CITATION:	*Knight ALG SM* [2020] NTSC 6
PARTIES:	In the matter of an Application by Cheryl Knight as litigation guardian for SM for authorisation of a will pursuant to s 19 of the *Wills Act 2000*
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	10 of 2018 (21839840)
PUBLISHED:	13 February 2020
ORDERS MADE:	19 July 2019
HEARING DATES:	16 November 2018 and 8 July 2019
JUDGMENT OF:	Hiley J

CATCHWORDS:

SUCCESSION – Wills, Probate and Administration – Application for the making of a statutory will – Interpretation and application of statutory wills provisions in ss 19 to 22 of the *Wills Act 2000* (NT) – Test for testamentary incapacity – Evidence of testamentary incapacity – Interpretation of the words "might … be … made" – Whether "appropriate to make the order" sought - Obligations to make enquiries to find and hear from other persons with a legitimate interest in the application

Banks v Goodfellow (1870) LR 5 QB 549; *Boulton v Sanders* [2003] VSC 405; *Boulton v Sanders* [2004] VSCA 112; 9 VR 495; *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336; *Edwards v Edwards* [2009] VSC 190; 25 VR 40; *Pistorino v Connell & Ors* [2012] VSC 438; *Re B (Court of Protection: Notice of Proceedings)* [1987] 1 WLR 552; *Re C (a patient)* [1991] 3 All ER 866; *Re Fenwick; Application of J R Fenwick; Re 'Charles'* [2009] NSWSC 530; 76 NSWLR 22; *Re The Will of Bridget* [2018] NSWSC

1509; *Wilson v McLeay* [1961] HCA 56; 106 CLR 523; *State Trustees Ltd v Do* [2011] VSC 45, referred to.

Administration and Probate Act 1969 (NT) s 61
Guardianship of Adults Act 2016 (NT) s 5, s 24
Succession Act 2006 (NSW) s 18, s 19, s 20, s 21, s 22
Wills Act 2000 (NT) s 19, s 20, s 21, s 22, s 23, s 24
Supreme Court Rules 2008 (NT) r 88.05B

Australian Concise Oxford Dictionary, 5th Ed, Oxford University Press, Australia and New Zealand, 2009.

G E Dal Pont and K F Mackie, *Law of Succession*, 2nd Ed, LexisNexis Butterworths Australia, 2017.

REPRESENTATION:

Counsel:

Applicant:	M Littlejohn
Amicus Curiae:	H Baddeley

Solicitors:

Applicant:	Povey Stirk Lawyers & Notaries

Judgment category classification:	B
Judgment ID Number:	Hil2001
Number of pages:	32

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Knight ALG SM [2020] NTSC 6
No. 10 of 2018 (21839840)

BETWEEN:

IN THE MATTER OF AN APPLICATION BY CHERYL KNIGHT AS LITIGATION GUARDIAN FOR SM FOR AUTHORISATION OF A WILL PURSUANT TO S 19 OF THE *WILLS ACT 2000*

CORAM: HILEY J

REASONS FOR JUDGMENT

(Published 13 February 2020)

Introduction

[1] The applicant, Ms Cheryl Knight, who is the sole guardian for and carer of SM, applied for authorisation of the making of a will for and on behalf of SM, pursuant to s 19 of the *Wills Act 2000*. Under the proposed will the bulk of SM's estate is to go to Ms Cheryl Knight. I made the relevant orders on 19 July 2019. These are my reasons.

[2] SM was born on 20 September 1996 with congenital abnormalities. Her biological mother left her shortly after she was born. Ms Knight worked as a nurse in the paediatric ward at the hospital and has cared

for SM ever since. SM has been living with Ms Knight and her son, Adrian Schaber. SM refers to Ms Knight as her mother and Mr Schaber as her father.

[3] In early 2006 SM underwent a medical procedure during which her midbrain and brainstem were injured. Since that time SM has needed near constant care and supervision which has been provided by Ms Knight, apart from when SM is in a day care centre for about four hours a day from Mondays to Thursdays and two hours on Fridays.

[4] On 12 September 2016 this Court made orders approving settlement of a medical negligence claim brought by Rene Laan as litigation guardian for SM relating to her 2006 injuries, by payment of $6.5 million in damages (**the 2016 Orders**). Those orders included payment of monies to Ms Knight for past gratuitous services and *Wilson v McLeay*[1] expenses, payment of special damages, and payment of the balance to Equity Trustees Limited to be held in trust for investment on behalf of SM.

[5] The 2016 Orders noted that SM has been disabled since she was born and that the Public Guardian had (in 2006) existing authority over SM's financial matters. The 2016 Orders included an order providing that SM may not make any will or testamentary disposition except with the consent of and in the presence of the Public Guardian (**Order 10**).

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1 (1961) 106 CLR 523.

