two or more witnesses present at the same time, who attest and sign the will in the presence of the testator (*Succession Act* s. 6(1)). Section 8 of the *Succession Act* deals with what are colloquially referred to as "informal wills". It replicates in substance what was first introduced into probate law in New South Wales by s.18A of the *Wills Probate & Administration Act* 1898. Although worded slightly differently, s.8 is in substantially the same terms as s.18A, and the cases on s.18A continue to be relevant to the application and interpretation of s.8.

5. Other than being a will which has not been executed in accordance with the formal requirements, the brief but necessary conditions for the admission of an informal will to probate are firstly, that it be constituted by a document. The term document is given an extended definition by s.21 of the *Interpretation Act* 1987 (NSW) and extends to any record of information. There are now a number of cases in which electronic documents have been accepted as informal wills. In *Yazbek v Yazbek* [2012] NSWSC 594, Slattery J admitted to probate an informal will constituted by a document found on the deceased's computer after the deceased's death.

6. Secondly, by virtue of s. 8(1)(a), the document ought purport to state the testamentary intentions of the deceased person. Generally, the application of this test is not controversial. However testamentary intentions are intentions in regard to the disposition of property upon death. A document of a deceased person stating an intention to make a gift, but which was not conditional upon the death of that person, would not be a statement of testamentary intention, but merely a statement of intention to make a gift that had not been perfected. Such a gift will generally fail.

7. Thirdly, the issue upon which the bulk of litigation has focused concerning informal wills is the requirement in s.8(2), that the Court be satisfied that the person intended the document to form his or her will, or alteration or full or partial revocation of his or her will.

8. In the earliest decisions on s.18A of the *Wills Probate & Administration Act* this final requirement was applied with some strictness. In the application of *Kencalo - In the Estate of Ruth Buharoff* (Supreme Court of New South Wales, Powell J, 18 October 1991), although the deceased had approved of a draft will, the deceased had intended to execute an engrossed copy and dying before that could be done, the draft was rejected on the grounds that it was not the document which the deceased had intended to constitute her will.

9. This principle has been applied in many cases since, and indeed the bulk of reported decisions on informal wills usually relate to issues surrounding proof of the intention of the deceased in regard to whether or not the document was intended to be a will. This provision has not been interpreted so narrowly as to require the deceased to have had the intention that the document would constitute his or her will in a formal sense. Any such requirement would have largely undermined the benefit of the reform allowing for informal wills.

10. Thus, Courts have rejected any contention that informal wills are limited simply to cases where a testator through mistake, or inadvertence, failed to correctly execute what was otherwise intended to be a formal will (see *Rodny v Weisbord* [2020] NSWCA 22 at [21]). In consequence, s.8 applies not merely in circumstances where a testator intends to make a formal will, but through mistake or inadvertence fails to do so, but extends to a document plainly known by the deceased not to have been formally executed but nevertheless intended to operate as a will. This leads s.8 to have significant facultative operation. In any circumstance where there are impediments to the execution of a formal will, a testator can simply execute an informal will. The issues raised by this matter are discussed further below.

11. A significant number of cases in regard to informal wills have arisen in regard to the instructions given to solicitors, or drafts prepared by solicitors, where for whatever reason the testator has not proceeded to formally execute a will. In many circumstances draft wills fail to be admissible as informal wills for the reason discussed above in regard to *Kencalo*, namely, that they may not constitute the document that the testator intended to be his or her will. One wonders, however, whether some of the distinctions drawn in cases such as *Kencalo*, and indeed in *Rodny v Weisbord* discussed at length below, have kept pace with the concept of a "document" in the digital age.

12. When documents existed chiefly on paper, a document constituted by a draft was clearly different from a document separately engrossed for execution. However, at the present time, any will printed out by a solicitor will be merely a paper copy of the electronic document held in the solicitor's computer. Where a testator has approved a will, have they not thereby approved the electronic document held by the solicitor? Do they intend that electronic document to be their will in circumstances where they intend to execute a copy of it when printed out from the computer's memory?

