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Allowing Persons Without Testamentary Capacity to Make Wills – the Succession Amendment Bill 2005 (Qld)

The Succession Amendment Bill 2005 (Qld) marks the first of the reforms arising from the Uniform Succession Project to be cast in legislation in Queensland. The Bill deals with the law of wills and the focus of this Research Brief is on two significant areas of reform. The first is provision for a person who is under the age of 18 years to make a valid will in certain circumstances approved by the Supreme Court. The other is provision for a person representing another person who lacks 'testamentary capacity' to seek the court's approval for the making of a will.

Nicolee Dixon

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Research Publications and Resources Section

Ms Karen Sampford, Director	(07) 3406 7116
Mrs Nicolee Dixon, Senior Parliamentary Research Officer	(07) 3406 7409
Ms Renee Giskes, Parliamentary Research Officer	(07) 3406 7241

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Inquiries should be addressed to:
Director, Research Publications & Resources
Queensland Parliamentary Library
Parliament House
George Street, Brisbane QLD 4000
Ms Karen Sampford. (Tel: 07 3406 7116)
Email: Karen.Sampford@parliament.qld.gov.au

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EXECUTIVE SUMMARY

A fundamental prerequisite of a valid will is that the person making the will (the testator) has **testamentary capacity** i.e. they must possess the necessary mental capacity to make the will, and know and approve of the contents of the will. Lack of testamentary capacity renders the will invalid. The testator must also be at least 18 years of age, meaning that a **minor** cannot make a valid will. The Queensland *Succession Act 1981* does not enable the court to make or revoke a will on behalf of a person who does not have testamentary capacity.

Many jurisdictions have, or are, altering their succession legislation to enable the Supreme Court of the relevant jurisdiction to authorise the making, alteration or revocation of a will on behalf of a minor and, also, on behalf of a person lacking testamentary capacity. The **Succession Amendment Bill 2005 (Qld)** provides for these matters: **p 1**.

There are multiple pieces of legislation dealing with one or more aspects of succession law in each State and Territory. There are numerous differences between the legislation of each jurisdiction, some substantial and some minor. The **Uniform Succession Laws Project** was initiated by the Standing Committee of Attorneys-General (SCAG) in 1991 and was coordinated by the Queensland Law Reform Commission (QLRC). In 1995, the Attorneys-General of each State and Territory nominated a representative to sit on the National Committee for Uniform Succession Laws for the Australian States and Territories (National Committee). The National Committee determined that four areas of succession law should be examined – the law of wills; family provision; intestacy, and estate administration. The **law of wills** is the subject of the Succession Amendment Bill 2005 (Qld): **pp 1-2**.

Following a number of meetings and papers, the National Committee's *Consolidated Report to the Standing Committee of Attorneys-General on the Law of Wills*, containing a model Bill, was provided to SCAG in December 1997. Also, in December 1997, the QLRC released '**The Law of Wills**'**,** ***Report No. 52***, which recommended that, in most respects, the model Bill should be adopted. The Succession Amendment Bill 2005, introduced into the Queensland Parliament on 23 August 2005, implements the model legislation, as modified by the QLRC recommendations: **pp 2-3**.

Under the current **s 8 of the *Succession Act 1981* (Qld)**, a person under the age of 18 years cannot make a legally valid will. Both the National Committee and the QLRC accepted that the court should, in particular circumstances, be able to authorise a minor to make or revoke a will: **pp 3-4**.

Part 2, **Division 4**, **Subdivision 2** (**proposed new ss 19-20**) deals with the powers of the Supreme Court to **allow a minor** (a person under 18 years of age) to **make or alter a will** in terms stated by the court or to **revoke** all or part of a will. The specified matters about which the court must be satisfied before the order can be made and related maters are considered on **pp 4-5**.

The succession laws in some **other jurisdictions** currently allow for minors to make court-authorised wills. Some provisions are identical, or very similar, to the proposed new ss 19-20 of the Queensland Bill. Those are: ss 8A-8B *Wills Act 1968* (ACT); s 18 *Wills Act 2000* (NT); s 6 *Wills Act 1936* (SA); s 20 *Wills Act 1997* (Vic); s 8 *Wills Act 1992* (Tas). The *Wills, Probate and Administration Act 1898*, (NSW), s 6A is more general: **p 6**.

An essential prerequisite for a valid will is that the person making the will (the testator) has '**testamentary capacity**'. The ingredients of testamentary capacity are that the testator was of full age (not a minor); possessed the necessary mental capacity; and knew and approved of the contents of the will. If there is lack of testamentary capacity, the entire will is invalid. The type of situations where a lack of testamentary may exist is where a person has been born with a brain injury or has, during their life, lost capacity through illness or disease or an accident and various examples are discussed on **pp 6-8**.