On 8 March 2018, the Northern Territory Civil and Administrative Tribunal made an order revoking the Public Guardian's guardianship of SM and appointed Ms Knight as SM's sole guardian. Section 24 of the *Guardianship of Adults Act 2016* provides that a guardian (ie Ms Knight) is not authorised to make a will for the represented adult. Given that the Public Guardian is no longer SM's guardian it is not taking an active part in these proceedings. However, it has confirmed that it does not oppose the setting aside of Order 10 (being one of the orders sought in this application).

[6] SM has a number of step-siblings but has had little if any contact with them, or her biological parents. Due to this fact, the fact that the proposed will would leave most of SM's estate to Ms Knight, and the large size of the estate, I was anxious to obtain the assistance of a contradictor. After the Public Guardian indicated that it did not wish to take an active part in the proceedings I requested the assistance of amicus curiae. On the instructions of the applicant's solicitors Mr Hamish Baddeley of counsel undertook this task and provided detailed written submissions together with suggestions as to further steps that the Court might wish be taken before making or refusing the application. Much of what follows below regarding relevant legal principles is based upon Mr Baddeley's submissions and those of Mr Matthew Littlejohn, counsel for the applicant.

[7] In short Mr Baddeley recommended that further attempts be made to locate and ascertain the attitudes of SM's relatives, and to obtain more medical evidence concerning SM's capacity to understand and make a will. The last of these steps occurred with the provision of a Neuropsychological Assessment Report by Doctor Judy Tang who assessed SM on 16 May 2019.

The application and the proposed will

[8] The application sought that, inter-alia, Order 10 be set aside, the applicant be granted leave pursuant to s 20 of the *Wills Act* to make the application, and the Court authorise the making of a will for SM pursuant to s 19(1)(a) of the *Wills Act*.

[9] Annexed to the affidavit of the applicant's solicitor, Ms Alison Phillis of Povey Stirk, sworn on 14 September 2018 and filed in support of the application, was a copy of the will for which authorisation was sought. In short it was proposed that SM's estate (currently worth in excess of $6M) be distributed by gifting $10,000 to Alice Springs Animal Shelter Inc with the residue of her estate gifted to:

(a) Ms Knight;

(b) if Ms Knight does not survive SM – to Mr Adrian Schaber; and

(c) if neither Ms Knight nor Mr Schaber survive SM – to such of Mr Schaber's children who survive SM and attain the age of 21.

[10] Following, and as a result of further investigations, it was proposed that there also be a gift of $100,000 to SM's sister, KAM. Accordingly, the proposed will to which the application now relates is that annexed to the affidavit of Yiannis Roubos made on 2 July 2019 (**the Proposed Will**).

Wills for persons without testamentary capacity

[11] All jurisdictions in Australia have a statutory regime empowering a court to make wills for persons who lack testamentary capacity (i.e. a "statutory will").

[12] In the Northern Territory the relevant legislation is contained in Part 3, Division 2 of the *Wills Act 2000*:

(a) s 19(1)(a) relevantly provides that the Court may, on application, make an order authorising the making of a will in terms approved by the Court for and on behalf of a person who lacks testamentary capacity;

(b) s 20(1) provides that an applicant must obtain the leave of the Court to make such an application. In this respect, the applicant must provide the information listed in s 20(2);

(c) s 21 provides that the Court must refuse leave to make the application unless it is satisfied of the matters set out in that section; and

(d) s 22 sets out the orders the Court may make on hearing an application for leave to make an application under Division 2.

Role of the Court

[13] Section 23 provides that in considering an application under Division 2, the Court may inform itself of any matter in the manner it considers fit (s 23(1)(b)), is not bound by the rules of evidence (s 23(1)(c)) and may refuse the application or grant it subject to the terms and conditions it considers just (s 23(2)).

[14] The Supreme Court of New South Wales considered similar provisions in that jurisdiction in *Re Fenwick; Application of J R Fenwick; Re 'Charles'*[2]:

> The best interests of an incapacitated person and of those having a proper claim on his or her testamentary bounty are the objects of the jurisdiction which the Court exercises under Pt 2.2 Div 2 of the *Succession Act*. It is a remedial and protective jurisdiction and is, accordingly, not governed by the rules of adversarial litigation. In other words, the judge is not a referee; rather, the judge is to endeavour to rectify a problem which is affecting people's lives, in the best possible way. It is for this reason that s 21 provides that, in hearing an application for an order under s 18 (as distinct from an application for leave under s 20(1)(a)), the Court may inform itself of any matter, in addition to the information provided under s 19, in any manner the Court sees fit. Further, in hearing an application, the Court is not bound by the rules of evidence.
>
> For example, the Court may have reservations about the impartiality of an expert medical witness, even though there is no other party to the proceedings who wishes to contest testamentary incapacity. The Court may, in such a case, insist on seeing and hearing the patient for itself. It may require a report from a court appointed expert. Indeed, the Court is more likely to feel the need

2 (2009) 76 NSWLR 22 (***Re Fenwick***) at [132] – [133] per Palmer J.

to use the investigative power expressly conferred on it by s 21(b) in a case where there is no apparent opposition to the application than in a case where the application is opposed by a party legally represented and able to adduce contradictory evidence.