13. It is clear that if evidence demonstrated the testator only intended his or her will to take effect upon formal execution of a written copy, then drafts would not be sufficient to constitute an informal will. Solicitors will be familiar with the client who gives instructions for a will, which is drafted, and then asks the solicitor to hold on to it for a while because they are still thinking about the gifts they wish to make. However, the caselaw is replete with instances of testators who clearly completed their dispositive deliberations and indicated the intention of executing the document and died before they could do so. These issues were all raised in the recent decision of the New South Wales Court of Appeal in *Rodny v Weisbord* [2020] NSWCA 22.

Rodny v Weisbord

14. In *Rodny* the deceased had given instructions to a solicitor to prepare a will, along with other documents related to guardianship and Powers of Attorney. A first draft of the will contained an error. The evidence did not allow one to gain clarity as to the precise events that occurred, but it appeared likely that the testator had been unable to execute the will on her first appointment at the solicitor's office because of the error. A second draft was prepared by the solicitor, and was found by His Honour Robb J to correctly

reflect the testator's instructions, and it was further found by the primary Judge that the testator had a definite intention to execute a will in terms of that final draft (*Rodny* at [30]).

15. Further, the existing will of the testator was no longer adequate. She had disposed of substantial property which would cause gifts under her existing will to adeem. The primary Judge found there were good reasons for the testator to wish to execute a will in the form of the second draft, and that she had a definite intention to make a will in those terms.

16. There were also findings made by the primary Judge that the testator had stated to family members that she had made a new will. The only possible document that could have been referred to in that statement was a will in the form of the second draft of the 2008 will.

17. The difficulty in *Rodny v Weisbord* was that no executed document could be identified. No records held by the solicitor indicated that the final draft had been executed at his office. It was possible that the testator had executed the 2008 final draft, but there was no evidence to establish that, or that she had even received that draft. It was also possible that the testator had come to mistakenly believe that she had executed it, possibly confused by the other documents that she had executed at the solicitor's office.

18. Although the primary Judge had found that the second draft was capable of being admitted to probate, this was reversed on appeal. The leading judgment by Meagher JA found that the evidence could not justify the conclusion on the balance of probabilities that the testator intended – "the second typewritten draft without more to operate as her will". She still intended to make a further will, and to do so by executing a document.

19. White JA agreed with Meagher JA, His Honour found that it did not follow from the facts that the testator believed she had made a will, and that there was only one document which could be the subject of that belief, that therefore it could be inferred that she intended that document prepared by the solicitor would be operative as her will if it accorded with her instructions.

20. However, White JA went on to state that the evidence did not establish that the testator intended any specific document, either already created, or to be created, would form her will, and it was equally likely that she believed that she had made her will because she had given instructions to the solicitor without turning her mind to any particular document. The speculative choices did not permit anything to be established on the balance of probabilities. McCallum JA agreed with Meagher JA.

21. What is striking about the decision in *Rodny v Weisbord* is that there was a clear finding that the second draft embodied the testator's testamentary intentions. Further, there was the finding that the testator believed that she had made a will, albeit there was no way of knowing whether or not she was mistaken in that regard. The second draft referred to as – "a second typewritten draft will" was not proven to have been sent to or seen by the deceased (*Rodny v Weisbord* at [1]).

22. Clearly, there were several possibilities such that it was not possible to establish on the balance of probabilities a particular chain of events. However, any document ultimately executed by the testator would simply have been a paper copy of the electronic document retained by the solicitor, and identical in content with that electronic document held by the solicitor. If the testator had not executed a copy of the second draft, that could have been because she was mistaken and had failed to do so through inadvertence, or because she did not appreciate the need to go back and execute a copy after having given her instructions. Those would appear to be the two most likely explanations for the events. It would seem at least arguable on either of those two hypotheses that the electronic document held by the solicitor was intended to form the person's will.