Part 2, **Division 4**, **Subdivision 3** (**proposed new ss 21-28**) governs **court-authorised wills** for persons **without testamentary capacity**. A two-stage process will be established under these provisions. First, a person must seek **leave** to apply for an order from the Supreme Court that a will be made, altered or revoked on behalf of a person without testamentary capacity. If leave is granted, **application for the order** is then sought. The hearing of the application seeking leave to apply for an order operates as an early 'screening' process where the applicant must provide considerable **information** and **evidence** to the court about a number of matters including the testator's lack of testamentary capacity and any evidence of the testator's intentions regarding dispositions. These matters, and other related issues, are considered on **pp 8-14**.

Legislative provisions in **other jurisdictions** are discussed on **pp 14-15**. These are *Wills Act 1997* (Vic), ss 21-30; *Wills Act* (NT), ss 19-26; *Wills Act 1936* (SA), s 7; and *Wills Act 1992* (Tas), ss 27A-27I.

Other **amendments** to the law of wills made by the Bill are briefly discussed on **pp 15-17**.

1 BACKGROUND

Succession law covers matters such as wills, intestacy, family provision for persons who have been inadequately provided for under a will, administration and probate, and administration of assets.

The law of wills is quite complex. There are quite strict requirements about the manner in which a will must be executed and non-compliance can cause a will to be invalid. A fundamental prerequisite of a valid will is that the person making the will (the testator) has testamentary capacity i.e. they must possess the necessary mental capacity to make the will, and know and approve of the contents of the will. Lack of testamentary capacity renders the will invalid. The testator must also be at least 18 years of age, meaning that a minor cannot make a valid will.

Many jurisdictions have, or are, altering their succession legislation to enable the Supreme Court of the relevant jurisdiction to authorise the making, alteration or revocation of a will on behalf of a minor and, also, on behalf of a person lacking testamentary capacity. The Succession Amendment Bill 2005 (Qld) provides for these matters and also makes a number of other important amendments which will be discussed briefly at the end of this Brief. The focus of this Brief, however, is on the provisions of the Bill introducing court-authorised wills for minors and for people who lack testamentary capacity.

There tends to be multiple pieces of legislation dealing with one or more aspects of succession law in each State and Territory. There are numerous differences between the legislation of each jurisdiction, some substantial and some minor. Any reforms have been sporadic with no attempts at uniformity across jurisdictions ever made. As a result of the Uniform Succession Project and recommendations of the National Committee for Uniform Succession Law (discussed below), a number of jurisdictions have, or are, implementing legislation to achieve consistency across the States and Territories. The Succession Amendment Bill 2005 (Qld) forms part of this endeavour.

2 UNIFORM SUCCESSION LAWS PROJECT

The Uniform Succession Laws Project was initiated by the Standing Committee of Attorneys-General (SCAG) in 1991 in an attempt to achieve uniformity in succession laws throughout Australia. In 1992, the Queensland Law Reform Commission (QLRC) was asked to coordinate the Project. The next step was taken in 1995 when the Attorneys-General of each State and Territory nominated a representative to sit on the National Committee for Uniform Succession Laws for the Australian States and Territories (National Committee), which met for the first

time in September of that year. The National Committee determined that four areas of succession law should be examined – the law of wills; family provision; intestacy, and estate administration. The law of wills is the subject of the Succession Amendment Bill 2005 (Qld) and of this Research Brief. The family provision project has been completed and it is anticipated that work on the areas of intestacy and estate administration will be finalised later in 2005.[1]

In May 1996, the National Committee considered a draft *Wills Act 1994* (Vic) which was appended to the Victorian Law Reform Committee's *Law of Wills Report*, published in May 1994. As a consequence, the National Committee presented 'The Law of Wills' *Miscellaneous Paper 19* to SCAG, regarding the Victorian draft legislation and the amendments that each State and Territory would have to make to its succession legislation to reach uniformity.[2]

Various outstanding issues were considered at meetings of the National Committee during 1997. The April 1997 meeting agreed that a Report on the Law of Wills should be prepared for SCAG, which would revisit and update the previous Report and annex a draft model Wills Bill. The draft model Bill was prepared by the New South Wales Office of Parliamentary Counsel. The National Committee's *Consolidated Report to the Standing Committee of Attorneys-General on the Law of Wills* was provided to SCAG in December 1997. The model Bill contained provisions allowing minors and persons without testamentary capacity to make wills under court authorisation in certain circumstances.