Section 21 matters that must be satisfied before granting leave

[15] Section 21 provides as follows:

> The Court must refuse leave to make an application for an order under this Division unless the court is satisfied that:
>
> (a) there is reason to believe that the proposed testator is or may be incapable of making a will;
>
> (b) the proposed will or alteration or revocation of a will is or might be one that would have been made by the proposed testator if he or she had testamentary capacity;
>
> (c) it is or may be appropriate for an order authorising the making, alteration or revocation of a will to be made for the proposed testator;
>
> (d) the applicant is an appropriate person to make the application; and
>
> (e) adequate steps have been taken to allow representation of all persons with a legitimate interest in the making of the application, including persons who have reason to expect a gift or benefit from the estate of the proposed testator.

[16] The matters referred to in s 21 do not appear to have received judicial consideration in the Northern Territory. However, the same or similar provisions in other jurisdictions have been considered by courts elsewhere.

Section 21(a) – lack of testamentary capacity

Test of testamentary capacity

[17] The recognised test for testamentary capacity was set out by Cockburn CJ in *Banks v Goodfellow*.[3] It is necessary that the testator:

(a) understands the nature of the act and its effects – in this respect it is sufficient that the testator understands that he or she is making a will with the requisite knowledge and approval;

(b) understands the extent of the property of which he or she is disposing – in this respect, the testator must be aware in general terms of the nature, extent and value of the estate over which he or she has disposing power;

(c) is able to comprehend and appreciate the claims to which he (or she) ought to give effect – this requires an awareness in the testator of those who might reasonably be thought to have a claim upon his or her testamentary bounty; and

(d) is suffering from no insane delusions.[4]

[18] In light of the principle of freedom of testation and the legal consequences of a finding of mental incompetency the courts approach

3 (1870) LR 5 QB 549 at 565.

4 See G E Dal Pont and K F Mackie, *Law of Succession* (LexisNexis Butterworths Australia, 2017, 2nd Ed), Chapter 2 (**Law of Succession**).

allegations of lack of mental capacity with caution. The test for mental competency is a legal test not a medical one.[5]

Guardianship order not definitive

[19] That a person may be subject to a guardianship order does not necessarily mean that that person does not have testamentary capacity.[6]

[20] In *Edwards v Edwards*[7] Forrest J noted that the "test laid down by the [guardianship legislation] does not involve the same application of principle as the test for testamentary capacity. … It cannot be thought that Parliament would have intended by [the guardianship legislation] to have removed by a side-wind a fundamental and longstanding method of determining whether a person with a mental impairment had or had not made a valid Will."

[21] These comments appear applicable in the Northern Territory where the guardianship legislation poses different tests regarding 'decision-making capacity' and 'impaired decision-making capacity' to the test regarding testamentary capacity.[8]

Evidence of testamentary incapacity

[22] In *Re Fenwick*, Palmer J explained, at [126] to [127], that, absent urgency or some compelling reason, the application for leave should

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5 Law of Succession at [2.2].

6 Law of Succession at [2.3]

7 (2009) 25 VR 40 at [56] per Forrest J.

8 See *Guardianship of Adults Act 2016* (NT), s 5.

provide the best evidence available as to the purported lack of testamentary capacity. The best such evidence is that of a specialist professional, for example a psychiatrist, consultant physician or clinical psychologist who has recently examined the incapacitated person and who expresses an opinion in a report compliant with the expert witness rules of conduct.

[23] At [130], Palmer J said:

> The level of satisfaction that a court must feel as to the essential requirement of permanent testamentary incapacity must have regard to the gravity of the power being exercised and to its consequences: cf *Briginshaw v Briginshaw* (1938) 60 CLR 336. If no more than the minimum level of proof of testamentary incapacity is demonstrated by an applicant at the leave stage, when better proof would be expected, the application may survive s 22(a) [i.e., the equivalent of s 21(a)] but may founder at s 22(c) [i.e., the equivalent of s 21(c)].

[24] In the present matter, although the Court was originally provided with medical evidence that had been tendered in support of the application for approval of the compromise, I was not satisfied that sufficiently addressed the questions necessary for determination in this proceeding. Those concerns have now been dealt with by Doctor Judy Tang in her Neuropsychology Assessment Report filed 8 July 2019.

Section 21(b) – the proposed will is or might be one that would have been made by the proposed testator if he or she had testamentary capacity

[25] The wording of s 21(b) is slightly different to that used in other Australian jurisdictions (which also vary).[9] The analogous requirements elsewhere have caused the courts some difficulty in determining statutory will applications. Mr Baddeley has referred to a number of relevant authorities from other jurisdictions.