23. The difficulties of analysis in cases like *Rodny*, flow from confusion about the concept of the testator's intentions in regard to his or her will. If I intend to make a will in the form of the final draft prepared by the solicitor, then it must follow that I will intend to make a will in a form of some copy produced from the electronic document held at the solicitor's office in the solicitor's computer. An infinite number of copies could be made of that electronic document, and I presumably do not have an intention in regard to any specific copy that might be made. Surely, in cases such as this, the requisite

intention is in regard to the substance of the dispositions correctly recorded in the electronic document. My intention of ultimately executing a paper copy, is not inconsistent with the intention that my will shall be in accord with the electronic document held at the solicitor's office. If the evidence established there was a specific intention that the will not be operable until formal execution, then there is no reason why this should not be respected, but few lay people are likely to have turned their mind to this precise issue. More likely, most lay people attend a solicitor's office to execute a paper copy because they believe this is necessary in order to give the will efficacy, but in such circumstances I suggest, it is clearly arguable that they already have the requisite intention in regard to the electronic document held by the solicitor.

24. The decision in the Court of Appeal in *Rodny v Weisbord* represents perhaps, the conventionally strict approach to the application of s.8 (2). However, the lengthy analysis of the competing hypotheses and possible intentions leading ultimately to a conclusion which appears to have defeated the testator's expectations in regard to her estate, makes one wonder whether the additional requirement that the document not merely purport to state the testamentary intentions of the deceased, but be intended to be the will of the deceased, is an unnecessary obstacle. Clearly, possible dispositions to which the testator had not committed him or herself ought not to be admitted to probate simply by virtue of being embodied in a document. However, this is a factual issue that perhaps ought best be left to be decided case by case, rather than requiring satisfaction that there be a specific document which the testator in some fashion intended to form her will. The very long line of cases now decided on the provision suggests that people frequently do not form intentions that fit neatly within the categories created by s.8 of the *Succession Act.*

25. Some have suggested that the near identical statutory provisions have been construed in a slightly different fashion by the Supreme Court of Western Australia (see *Mitchell v Mitchell* [2010] WASC 174) and the Victorian Supreme Court (see *Fast v Rockman* [2013] VSC 18 at [114] to [117]). That may, perhaps, read too much into the slightly different manner in which the tests regarding the intention of the deceased in regard to the document have been expressed in the various cases. Nevertheless, Habersberger J admitted to probate a document in circumstances remarkably similar to those in *Kencalo* where in New South Wales probate had been refused. However, while it may

be that a more liberal approach would still be consistent with the s.8(2), one wonders whether the simplest course would be a revision of the statutory language. (See also McMurdo J in *Mahls v Hehir* [2011] QSC 243 on electronic drafts).

Informal Wills and Legal Practice

26. As described above, the law clearly contemplates informal wills that arise not from mere mistake or inadvertent failure to execute a formal will, but wills deliberately executed informally for the purposes of being interim, or temporary wills. All of the difficulties and complex reasoning in *Rodny v Weisbord* is easily avoided, at least by legal practitioners, simply through giving consideration to whether or not written instructions or draft wills should be given immediate effect as interim or temporary measures pending the execution of a formal will.

27. Indeed, the Judgments in *Rodny v Weisbord* make clear several propositions in regard to written instructions and drafts, namely:

i. It is not necessary that a testator has seen or signed the document for it to constitute an informal will – *Rodny v Weisbord* [21] and [109].
ii. The testator may subsequently intend that a document operate with immediate effect as his or her will – *Rodny v Weisbord* [21].
iii. Indeed, White JA in *Rodny v Weisbord* considered that a document which a putative testator had not seen, and which had not yet been brought into existence at the time of forming the intention, could operate as a will when brought into existence, and it would be a question of fact in each case as to whether it could constitute an informal will [116].
iv. The comments of White J noted in the last passage raise an interesting question as to whether a testator who gave clear instructions for a document to be produced embodying testamentary intentions, and which document was to constitute his or her will on being brought into existence, would have thereby created an informal will if the document was brought into existence in accordance with the testator's intentions, after the testator's death.

Can a Solicitor Have a Duty to Advise about the Possibility of Creating an Informal Will?