Also, in December 1997, the QLRC released 'The Law of Wills', *Report No. 52*, which considered the provisions regarding wills in the existing Queensland *Succession Act 1981*. The Report compared the *Succession Act 1981* and the draft *Wills Act 1994* (Vic), considered whether the recommendations made by the National Committee regarding legislative changes should be adopted, and what other amendments to the *Succession Act 1981* might be required.

The QLRC *Report No. 52* recommended that, in most respects, the model Bill should be adopted. There were two areas where the QLRC differed from the National Committee's view and three other matters on which the QLRC made recommendations that were not part of the National Committee's December 1997 *Consolidated Report*. Apart from one issue (regarding the deposit of wills with the Registrar of the court which will be mentioned later in this Brief), those departures

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1 Information obtained from the 'current projects' webpage of the QLRC's website at www.qlrc.qld.gov.au/projects.htm.

2 Much of the information in this section has its source in the Queensland Law Reform Commission's (QLRC's), 'The Law of Wills', *Report No. 52*, (QLRC, *Report No. 52*), December 1997, Preface.

did not touch upon court-authorised wills of minors and persons lacking testamentary capacity.

The remaining three areas of succession law dealt with by the Project are currently under review. However, the first of the reforms to succession law – the law of wills – has been completed and is manifested in the new Succession Amendment Bill 2005, introduced into the Queensland Parliament on 23 August 2005. The Bill implements the model legislation, as modified by the QLRC recommendations.

3 COURT-AUTHORISED WILLS MADE BY MINORS

Under the current s 8 of the *Succession Act 1981* (Qld), a person under the age of 18 years does not have the legal capacity to make a valid will unless the person is married. In some jurisdictions, including in Queensland, a minor can make a will in contemplation of marriage. Thus, in Queensland, a person who is under 18 years and is unmarried cannot make a will nor can a person under 18 years who has been, but is no longer, married. However, a person under 18 years who is no longer married can revoke a will made while married.

The National Committee believed that there should be no general lowering of the age of legal capacity below 18 years (a minor) but that a minor who is married should have such capacity to make a valid will.[3]

The situations are quite rare in which a minor would need to make a will. However, there are very pertinent circumstances when this may be desirable. A 16 year old may be suffering from a disease that may result in death before attaining adulthood and may have received a large inheritance. That minor's circumstances may be such that the minor does not want the rules of intestacy to apply, which would normally be the case in relation to the estate of a minor. Usually, the intestacy rules would result in the parents benefiting from the will. However, the minor might have become estranged from his or her parents and would prefer a sibling or other relative to benefit.[4] Another situation might be that a 17 year old with a similar illness has a long-term relationship with another person for whom they wish to provide after their death.

Both the National Committee and the QLRC accepted that the court should, in particular circumstances, be able to authorise a minor to make or revoke a will. Accordingly, the QLRC recommended that the model provisions on this aspect be

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3 QLRC *Report No. 52*, p 7.

4 QLRC *Report No. 52*, p 56.

adopted in the *Succession Act 1981*. Other related matters upon which recommendations were made were –[5]

- that a court-authorised will for a minor should be retained by the Registrar of the court so that the court has ongoing control over the will;
- that a court-authorised will made in accordance with the law of a particular jurisdiction where the deceased was resident at the time of execution should be accepted in an application for probate in another jurisdiction. This would ensure that uniformity of succession laws was enhanced;
- that the laws relating to court-authorised wills should be confined to substantive matters but the QLRC believed that any decision about whether the court Registrar should have power to approve wills in situations not dealt with by the court (e.g. where a small estate is involved) should not be made until the laws have been in place for three years and their practical operation observed.

3.1 THE SUCCESSION AMENDMENT BILL 2005

Part 2, **Division 4**, **Subdivision 2** (**proposed new ss 19-20**) deals with the powers of the Supreme Court to allow a minor (a person under 18 years of age) to make or alter a will in terms stated by the court or to revoke all or part of a will. The proposed provisions make it clear that the order itself does not make, alter or revoke a will or dispose of any property. If the minor dies before making the will pursuant to the order, the property will be disposed of under the rules of intestacy.

A minor, or a person on his or her behalf, may apply to the court to make an order of this type. The court can also place conditions on its order as it considers appropriate.