Position in NSW

[26] In NSW, the analogous provision requires 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 testamentary capacity."

[27] In *Re Fenwick*, Palmer J said that the words "reasonably likely" may be interpreted as meaning a 'fairly good chance' that it is likely.

[28] Palmer J noted that applications for statutory wills can relate to different circumstances and identified three general categories:

(a) 'lost capacity cases' where the incapacitated person previously had testamentary capacity;[10]

(b) 'nil capacity cases' where the incapacitated person has been born with mental infirmity or has lost testamentary capacity well before

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9 Its closest counterpart seems to be the Queensland legislation which requires that the proposed will "is or may be one" that the proposed testator would have made had they had capacity.

10 See *Re Fenwick* at [154] – [170].

ever being able to develop any notion of testamentary capacity;[11] and

(c) 'pre-empted capacity cases', where the incapacitated person was still a minor but has lost testamentary capacity at an age at which he or she had formed relationships and had a fairly good understanding of will-making, intestacy and their consequences (also referred to as the 'teenager' cases).[12]

[29] Palmer J found that the test regarding the requirement that the proposed will "is reasonably likely" to have been made will depend upon which category is being considered. Depending on the category the test may involve subjective considerations or may involve a purely objective assessment.

[30] In relation to 'nil capacity cases', being the category into which SM likely falls (assuming that she lacks testamentary capacity), Palmer J said that a "search for any degree of subjective intention is impossible in a nil capacity case, where the person has been born with mental infirmity or has lost testamentary capacity well before ever being able to develop any notion of testamentary disposition."

[31] Accordingly, rather than attempting to make any subjective consideration, the Court's assessment is "entirely objective", the

11 See *Re Fenwick* at [171] – [176].

12 See *Re Fenwick* at [177] – [188].

question being "is there a fairly good chance that a reasonable person, faced with the circumstances of the incapacitated minor, would make such a testamentary provision?"[13]

[32] However, there seems to be a slight tension between this 'entirely objective' assessment and the requirement for the applicant to give, in support of the application, any evidence available of the incapacitated person's wishes (s 19(2)((e) of the *Succession Act 2006* (NSW) and s 20(2)(d) of the *Wills Act 2000* (NT)).

[33] Presumably, in 'nil capacity cases' it is thought that there will be no such evidence. However, in 'nil capacity cases' where a child becomes mentally incapacitated at say around 10 years' of age (e.g. SM as a result of her medical misadventure), some such evidence may be available regarding that person's interests and wishes up to that time.

[34] Moreover, as noted by Palmer J in considering the 'lost capacity' cases, sometimes an incapacitated person's testamentary capacity may be "borderline" such that it may be easier to assess that person's subjective wishes.[14]

[35] It is not clear why "borderline" testamentary capacity would only be found in 'lost capacity' cases and not also in 'nil capacity cases'. For example, a child becoming mentally disabled at 10 years of age may

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13 *Re Fenwick* at [176].

14 *Re Fenwick* at [157] per Palmer J.

only have "borderline" incapacity as he or she enters adulthood. In that example, a 'purely objective' assessment may not be appropriate.

The Victorian legislation

[36] The *Wills Act 1997* (Vic) has been amended from:

(a) a requirement that the proposed will "accurately reflect the likely intentions of the person if he or she had testamentary capacity"; to

(b) a requirement that the proposed will "reflects what the intentions of the person would be likely to be, or what the intentions of the person might reasonably be expected to be, if he or she has testamentary capacity." (my emphasis).

[37] The former wording caused great difficulties as it required a subjective assessment of the actual person's wishes, and satisfaction by the court, on the balance of probabilities, that the proposed will was one that the person would have made if not incapacitated.[15]

[38] The amendment, by the use of the words "might reasonably be expected to be", avoids the need for the proposed will to reproduce the person's intentions with a substantial degree of exactitude or precision.[16] In *State Trustees Ltd v Do* [2011] VSC 45, Bell J noted that the amended provision sought to give "more scope to the court" to

15 See *Boulton v Sanders* [2003] VSC 405; *Boulton v Sanders* (2004) 9 VR 495 and *Re Fenwick* at [141] – [146].

16 Law of Succession at [3.14] – [3.15].

authorise the making of statutory wills for persons lacking testamentary capacity, and "a broad-brush approach is required, for otherwise the beneficial purpose of the function might be defeated."[17]

[39] In *Re Fenwick*, Palmer J said that these words "clearly give the [Victorian] Court far more latitude in applying an objectively reasonable approach to identification of testamentary intention than did the words of the previous section."[18]

The word 'might'

[40] The ordinary dictionary definition of 'might' is "expressing a possibility based on a condition not fulfilled".[19]

[41] In *Re C (a patient)* [1991] 3 All ER 866, Hoffmann J, considered a 'nil capacity case' concerning an elderly lady who had been severely mentally handicapped since birth. The test in the UK required a subjective assessment of the will that the actual patient, acting reasonably, might have made if restored to full capacity.