28. In *Hill v Van Erp* (1997) 188 CLR 159, the High Court found that a solicitor advising a testator may have a duty not only to the testator, but also to beneficiaries, in circumstances where negligence by the solicitor in carrying out the testator's instructions thereby causes loss to a beneficiary who fails to receive an intended gift. The High Court adopted and applied reasoning of the House of Lords in *White v Jones* [1995] 2 AC 207. *Van Erp* itself was a case in which the solicitor failed to properly supervise the witnessing of the will causing a beneficiary to forfeit a gift by virtue of being a witness. However, *White v Jones* was a delay case in which a solicitor had delayed unreasonably in carrying out instructions to prepare and procure execution of a will prior to the testator's death.

29. The *Van Erp* principle also applies in circumstances where a solicitor fails to give advice to a testator of the means or options for carrying out the testator's wishes. In *Summerville v Walsh* (1998) NSWCA 222, the New South Wales Court of Appeal found that a solicitor was negligent where he had failed to advise a severely disabled testator, that he the solicitor, could execute the will on the testator's behalf. The Court found that had the testator been so advised, he would have instructed the solicitor to execute the will.

30. In *Maestrale v Aspite* (2012) NSWSC 1420, Justice Fullerton found a solicitor had been negligent in having delayed some days in arranging for the engrossment of a formal will, and attendance upon the testator for execution. The solicitor arrived to procure execution 10 minutes after the client had died. An appeal to the Court of Appeal did not contest the finding of negligence.

31. In *Fisher v Howe* (2013) 85 NSWLR 67, Adamson J found a solicitor had been negligent where he had attended upon a testator 94 years of age, frail, and with mobility problems, who had given instructions for a will, and where the solicitor had undertaken to return twelve days later and had not advised the client as to the possibility of a stop-gap, or interim informal will being executed. The client died before the solicitor returned with the formal will for execution.

32. Adamson J concluded that the solicitor was negligent in not having advised the testator of the facility for making an informal will, and procuring one. Her Honour found that such advice would most probably have elicited the testator's agreement to make an informal will. In *Fisher v Howe*, the claim was brought by a disappointed beneficiary who would have benefited under the proposed new will. Both sides called expert evidence from solicitors with great experience in the field of wills and probate, and both experts accepted that there would be circumstances that would justify advising clients of the possibility of making an interim informal will. The experts differed as to the circumstances that would call this duty into existence.

33. The decision in *Fisher v Howe* was reversed by the Court of Appeal (see *Howe v Fisher* [2014] NSWCA 286. In the Court of Appeal, Barrett JA with whom Beazley P and Macfarlan JA agreed, concluded that the nature of the retainer of the solicitor, and duty to any potential beneficiary, was to call attention to the possibility of making an informal will, only if the solicitor was aware that there was a factor at work that as a matter of reasonable foresight, might cause the client's objective of making an effective testamentary disposition to be frustrated. Despite the client's age and mobility problems, Barrett J.A. concluded that there were insufficient matters to require the solicitor as a matter of reasonable foresight, to entertain an apprehension that the client might be expected to die in the 12 odd days before the solicitor returned with the will for formal execution.

34. The judgment in the Court of Appeal in *Fisher v Howe* nevertheless appears to accept that at least in certain circumstances, a solicitor ought advise a client of the possibility of executing an informal or interim will. Even in such circumstances, in any action against the solicitor, oit still requires proof as to whether the client would, or would not, have acted on that advice.

35. It is worth also noting the decision of *Badenach & Anor v Calvert* (2016) 257 CLR 440 at 453, in which the High Court overturned the decision of the Tasmanian Full Court, which had upheld a claim of negligence against a solicitor who had failed to give advice to a testator as to steps that might be taken to immunise the testator's estate against a *Testator's Family Maintenance Act* claim. The Court emphasised the need for any duty allegedly owed to a beneficiary to be consistent with the retainer between the solicitor

and client. The Court further found that the nature of that retainer and the instructions of the client would not have conveyed to the solicitor the need to advise the client on any lawful steps that could be taken to defeat a TFM claim by his daughter. Further, the High Court concluded the claim would, in any event, fail on the ground that there was simply insufficient evidence to establish what the testator would have done had such advice been given.