There will be specified criteria about which the court must be satisfied before the order can be made –

- that the minor understands the nature and effect of the proposed will, alteration or revocation and the extent of property disposed of under it; and
- that the proposed will, alteration or revocation reflects the intentions of the minor; and
- that it is reasonable in all the circumstances that the order be made; and
- the court has approved the proposed will, alteration or revocation.

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5 See QLRC *Report No. 52*, pp 56-58.

A will or other instrument which is made pursuant to the court order will have to comply with the new provisions concerning execution under the **proposed new Part 2** of the Bill. In addition, one of the witnesses attesting the will or instrument must be the Supreme Court Registrar or Deputy Registrar. Any conditions contained in the court order must also be followed.

The court-authorised will must be held in a sealed envelope[6] by the Registrar of the court: **proposed new s 29**. The Registrar can only stop holding the will if the testator is at least 18 years and has testamentary capacity; or the court orders that the minor may revoke the will; or the will is given to an executor or a solicitor or other persons named in **proposed new s 32** upon the testator's death. This provision accords with recommendations of the National Committee and the QLRC that such a requirement gives the court continuing control over the will made under this new jurisdiction.[7]

The jurisdiction is one that appears closely supervised by the court in that the order does not just confer legal capacity to make a will on the minor – the approval is for a *specific* will. When the NSW Law Reform Commission was considering this issue in the context of a Community Law Reform Program on Wills as long ago as 1986, it believed that because the power was so exceptional, it needed to be closely controlled and a court would, in any event, normally be reluctant to confer a general power to a minor. The Commission warned that a minor may be sufficiently mature but may still be more prone to the influences of others than an adult would be. If the court is considering whether to authorise a specific will, it can have regard to factors such as the minor's relationship with the beneficiary and the reasons why the minor wishes to dispose of his or her property in a particular way. Subject to that caveat, the Commission recommended that minor should be able to seek the Supreme Court's approval to make a specific will in exceptional circumstances, subject to such conditions as the court thought fit.[8]

A **proposed new s 33X** will provide that a court-authorised will for a minor made under an order of a court in a jurisdiction outside Queensland is recognised as a valid will. This reflects the recommendation of the National Committee and the QLRC that such a provision accords with the desire for uniformity in succession laws throughout the States and Territories.

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6 See **proposed new s 31** regarding what must be written on the envelope.

7 QLRC *Report No. 52*, pp 56-57.

8 NSW Law Reform Commission, 'Community Law Reform Program: Wills – Execution and Revocation', *Report 47*, 1986, Chapter 12, www.lawlink.nsw.gov.au/lrc.nsf/pages/R47CHP12.

3.2 OTHER JURISDICTIONS

The succession laws in some other jurisdictions currently allow for minors to make court-authorised wills. Some provisions are identical or very similar to the **proposed new ss 19-20** of the Queensland Bill. Those are: ss 8A-8B *Wills Act 1968* (ACT); s 18 *Wills Act 2000* (NT); s 6 *Wills Act 1936* (SA); s 20 *Wills Act 1997* (Vic); and s 8 *Wills Act 1992* (Tas) (although, under the Tasmanian legislation, the court must take into account any objections made by a person who would, if the minor had died intestate on making the application, have been entitled in the distribution of the minor's estate). In Tasmania, the Public Trustee can also authorise a minor to make a will if the same prerequisites are satisfied. The New South Wales *Wills, Probate and Administration Act 1898*, s 6A is more general, providing that the court may grant a minor leave to make a will, the terms of which have been disclosed to the court and that that leave may be granted subject to such conditions (if any) as the court thinks fit.

4 COURT-AUTHORISED WILLS BY PERSONS WITHOUT TESTAMENTARY CAPACITY

An essential prerequisite for a valid will is that the person making the will (the testator) has 'testamentary capacity'.[9] The ingredients of testamentary capacity are that the testator was of full age (not a minor); possessed the necessary mental capacity; and knew and approved of the contents of the will. A further requirement for validity is, of course, that the testator had the necessary testamentary intention not tainted by undue influence or fraud. The will must be that of a free and capable testator and made with the testator's knowledge and approval.[10] This paper will deal only with the issue of testamentary capacity.

In order to ensure that the testator had the necessary mental capacity to execute a valid will, he or she must –

- understand his or her acts, the nature of those acts, and the extent of his or her testamentary dispositions;
- comprehend the claims to which he or she ought to give effect; and

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9 *Banks v Goodfellow* (1870) LR 5 QB 549.