[42] Hoffmann J recognised the difficulty in trying to form a view of what 'might' have been expected from a person who never possessed a rational mind. Relevantly, Hoffmann J observed that "the statute, recognising the difficulty in arising at any certainty in these matters,

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17 *State Trustees Ltd v Do* [2011] VSC 45 at [10] – [11] per Bell J.

18 *Re Fenwick* at [147] per Palmer J.

19 Australian Concise Oxford Dictionary, Oxford University Press, Fifth Edition, Australia and New Zealand, 2009.

says ‘might’ rather than ‘would’ be expected to provide’. In matter of detail, there must be a range of choices which would be equally valid.[20]”

[43] In short, the word ‘might’, as with ‘reasonably likely’, means that the Court does not have to be persuaded of likelihood on the balance of probabilities. Rather, s 21(b) is satisfied if the Court finds that it is ‘reasonably likely’ or there is a ‘real chance’ that the proposed will is one that the testator would have made if he or she had testamentary capacity.

Construction and application of s 21(b)

[44] In Law of Succession Dal Pont and Mackie explain that the fact that various jurisdictions such as the Northern Territory do not adopt the phrase ‘reasonably likely’, does not appear to comprise any substantial shift from the approach to the NSW / Victorian legislation, “…as the wording is, by avoiding a subjective focus, amenable to dealing with both ‘lost capacity’ and ‘nil capacity’ cases.”[21]

[45] I consider Palmer J’s detailed analysis of the NSW requirements in *Re Fenwick* relevant to the interpretation and application of s 21(b), and agree that different approaches may apply depending upon which category of case is being considered.

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20 *Re C (a patient)* [1991] 3 All ER 866 at 870 per Hoffman J.

21 Law of Succession at [3.16].

[46] The use of the word ‘might’ in s 21(b) ensures that the Court does not need to be satisfied, on the balance of probabilities, that the proposed will is one which ‘would’ have been made by the incapacitated person if he or she had testamentary capacity.

[47] In relation to ‘nil capacity cases’, adopting the reasoning of Palmer J in *Re Fenwick*, the s 21(b) requirement would be approached primarily (or perhaps ‘entirely’) on an objective basis by assessing whether a ‘reasonable person’, in the circumstances of the incapacitated person, ‘might’ (i.e. it is reasonably likely or there is a real chance) have made the proposed will.

Section 21(c) – it is or may be appropriate to make the order

[48] If the Court is satisfied that the proposed will qualifies under ss 21(a) and (b), the application for leave must then pass the test required by s 21(c), i.e., that it is or may be appropriate for an order authorising the proposed will to be made. To determine this condition the Court would have regard to the information provided under s 20(2).[22]

[49] There is little judicial consideration of this requirement. The cases in which an order is declined because it has been held not to be appropriate are rare and seem to relate to fairly unusual circumstances (e.g. because it will preclude claims by creditors or would be pointless

22 *Re Fenwick* at [189].

because it would be bound to provoke a successful claim under applicable family provision legislation).[23]

[50] However, and relevantly, the failure to provide the 'best evidence' of the person's purported testamentary incapacity may be such that it is inappropriate to make the order sought.[24]

Section 21(d) – the applicant is an appropriate person to make the application

[51] Under s 21(d) the applicant must be an appropriate person to bring the application. An appropriate person is typically a close family member and may be a guardian (i.e. someone with a personal connection and knowledge of the incapacitated person) as opposed to a stranger or officious bystander.[25]

Section 21(e) – adequate steps to allow representation of all persons with a legitimate interest

[52] Section 21(e) requires that adequate steps are taken to allow representation of all persons with a legitimate interest in the making of the application, including persons who have reason to expect a gift or benefit from the estate of the proposed testator.

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23 See *Re Fenwick* at [189] – [200] and Law of Succession at [3.20].

24 *Re Fenwick* at [130].

25 Law of Succession at [3.3].

[53] In *Re The Will of Bridget*[26] Hallen J, considered a very similar provision in s 22(e) of the *Succession Act 2006* (NSW). His Honour said that:

(a) the applicant should take all steps necessary to identify, locate, and serve any person with a legitimate interest in the application; and

(b) the class of persons may be wider than "persons for whom provision might reasonably be expected to be made by the will" and is likely to include any person entitled on intestacy and persons who may have a claim on the bounty of the person lacking capacity.

[54] At [126] Hallen J accepted the following statement of principle set out by Millet J in *Re B (Court of Protection: Notice of Proceedings)*[27]:

> … First the court must be satisfied before it exercises a judicial discretion that it has all the relevant material before it and that it has heard all the arguments which can properly be canvassed and which are directed to the question to be determined. Second all persons materially affected should be given every opportunity of putting their cases forward. Of course there will be exceptional cases in which it will be right to exclude a party from the proceedings, notwithstanding the fact that he is a party interested. Plainly delay, cost, embarrassment and the exacerbation of family dissensions are all relevant matters. But only in the most exceptional circumstances should the consideration to which I have referred be overridden … I approach this matter on the basis that the court has a general discretion concerning notification, but that it is one which must be exercised in relation to the facts of

26 [2018] NSWSC 1509 at [123] – [124] per Hallen J.