36. From the cases above, it can be seen that in circumstances where a client may reasonably foreseeably suffer sudden mortality (such as in *Maestrale,* where the testator was in hospital and severely ill to the solicitor's knowledge) a duty may well fall upon the solicitor to advise the testator of the facility to make an immediate informal will, by for example, signing the solicitor's instructions, and adding an appropriate certificate indicating that they are to take effect as an interim will.

37. Quite apart from the danger for the solicitor of being sued in negligence, the circumstances in a case such as *Rodny* reveal, where death intervenes before a formal will is executed, complex hard fought litigation may follow to establish whether or not any of the drafts or instructions constitute an informal will. All these difficulties are avoided with little effort through seeking instructions in regard to an interim will.

38. It is usual for solicitors engaged in conveyancing practice, exchanging letters in anticipation of a contract, to clearly signpost throughout the correspondence, whether or not any particular proposal is intended to be an offer capable of becoming a binding contract by acceptance, or whether its intended that no binding relationship arises unless and until some particular formality, such as the making of a deed or the like, has been undertaken. Solicitors in probate practice should give thought to adopting some similar precautions when taking instructions for a will, especially from clients who are elderly or in poor health, or in any circumstance where sudden mortality is reasonably foreseeable. However, frankly there would appear no reason why precautions about the status of instructions should not be taken in regard to all testators where there will be delay between the giving of instruction and the execution of a formal will.

39. If clients are advised as a matter of course of the possibility that notes or letters of instruction may operate as an interim will pending formal execution, and their response

to that advice carefully recorded, then problems of the sort experienced in *Rodny v Weisbord* and *Fisher v Howe* would be avoided. If any client instructs that they wish their notes or letters of instruction, or other document, to constitute an interim will, the solicitor should ensure that the document has a certificate subscribed on it indicating the intention that it operate as an interim will, until a formal will can be executed. Clearly, although not necessary, the signature of the testator and the witnessing of that signature by the solicitor, will assist in proof of the documents authenticity and purpose.

The Jurisdiction of the Supreme Court of New South Wales to make a Statutory Will

40. Pursuant to Division 2 of Part 2.2 of the *Succession Act* 2006 (NSW) the Supreme Court of New South Wales may order that a will be made on behalf of a person who lacks testamentary capacity, including revocation of a will or part of a will. These provisions, which were included in the *Succession Act* on its commencement in 2008, had no antecedents in New South Wales, and represented something of a novel solution to the problem posed where a person has lost the mental capacity to make a will, but had an estate that would, in consequence, be disposed of either in accordance with the intestacy provisions, or some prior will, and where such a distribution upon death would likely be contrary to what the disabled person intended, and not in their interest.

41. In the United Kingdom a power to make wills had been exercised by Courts with control over people with mental incapacity, although in a limited fashion. The experience of the United Kingdom Courts had highlighted the need for statutory intervention. A detailed history of the background to the legislation and a useful survey of its structure and operation was provided by Justice Palmer in the first reported New South Wales decision on the new provisions, *Re: Fenwick; Application of JR Fenwick* (2009) 76 NSWLR 22.

42. A number of general comments can be made in regard to the nature of the jurisdiction. Firstly, its purpose is to exercise a protective jurisdiction over the estate of the person on whose behalf a statutory will is made. (see *GAU v GAV* [2016] 1 QdR1 at 6 approving the statements of Lindsay J in *Secretary, Department of Family Community Services v K* [2014] NSW SC 1065).

43. Thus, there may be circumstances in which the making of a Statutory Will, to confirm a gift to a family member or carer, will assure a protected person of continued care during their lifetime. In such circumstances, the manner in which the exercise of power inures for the benefit of the protected person, is straightforward.