10 Succession, *Halsbury's Laws of Australia*, Butterworths Online, para 395-175.

- not be influenced by insane delusion (provided the delusion relates to the testamentary act) in the deposition of the property.[11]

It is not necessary that testator understands the exact meaning of the will and its technical legal language provided that he or she comprehends its general nature and that it is his or her will that is being executed.[12]

If there is lack of testamentary capacity, the entire will is invalid. However, this may not be the consequence if the will was made during a time when the testator was not affected by insanity or insane delusion.[13]

The type of situations where a lack of testamentary may exist is where a person has been born with a brain injury or has, during their life, lost capacity through illness or disease or an accident. The examples are numerous. The typical scenario is that of an elderly person who has advanced Alzheimer's disease or dementia. However, a younger person may suffer a brain injury through illness or a car accident. A person may or may not recover from such an injury. A person may also go into a coma from which they regain consciousness at some future time or they may never do so. Thus, a person may never have had the necessary testamentary capacity to make a will or they may have lost it through injury or illness.

Where evidence exists to indicate lack of testamentary capacity, the person seeking to uphold the validity of the will bears the onus of proving capacity which must be established on the balance of probabilities.[14]

If the person's will is invalid due to lack of testamentary capacity, the rules of intestacy apply to the distribution of the property. If the person had a valid will prior to losing capacity, that will is the operative instrument even though it may be no longer appropriate and not take into account the known intentions of the person. For example, a man has a will which leaves all his property to his two named children. A third child is born but the man has a car accident and becomes brain

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11 *Halsbury's Laws of Australia*, para 395-185, citing *Banks v Goodfellow* and a range of other legal authorities.

12 *Halsbury's Laws of Australia*, para 395-185.

13 *Halsbury's Laws of Australia*, para 395-185, citing legal authorities including *Woodhead v Perpetual Trustee Co Ltd* (1987) 11 NSWLR 267; *Timbury v Coffee* (1941) CLR 277 at 281.

14 *Halsbury's Laws of Australia*, para 395-185, citing *Bull v Fulton* (1942) 66 CLR 295; *Bailey v Bailey* (1924) 34 CLR 558.

injured and unable to make a new will to include the third child. It had always been his avowed intention to make provision for that third child.[15]

Without there being power in the court to authorise an alteration to the father's will, the only recourse for the third child would be to make an application under the family maintenance laws for provision from the father's estate.

Another example is that of an elderly and frail lady who has divorced her spouse but has not revoked her will which leaves her estate to the spouse. For many years, that lady has been cared for by a friend and the person has often declared to a number of people that she intends to change her will to benefit the carer and remove the spouse as a beneficiary. However, the lady then rapidly declines into a state where her advanced dementia prevents her from being able to alter her will.

Thus, there may be situations where it is appropriate that a person who had, but has since lost, testamentary capacity to be able to seek the court's authority to make a valid will. This will is sometimes referred to as a 'statutory will'.

The Queensland *Succession Act 1981* does not enable the court to make or revoke a will on behalf of a person who does not have testamentary capacity. Some Australian jurisdictions do provide for this and those will be considered below.

Recently, in Victoria (where laws allowing court-authorised wills exist), a court made a will when the daughter of Maria Korp – the woman who was placed in the boot of her car and left to die – applied to the court to have Mr Korp's husband (who was charged with Mrs Korp's murder) removed as a beneficiary of Mrs Korp's will.[16]

4.1 THE SUCCESSION AMENDMENT BILL 2005

Part 2, **Division 4**, **Subdivision 3** (**proposed new ss 21-28**) governs court-authorised wills for persons without testamentary capacity. This also includes a minor in circumstances where s 19 does not apply because the minor also lacks testamentary capacity in another sense, such as through mental illness or, even, immaturity. This provision accords with recommendations made by the National Committee and the QLRC.[17]

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15 Example taken from a newsletter prepared by a Victorian firm of solicitors, Aitken, Walker and Strachan, 'Radical Changes to the Law of Wills and Deceased Estates', Winter 1998, www.aitken.com.au.

16 Hon Linda Lavarch MP, Attorney-General & Minister for Justice, 'Queensland Courts to be able to Make Wills in Cases of Brain Injury or Coma', *Media Statement*, 23 August 2005.

17 QLRC *Report No. 52*, p 68.

A two-stage process will be established under these provisions. First, a person must seek leave to apply for an order from the Supreme Court that a will be made, altered or revoked on behalf of a person without testamentary capacity (which may be granted with or without conditions). The application for the order is then made – generally with the application for leave or straight after leave is granted. In this section a person without testamentary capacity will be called the 'testator' for ease of reference.

At the hearing of the application for leave or for an order that a will be made, altered or revoked, the court may have regard to any information given to it under **proposed new s 23** (explained below); and may inform itself of any other matter as it thinks appropriate; and is not bound by the rules of evidence.