27 [1987] 1 WLR 552 at 556–557.

each particular case. In the ordinary case, and in the absence of emergency or need to act with great speed or of some other compelling reason, all persons who may be materially and adversely affected should be notified.

[55] In this respect, r.88.05B of the Supreme Court Rules provides that when the application for leave first becomes before the Court, the Court must:

(a) consider who are the persons who have reason to expect a gift or benefit from the estate of the proposed testator or who otherwise have a legitimate interest in the making of the application; and

(b) give the directions the Court considers appropriate to ensure that adequate steps are taken to allow those persons representation at the hearing of application.

[56] In this present matter I decided that further enquiries should be made in order to identify and locate other persons who might have a legitimate interest in the making of the application or have reason to expect a gift or benefit from SM's estate, in particular SM's parents or siblings.

Consideration of the matters specified in s 21

[57] Following receipt of counsel's submissions and suggestions made by Mr Baddeley I requested the applicant's lawyers to make further enquiries and obtain further evidence on two main points: medical evidence concerning SM's testamentary capacity; and more information

about the identity, whereabouts and attitudes of SM's relatives. That information has now been obtained and provided to my satisfaction.

Section 21(a) – testamentary capacity

[58] I now have evidence from a number of sources that causes me to be satisfied that there is reason to believe that SM is incapable of making a will. As I have said the other extensive medical evidence initially provided did not relate to her testamentary capacity and did not enable me to reach a conclusion as to whether she ever had testamentary capacity or whether her capacity deteriorated in 2006 when she suffered her medical misadventure.

[59] The most compelling evidence relevant to this issue is that of Clinical Neuropsychologist Dr Judy Tang.[28] Dr Tang had recourse to about a dozen medical reports, including reports of brain scans performed between October 1996 and March 2006 and reports of various doctors, namely Dr Robert Campbell, Dr Michael Epstein, Dr Robert Jones, Dr Marguerite Harding and Emeritus Professor Robert Ouvrier (Paediatric Neurologist). The reports from 2006 onwards were all related to and focused upon her damages claim and therefore did not address her testamentary capacity. However Dr Tang was able to rely upon much of the information contained in those reports when preparing her report. Dr Tang was also able to interview SM over a

28 See her Neuropsychology Assessment Report filed 8 July 2019.

period of about 1 ½ hours during a telephone conference also attended by Ms Knight.

[60] After summarising SM's relevant medical and health history, her cognitive and psychological and psychiatric functioning, her psychosocial, educational and occupational history, her daily living activities and relevant finance and legal information, Dr Tang made observations about her presentation and behaviour and about her cognitive abilities.

[61] She was asked for her opinions on each of the four criteria for testamentary capacity identified by Cockburn CJ in *Banks v Goodfellow* and set out in [17] above. She said that:

(a) "[SM] did not understand the definition or nature of a will. She was not able to communicate understanding about a will after several attempts and simple explanations were provided."

(b) "[SM] does not know her property or assets. She did not understand the definition of assets. She identified her iPad and Nintendo Switch as important objects."

(c) "[SM] was unable to comprehend and appreciate the claims to which she ought to give effect. When asked who she would like to give her important 'things' to, after she passes, she typed

"Adelaide". But neither she nor Ms Knight were able to indicate whether that referred to a person or a place.

(d) "[SM] does not suffer from delusions. She reported being happy with [Ms Knight], and enjoys attending her school. SM presented as a friendly and generally happy person."

[62] Dr Tang concluded:

> In summary, it is my opinion that SM does not have the capacity to make a will. She does not know the definition or nature of a will, she does not know to whom she owes a moral duty, she does not know her assets, and she does not have the cognitive capacity to learn, understand and appreciate the nature and extent of a will.

[63] I also have evidence from Ms Alison Phillis, a lawyer director of Povey Stirk.[29] She acted on behalf of SM in the medical negligence claim and has known SM since she commenced acting for her in 2008. Over that period she has had numerous discussions with SM. In the course of preparing the present application Ms Phillis had a meeting in April 2017 when she attempted to discuss SM's assets and to explain to SM what a will was. There were references to "Cheryl" (Knight), Adrian "my dad in Adelaide" and leaving something to a charity such as the Animal Shelter. She referred to her sisters "[KAM] and [TR]" and when asked whether she would like to leave anything to them she said "No". Ms Phillis said that from that meeting, and previous meetings with SM she was of the opinion that SM did not have capacity to make

29 Affidavits of Alison Phillis sworn 14 September 2018 and 15 November 2018.

a will in that she did not appear to fully understand the nature of a will, and did not understand the extent of her estate.