44. However, in many cases there can be no direct link between the making of a Statutory Will on the one hand, and the improvement of the life circumstances of the protected person on the other. Nevertheless, a Statutory Will can still be for the benefit of the protected person. Testamentary freedom has been described by the Victorian Court of Appeal as a human right, being the right to freely dispose of one's property upon death as a person thinks fit (see *Gray v Harrison* [1997] 2 VR 359 at 366 per Calloway JA). The exercise by a Court of the power to make a Statutory Will on behalf of a person furthers that right, where its direct exercise by an individual is prevented by virtue of mental incapacity.

45. Decisions on the statutory provisions for court ordered wills, both in New South Wales and other States, confirm that a substantial factor in determining whether the making of a will would be in the interests, and for the benefit of the protected person, is whether, in the absence of any statutory will, the estate of the protected person would on his or her death be distributed in a fashion that would be contrary to the wishes that would be expressed by that person (see the discussion by Palmer J in *Re: Fenwick: Application of J R Fenwick* (2009) 76 NSWLR 22 at p.54 ff).

46. The nature of the jurisdiction was discussed by the Queensland Court of Appeal in *GAU v GAV* [2016] 1QdR1. In *GAU* itself, the Court of Appeal concluded that an order for a statutory will was appropriate, finding *inter alia*:

> "First, authorisation of the proposed alteration of the will by codicil would be in the interest of the testatrix because it would facilitate the taking of a step that she herself would most likely take were she able to do so. Secondly, it is a step that she would be freely able to take herself in organising the testamentary fate of her own property were she able to do so. Thirdly, as senior counsel for the respondent conceded in argument, for her to take such a step would neither offend the policy of the law nor exhibit moral obloquy on her part." (*GAU* at p.28, and see also *GAU* at 6.33)."

Procedure on Statutory Will Applications

47. The structure of Division 2 in Part 2.2 has raised issues in regard to the appropriate procedure for applying for a statutory will. Prior to a Court making any statutory will, the applicant must obtain leave of the Court pursuant to s.19. Section 19(2) sets out information that must be provided to the Court in the Application for Leave. The substantial number of matters that must, unless the Court otherwise directs, be dealt with in the Leave Application, might be thought to cover almost any evidence relevant to the Court's determination to make a statutory will. Section 20 provides that upon hearing the Leave Application the Court may give leave and proceed to deal with the matter as an application for an order under s.18. In practice, this is what has occurred in a substantial number of cases, in which the leave application and the hearing for the making of the statutory will have been telescoped into a single hearing before the Court. If leave is refused that is the end of the matter. If leave is granted there is usually little further hearing required for the Court to determine the nature and type, if any, of the statutory will that ought be made.

48. The pivotal provision is s.22 which sets out five matters upon which the Court must be satisfied, or else leave must be refused. Because of their significance it is worth setting out s.22 in full.

> *"The Court must refuse leave to make an application for an order under s.18 unless the Court is satisfied 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, and*
>
> *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, and*
>
> *c)* *It is or may be appropriate for the order to be made, and*
>
> *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 order is sought."

49. Some further practical matters are worth noting. By virtue of s.18(3) of the *Succession Act,* the Court is not to make an order for a statutory will unless the person in respect of whom the application is made is alive when the order is made. A consequence of this provision is of course that applications may have to be dealt with on an urgent basis. There have been occasions where the Court has had to deal with these matters hurriedly where the incapacitated person's condition was *in extremis* since their death, prior to the making of the order, would immediately deprive the Court of jurisdiction. It is not yet entirely clear what might happen to such applications should the incapacitated person die between a hearing a first instance and the hearing of an appeal. It is possible that s.75A(10) of the *Supreme Court Act 1970* might enable the Court of Appeal to make any order that ought to have been made by the Primary Judge at the time of the making of the original order.

50. Turning to the specific matters that must be established if leave is not to be refused under s.22, the first is to establish that the person in relation to whom the order is sought is incapable of making a will. This is a straight forward factual question which simply requires proof of an absence of testamentary capacity. Some have divided the cases into two categories, the first being that of adults who have lost testamentary capacity through ill health, accident or the like. Such persons may already have a will that may be out of date and no longer appropriate, or they may have never made a will and would be in jeopardy of dying intestate in the absence of a will.