4.1.1 Application for Leave

The application for leave is made pursuant to **proposed new s 22**. It operates as a type of 'screening' process to allow the court to determine if the application is well founded. The applicant must be ready to provide very comprehensive material to the court to support the request.

In *Report No. 52*, the QLRC noted that, in some jurisdictions, such as in Victoria, the legislative provisions concerning court-authorised wills for persons lacking testamentary capacity envisage a two-staged process. First, the leave of the court has to be sought before the second stage – the application for the order. At the first stage (seeking leave), the applicant must provide the court with a substantial amount of information and evidence for it to consider. Those include evidence of the likelihood of the person regaining testamentary capacity, an estimate of the size of the estate, any evidence of the wishes of the person on whose behalf the order is sought, and information about the interests of people who might be entitled to make an application under testator family maintenance provisions. The QLRC considered that this approach was to be preferred, rather than that adopted in South Australia where the information and evidence is given at the application for an order stage rather than the initial seeking of leave stage. It was felt that as much information as possible should be available to the court at the earlier seeking of leave stage.[18]

At the hearing of the application for leave, the applicant must give the court the following information –

- a written statement of the general nature of the application to be made for the order and the reasons why it is being made;

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[18] QLRC *Report No. 52*, pp 64-65.

- satisfactory evidence of the lack of testamentary capacity of the testator (usually a medical report);
- any available evidence the applicant has, or can discover by reasonable diligence, of the likelihood of the testator regaining or acquiring testamentary capacity (again, a medical report would provide such evidence);
- a reasonable estimate, formed from available evidence, of the size and character of the testator's estate;
- a draft of the proposed will, alteration or revocation being sought;
- any evidence of the testator's wishes;
- any evidence of the terms of any previous will made by the testator;
- any evidence of the likelihood of a testator's family maintenance application being made;
- any evidence of a gift to a charity etc. that the testator might reasonably be expect to bequeath;
- any evidence the applicant has, or can discover with reasonable diligence, of the circumstances of a person for whom provision might reasonably be expected to be made by a will of the testator;
- any evidence the applicant has, or can discover with reasonable diligence, of any persons who might be able to claim on intestacy; and
- any other relevant facts of which the applicant is aware.

Before the court gives leave to make the application it must be satisfied of the matters specified in **proposed new s 24** which are –

- that the applicant is an appropriate person to make the application (and it is anticipated from experience in other jurisdictions that most applicants will be the testator's spouse, a family member or a guardian);[19]
- adequate steps have been taken to allow representation of all persons with a proper interest in the application – thus enabling people with an interest in the matter, such as the testator or persons who might have been beneficiaries from the testator's estate, to be heard;

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[19] Hon LD Lavarch MP, Attorney-General & Minister for Justice, Succession Amendment Bill 2005 (Qld), Second Reading Speech, *Queensland Parliamentary Debates*, 23 August 2005, pp 2586-2589, p 2587.

- there are reasonable grounds for believing that the testator lacks testamentary capacity;
- the proposed will, alteration, or revocation is one that the testator would make if they had testamentary capacity; and
- it is, or may be, appropriate for an order to be made in relation to the testator.

It can be a very difficult matter for the court to be satisfied about what the testator may have done with his or her property if they had testamentary capacity. This was illustrated in a recent decision of the Supreme Court of Victoria in *Re Fletcher; ex parte Papaleo*.[20] An application was made under s 21 of the Victorian *Wills Act 1997* for leave to apply for an order that the court authorise the making of a statutory will on behalf of an elderly lady, F, who was in extremely bad health. F's affairs had been placed in the hands of Mr Papaleo (the applicant) when it became apparent, some years before, that F was confused and not coping with living alone. The medical evidence showed F had advanced Alzheimer's disease and the court accepted that she could not make decisions about her affairs and, thus, lacked testamentary capacity. F had made a will and codicil some years previously when she had testamentary capacity, the effect being that her two children (a son and daughter) were to equally benefit from her estate.

Mr Papaleo brought the application for an order for a statutory will on the basis that subsequent events had affected the intended equality of benefit. The son had borrowed large sums of money from F on a number of occasions which he had not repaid and he eventually became bankrupt. F did, however, reclaim some money in an application made on her behalf during that time. The basis of Mr Papaleo's application was that the children should not still be entitled to benefit equally from F's estate given that the son had, during F's life, received large sums of money from her.