[64] I accept that a lawyer such as Ms Phillis has the training and skills to assess capacity in her clients across a number of areas including the capacity of the client to give proper instructions and to manage financial affairs.[30]

Section 21(e) – other persons with a legitimate interest

[65] I turn to consider this provision next, partly because this was the other matter of concern to me during the early stages of this proceeding, and partly because it will assist me in addressing the other requirements in s 21.

[66] The class of persons falling within s 21(e) may be wider than those persons for whom provision might reasonably be expected to be made in the will, and is likely to include any person who might be entitled on intestacy and persons who may have a claim on the bounty of the person lacking capacity.

[67] Under the *Administration and Probate Act 1969* (NT), the distribution of an intestate estate upon intestacy may (depending on order of survivorship) go to the deceased's spouse / de facto partner and his or her direct biological family (i.e. children, parents and siblings). In

30 Cf *Pistorino v Connell & Ors* [2012] VSC 438.

"ascertaining relationship it is immaterial whether the relationship is of the whole blood or the half blood."[31]

[68] As such, the members of SM's biological family are each persons for whom 'adequate steps' must be taken under s 21(e) because they may have a 'legitimate interest' in the making of the application and also because they may be entitled to a distribution under the rules of intestacy.

[69] SM's biological family comprises her mother STM and three stepsiblings, TR, KAM and RM. RJ "could" be SM's biological father. There is no evidence to suggest that SM has or ever had a partner or a child. According to Ms Knight in her affidavit sworn 12 September 2018:

(a) STM last had contact with SM when she was around five years old when STM attended a court hearing regarding a child protection matter and saw SM at the hearing;

(b) The only interaction between RJ and SM was in around 2002 when Ms Knight facilitated a meeting between them in Katherine, at which RJ is said to have dragged SM across a room;

31 *Administration and Probate Act 1969* (NT), s 61(2)(b).

(c) TR is a half-sister of SM. SM last saw TR by chance in July 2016 at the Tenant Creek show and prior to this had last seen her around 10 years previously;

(d) KAM is a half-sister of SM and has lived in Alice Springs, Tenant Creek and Katherine. For a period of about six months, Cheryl [Knight] and SM would visit KAM on Saturdays but it had been about a year since their last visit; and

(e) RM is a half-brother of SM and has never met her.[32]

[70] Initial attempts made by the applicant's solicitors to contact those people were unsuccessful. Ms Phillis's affidavit deposed that she instructed her staff to attempt to contact SM's biological family and she annexed a chronology summarising the attempts to contact them.[33] The chronology records that telephone messages were left with KAM in August and September 2017 and in August 2018, but does not refer to the other members of SM's biological family.

[71] Following my request that further attempts be made the applicant's solicitors engaged private investigators. They provided a report in relation to each of the five potential family members. They undertook extensive investigations of various public records including electoral rolls, property and rental records and civil court records, and made

32 Affidavit of Cheryl Knight sworn 12 September 2018 and filed 20 September 2018.

33 Affidavit of Alison Phillis sworn 14 September 2018 and filed 20 September 2018.

other enquiries using telephone, internet and other such methods. They did identify a number of possible addresses and the applicant's solicitors sent letters by registered post to those addresses. No response was received to any of those attempted communications.

[72] However, Ms Phillis met KAM on 20 November 2018 at the Alice Springs Correctional Centre, and provided her with a copy of the relevant court documents.[34] Ms Phillis discussed the proposed will with KAM. KAM agreed with the gift to the Animal Shelter as she understood that SM loves puppies, she believed that there should be a bequest for her in SM's will, and she said that she intended to visit SM once she got out of prison and would like her and her two children to spend more time with SM. She also told Ms Phillis that SM does not know her eldest sister or mother and that her brother and sister do not wish to spend time with SM. She is happy with Ms Knight's care of SM and is very thankful for Ms Knight having looked after SM since she was a baby. KAM has two children, both in care. She was 24 years of age. After her release from prison she would like to obtain employment. She told Ms Phillis that she would take a copy of the proposed will to Central Australian Women's Legal Service, who had acted for her in her child protection matters, to get advice.

34 Affidavit of Alison Phillis sworn and filed on 7 January 2019.

[73] Numerous attempts have been made by the applicant's solicitors to contact KAM again, but have not been successful.[35] Ms Knight informed Mr Roubos that she had not seen KAM since August 2017 and thought that she was living in Tennant Creek. On 24 May 2019 Ms Knight informed Mr Roubos that the carer of KAM's daughter had told her that KAM had received letters from Povey Stirk but did not care and did not want to be involved with the matter. Attempts to contact KAM included calls to her last known telephone number which resulted in a message to the effect that the number was disconnected, messages left on KAM's Facebook page, enquiries of community corrections in Alice Springs and Katherine and letters sent to two addresses in Tennant Creek being the last known addresses known to corrections officers.