51. The second category are people who may never have had capacity either through being born with an incapacity or having lost capacity while still a minor, or through being a minor at the time of application. Such persons may, nevertheless, have property to bequeath perhaps received as a substantial damages award, particularly if their lack of capacity was associated with a negligently caused accident, or have otherwise acquired a valuable estate by inheritance or the like. There is no doubt that the Court's power extends to people in this second category.

52. The requirement in paragraph 22(b) that the proposed will *"is, or is reasonably likely to be, one that would have been made by the person if he or she had capacity"* is a less straight forward provision to apply. The meaning of the words 'reasonably likely' in 22(b) have now been considered in a number of first instance decisions in New South Wales. In *Re: Fenwick; Application of JR Fenwick (2009)* 76 NSWLR 22 at p. 54. Palmer J concluded that the phrase conveyed that there was "a fairly good chance that the result is likely". Alternatively that a reasonable person could regard the result as likely, or that some reasonable people think there was a fairly good chance that it was likely (at [152]). Palmer J also noted that s.22(b) raised two questions in a lost capacity case. Firstly, what were the actual intentions of the incapacitated person, and secondly, would the person have carried such intentions into testamentary effect if they had capacity (at p. 55 [157]).

53. The test of reasonable likelihood was considered by Hallen AsJ (as his Honour then was) in *Re: Will of Jane* [2011] NSWSC 624. His Honour said at [76]:

> "If an actual intention cannot be established, the sub-section speaks in the chameleon-like language of reasonable likelihood. The degree of satisfaction that the phrase 'reasonably likely' contemplates is difficult to discern. The phrase has a different connotation from the single word 'likely'. The qualifying adverb 'reasonably' requires that the word 'likely' be given a meaning less definite than 'probable'. It is that word 'reasonably' which governs the standard of likelihood. It lessens the intensity of the word 'likely'. In other words, quantitative guidance is suggested by the word 'reasonably' whilst the word 'likely' requires a qualitative judgement".

His Honour also said (at [83]) that while reasonably likely required the event to be above mere possibility, it did not need to be so high as to more likely than not.

54. In E*state of* S [2012] NSWSC 1281)Ward J (as Her Honour then was) set out with approval substantial extracts from the decision in *Fenwick* and *Will of Jane*.

55. The concept of reasonable likelihood for the purposes of s.22(b) was also considered by Black J in *Burns v The Estate of Burns* [2013] NSWSC 1 550). His Honour referred

to the three preceding cases and the analysis in those cases (at [22] to [30]). His Honour applied the methodology referred to by Palmer J in *Fenwick* (at [157]), firstly enquiring as to what actual subjective intentions could be established in regard to the protected person (at [31]), but where in *Burns* there was only scant evidence, His Honour then turned to whether the proposed Will was reasonably likely to have been made in all the relevant circumstances (at [32]).

56. The first occasion in which the New South Wales Court of Appeal had cause to consider Division 2 of Part 2.2 and s.22(b) in particular, was *Small v Phillips No. 2* [2019] NSWCA 268. In that case the protected person had been engaged over a period of some 12 months in taking steps to draft a will. A stroke deprived the testator of capacity before any will was executed. The drafting process had not arrived at a clear and unequivocally approved draft prior to her stroke. The estate was very substantial, estimates of its value before the Court ranged from in excess of $60 million to greater than $100 million. Much of it was invested in properties the value of which was not easily ascertained. The applicant for the statutory will was a grandson of the testator and had been considered by the testator for a very substantial gift in the draft wills that had been under consideration prior to her stroke. The case was a little unusual in that it was contested, with other members of the family appearing, separately represented, and arguing that there was no will, in regard to which it could be said that there was the relevant reasonable likelihood for the purposes of s.22(b) of the *Act*.
57. In *Small v Phillips* Emmet AJA said of the concept of reasonable likelihood at [158]:-