The court declined to grant leave to make application for the order on the basis of a preliminary view that the substantive application would be unlikely to succeed. Byrne J was not satisfied what F's intention would have been, if she still had testamentary capacity. His Honour noted that the terms of the provision in the *Wills Act* required that the court be satisfied about the likely intention of the will-maker, assuming testamentary capacity. The court has to discover that likely intention from evidence of what the testator in a sufficiently lucid moment has said about their intention and assume that intention still holds good at the time of the order.[21] Here that statement of intention appeared to be disclosed in F's codicil made in 1970. The interval between that date and the present was such that Byrne

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20 [2001] VSC 109, 1 May 2001.

21 [2001] VSC 109, 1 May 2001, para 21.

J was reluctant to infer that her desire to divide her estate equally between the children had changed. To change a will is a serious matter and subsequent events do not necessarily lead to such change. While it may have been argued that the financial misadventures of the son would have caused F to order he repay the debt or to alter her will to reduce the son's share of the estate, there was no evidence to suggest that. As Byrne J pointed out, F might have instead treated him as a prodigal son.[22]

In the case of a person who has *never* had testamentary capacity, for example, where they have been born with a brain injury, it will be very difficult for a court to form a view about the testator's likely intentions if they had such capacity.

4.1.2 Application for an Order

The court may, on application, make an order authorising that a will be made or altered, in terms stated by the court, on behalf of the person without testamentary capacity; or that the will (or part of a will) be revoked on that person's behalf: **proposed new s 21**. Power is also given to the court to order that costs be paid out of the person's assets but the *Explanatory Notes* indicate that this will not be done lightly, particularly where the person's long term welfare and security may be compromised by such an order.[23]

The order can be made only if the testator lacks testamentary capacity; the testator is alive when the order is made; and the court has approved the proposed will, alteration, or revocation. The order may be made subject to conditions as the court considers appropriate.

The National Committee considered the issue of whether the application for the order must be made before the death of the testator or whether there could be some lee-way for making an application within a short period after the testator's death. It was suggested that there may be reluctance and/or lack of money in some cases, on the part of the testator's family, to approach the court to make a will for the testator or they might not appreciate how intestacy laws operate. If the court is able to make an order for a short time after the death of the testator, this might address those matters.

However, after the National Committee completed its work on the Family Provision stage of the Uniform Succession Project, the Committee and the QLRC came to the view that the applications for a court-authorised will should be restricted to those made *before* the death of the testator. The basis of this view was

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22 [2001] VSC 109, 1 May 2001, para 22.

23 Succession Amendment Bill 2005 (Qld), *Explanatory Notes*, p 12.

that the recommendations for changes to family provision laws would significantly expand the range of persons who could apply for family provision after the death of a person. Another reason was that it would seem more consistent if only the family provision rules operated after the death of a person rather than two sets of laws, one allowing an application for a court-authorised will and another allowing an application for family provision. It was therefore the QLRC's recommendation that the proposed laws for applications for court-authorised wills be confined to those made while the testator is still alive. It was also recommended that the court should not be able to make the order unless the person is alive when the order is made even though the application has already been filed.[24]

As in the case of court-authorised wills of a minor, the court's order does not make, alter, or revoke a will or dispose of property.

4.1.3 Other Matters

Note that the will, in order to be properly executed, must be in writing and signed by the Registrar and bear the seal of the court. However, the will may only be signed by the Registrar if the person in relation to whom the order was made is alive. The will made under the court order has the same effect as one executed by a person with testamentary capacity: **proposed new ss 26-27**.

As in the case of a court-authorised will by a minor, the Registrar must hold the will (in a sealed envelope)[25] until the events set out in **proposed new s 30** occur. This is in line with recommendations made by the National Committee and the QLRC that the possibly controversial nature of this new jurisdiction makes it desirable that the will should be kept in the registry so that the court retains control over a will created under its order.[26]

As with wills of minors, the QLRC considered that the laws relating to court-authorised wills for persons lacking testamentary capacity should be confined to substantive matters and that any decision about whether the Registrar should have power to approve wills in situations not dealt with by the court (e.g. where a small estate is involved) should not be made until the laws have been in place for three years and their practical operation observed.[27]

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[24] QLRC *Report No. 52*, pp 64-66.

[25] See **proposed new s 31** regarding what must be written on the envelope.

[26] QLRC *Report No. 52*, p 69. Failure to comply with this requirement does not result in invalidity of the will.

[27] QLRC *Report No. 52*, p 70.