[74] On 24 May Ms Knight gave instructions to amend the proposed will to include a clause allowing for KAM to be given $100,000. She instructed that she believes that SM would approve of that.[36]

[75] I am satisfied that the only member of SM's family who has ever shown any interest in SM and her welfare is KAM. Even then it does not appear that she has honoured her promise to visit or take any interest in SM after her discussion with Ms Phillis on 20 November

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35 Affidavit of Yiannis Roubos sworn and filed on 2 July 2019.

36 Affidavit of Yiannis Roubos sworn and filed on 2 July 2019 at [16].

2018. She should not have any expectation to be left any part of SM's estate.

[76] I am satisfied that the steps required by s 21(e) have been taken.

Section 21(d) – appropriate applicant

[77] I am also satisfied that the applicant, Ms Cheryl Knight, is "an appropriate person" to bring the application. She is SM's guardian and has effectively been SM's mother since shortly after she was born. Her natural mother and siblings would not be appropriate persons to bring this kind of application.

Section 21(c) – appropriateness of authorising the making of a will

[78] I am also satisfied that it is appropriate for the Court to make an order authorising the making of a will for SM. The main reasons for this are the large size of her estate and the fact that she is unlikely to ever obtain testamentary capacity.

Section 21(b) – the proposed will

[79] I am also satisfied that the Proposed Will is or might be one that would have been made by SM if she had testamentary capacity.

[80] Although some of the things that she has told various people show that she has a very close relationship with Ms Knight, and also recognises Mr Schaber as her father and is fond of her dogs, she effectively falls within the 'nil capacity' category outlined by Palmer J in *Re Fenwick*.

[81] I would expect a person in SM's situation to leave virtually everything to the only person who has cared for her since birth and who she has always regarded as her mother. She would expect that Ms Knight would continue to provide her with that love and support for the rest of her life. Accordingly I consider that that (substantive) part of the Proposed Will, namely a demise of the bulk of her estate to Ms Knight, "is or might" be a demise that would have been made by SM if she had testamentary capacity.

[82] I would also expect that if Ms Cheryl Knight died before her she would leave her estate to the only other person in her life and who she has regarded as her father, Mr Adrian Schaber. Further, from a moral standpoint, it can be readily accepted that Cheryl (and then Adrian) is entirely deserving as the beneficiary under the Proposed Will.

[83] One might also expect that if SM had capacity she would make some provision, albeit small, for her half-sister KAM, she being the only biological relative that she has had anything to do with. This might be reasonable having regard to KAM's own apparent medical, family and financial issues. There would be no reason for her to contemplate leaving anything to other members of her biological family.

[84] Finally, the small gift to the Alice Springs Animal Shelter would seem appropriate in light of her interest in dogs.

[85] Accordingly, I am satisfied that the dispositions proposed under the Proposed Will are appropriate.

[86] I also note that the proposed trustee and executor of the estate is Ms Kerri-Lee Whitney of Echuca, Victoria, and that if she is unable or unwilling to act or continue to act in that capacity Equity Trustees Limited is to be appointed. Equity Trustees Limited is the company which holds the settlement monies in trust for SM under the 2016 Orders, and would therefore be an appropriate trustee and executor. Following my query about Ms Kerri-Lee Whitney I was informed that Ms Whitney is the niece of the applicant, Ms Knight. Ms Whitney is about 50 years of age and has met SM on several occasions. Ms Knight says that she has chosen Ms Whitney because she is her niece and she is very reliable.[37] I have no reason to suspect that Ms Whitney would not carry out her duties appropriately, particularly as the main beneficiary is her aunt, Ms Knight.

[87] Accordingly, I am satisfied that the requirements of s 21(b) have been met.

Conclusions and disposition

[88] I am satisfied of the matters set out in s 21 of the *Wills Act 2000* and give leave under s 20 for the making of the application for an order under Division 2, Part 3 of the *Wills Act 2000*.

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37 Affidavit of Yiannis Roubos sworn and filed on 8 July 2019.

[89] Accordingly, I made the following orders:

1. Order 10 of the Orders made on 12 September 2016 in proceedings No.7 of 2015 (21534538) be set aside;

2. The Applicant is granted leave pursuant to s 20 of the *Wills Act 2000* to make the application;

3. The application is taken to be, and to proceed as if it were, an application for the order for which the Court grants leave pursuant to r. 88.05B of the Supreme Court Rules;

4. The Court authorises the making of a will for Ms [SM] pursuant to s 19(1)(a) of the *Wills Act 2000*;

5. The will authorised by the Court is to be in the terms as annexed to the affidavit of Mr Yiannis Roubos sworn 2 July 2019;

6. The will, in the terms authorised by the Court, shall be presented to the Registrar within 14 days and shall be sealed in accordance with s 24 of the *Wills Act 2000*.