> *Section 22(b) draws a distinction between a will that would have been made by an incapable person, on the one hand, and a will that is reasonably likely to be a will that would have been made by the incapable person, on the other. That distinction raises questions of what might be characterised as relative certainty. Clearly enough, one can envisage a situation where a person evinced a clear intention and desire to make a will in a finalised form but, because of intervening events, leading to incapacity, was unable to execute the will. Evidence may well lead to the conclusion that, in such a situation, the will is one that* **would** *have been made by the incapable person. Nevertheless, that degree of certainty is not necessary in order to satisfy s 22(b). Thus, even if the proposed will is not one about which it can be said the incapable person* **would** *have made it, s 22(b) may be satisfied where the evidence discloses that the proposed will is one that the incapable person is reasonably likely to have made. The introduction of "reasonably" introduces an element of uncertainty over and above "likelihood". Thus, there is a degree of latitude or*

margin for judgment in considering the intentions of the incapacitated party. [18]

58. *Small v Phillips* largely turned on this issue of reasonable likelihood. The Primary Judge had found that there was insufficient certaievidencenty to justify a statutory will, especially in light of correspondence between the protected person and her solicitors in which she had expressed dissatisfaction with the wills they had drafted. However, in the Court of Appeal, reference to the will drafting activities of the protected person engaged in over a period of some 12 months, revealed a pattern with a high level of consistency as to the form of gifts that the protected person had in contemplation. In those circumstances the Court of Appeal concluded that there were indeed a series of dispositions that it was reasonably likely that the protected person would have included in a will but for her intervening stroke.

59. The Primary Judge had relied upon the disagreement among family members, indeed significant disagreement amongst family members as a ground for rejecting the application. This in itself played little part in the decision of the Court of Appeal. The Court of Appeal viewed the matter as a factual issue capable of proof in conventional fashion as to whether or not the applicant for the statutory will had made out the matters in s.22 of the *Act*.

60. Another issue is worth noting. By virtue of s.18(2) of the *Succession Act* the order for a statutory will, may be in regard to the whole or part of the property of the person. Thus, where there may be sufficient evidence to establish some gifts that would be made by the person to the requisite standard of reasonable likelihood, then it would seem to follow that the Court could make a statutory will in regard to that portion of the estate, without necessarily making a will that disposes of the whole of the estate.

61. Section 22(c) requires the Court to be satisfied that it is, or maybe, appropriate for the order to be made. In *Small v Phillips* at first instance the Primary Judge had relied upon uncertainty about the value of the estate, and whether or not the protected person had any will in place, as reasons for not making an order. The Court of Appeal did not consider they were reasons for declining to make an order. In the Queensland decision

in *Gau* it was clear that a motivation behind the making of the order was in part a divorce of the protected person's child, but the Queensland Court of Appeal did not consider that this made the application inappropriate. There was no particular reason or moral obligation on the protected person to enrich a child under her will who was embroiled in litigation in the Family Court of Australia. No doubt as the jurisdiction develops, more guidance will be obtained on what may or may not constitute a reason for refusing a statutory will on the ground that it is inappropriate.

Implications of *Small v Phillips*

62. In many cases the proper answer to whether or not a statutory will ought be made may be relatively clear and such applications may be heard on an uncontested, or even ex parte basis (e.g. *Re: The Statutory Will of Rolf v Huenerjaeger* [2020] NSWSC 1190). On the other hand, there will inevitably be cases where there are strongly conflicting interests and views as to the appropriate course. In such a situation the Court may well order that there be separate representation for the interests of the protected person, such counsel and solicitor will have a role similar to an *amicus curiae*. Section 25 of the *Succession Act* expressly provides for such separate representation.

63. The jurisdiction of the Supreme Court to make statutory wills is an important legal innovation. Where a person has lost testamentary capacity there was, in the absence of this jurisdiction, little that could be done upon the person's death. An eligible person could seek a family provision order, but only a limited class of people are entitled to apply, and the bases upon which such orders are made, associated as they are with education or advancement in life, seriously restrict their scope. There are no such limits in regard to the making of statutory wills. Indeed, in *Small v Phillips* the statutory will provided for a substantial portion of the estate to be settled on a charitable trust reflective of a key life interest of the protected person.

March 2021