A **proposed new s 33Y** recognises a court-authorised will for a person without testamentary capacity made in a jurisdiction outside Queensland where the deceased was resident at the time the will was executed. The National Committee and the QLRC believed that such a provision was desirable in the context of uniformity.[28]

4.2 OTHER JURISDICTIONS

The Victorian *Wills Act 1997* provisions concerning court-authorised wills for persons who do not have testamentary capacity are contained in ss 21-30. There are a number of differences from the draft 1994 provisions under consideration by the National Committee and QLRC. For example, the testator must be alive at the time the order is made whereas the draft provisions permitted the seeking of an order within six months of the death of the testator. The current ss 21-30 of the *Wills Act 1997* are similar in substance to the Queensland Bill provisions. One difference is that the Victorian legislation provides that any person may make the application for an order provided leave is granted to do so but then specifically sets out the persons who are entitled to appear at an application for leave to apply for an order. The Queensland Bill provisions (see **proposed new s 24**) state that the court must, before granting leave, be satisfied that the applicant is the appropriate person to apply for such leave and that adequate steps have been taken to allow all persons with a proper interest in the matter to be represented at the hearing of the leave application.

The Northern Territory *Wills Act* provisions regarding wills for persons lacking testamentary capacity (ss 19-26) are very similar in substance to those contained in the Queensland Bill.

Section 7 of the South Australian *Wills Act 1936*, dealing with this aspect is somewhat different to the Queensland provisions and those in the above jurisdictions and does not appear to have significantly changed since it was considered by the QLRC in its Report.[29] As noted above, s 7 of the *Wills Act 1936* (SA) merely states that a person can apply for an order for a court-authorised will if the person has the leave of the court. The time at which the court takes into account all of the relevant information regarding the circumstances of the case is at the time the application for the order is being heard, not at stage of seeking the leave of the court to make the application. Thus, there is no early 'screening' process as occurs under the Victorian, Northern Territory and proposed

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28 QLRC *Report No. 52*, p 69.

29 QLRC *Report No. 52*, pp 61ff.

Queensland legislation. The *Wills Act 1936* does not address whether or not the testator must still be alive at the time the order is made.

Under ss 27A-27I of the Tasmanian *Wills Act 1992*, it is the Guardianship and Administration Board (the Board) that has the power to make an order to enable the execution of a will for a person lacking testamentary capacity. No provision appears to be made to alter or revoke an existing will of that person. Indeed, the Board cannot make an order for the execution of a will if there is a prior will in existence. The Board can exercise that power on the application of any person or of its own motion after conducting a hearing. Before exercising its powers, the Board must consider similar matters that the court must consider in the Victorian, Northern Territory and proposed Queensland legislation. If the Board makes an order that a will should be made, the order will set out the terms and objectives to be contained in the will and request a qualified person or body (e.g. a solicitor or the Public Trustee) to prepare it.[30]

5 OTHER SIGNIFICANT AMENDMENTS IN THE SUCCESSION AMENDMENT BILL 2005

Not all of the amendments made by the Succession Amendment Bill 2005 (Qld) can be discussed here but the highlights of other changes are –

- the will no longer needs to be signed at the 'foot or end'. However, the requirement that the testator signs or acknowledges his or her signature in the presence of at least two witnesses present together remains, as does the need for at least two of the witnesses to attest and sign the will in the presence of the testator (although not necessarily in the presence of each other): **proposed new s 10**;

- a will that has not been properly executed by the testator can be admitted into probate by the court if the court is satisfied that the testator intended the document to form his or her will. In making its decision, the court can have regard to evidence about the way the document was executed and any evidence of the testator's testamentary intentions. Currently, a will can fail if there has not been 'substantial compliance' with the execution requirements: **proposed new s 18**;

- the court will, for the first time in Queensland, be able to admit extrinsic evidence of the testator's actual intention in order to interpret a will in circumstances where the language used in the will is meaningless or

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[30] Guardianship and Administration Board (Tas), Making a Statutory Will, *Fact Sheet*, www.guardianship.tas.gov.au/__data/assets/pdf_file/35968/Making_a_Statutory_Will.pdf

ambiguous. However, it cannot be admitted to establish surrounding circumstances: **proposed new s 33C**;

- new provisions about formalities such as making valid alterations after the will has been executed: **proposed new s 16**;

- new provisions about dispositions of property (e.g. what a general disposition of all of the property of the testator will include): **proposed new ss 33F-33P**;

- broader rectification powers to enable the court to give effect to a testator's intentions provided that it is satisfied that the clerical error or other problem in the will does not give effect to the testator's intentions: **proposed new s 33**;[31]

- new rules about 'interested witnesses'. Presently, a witness or interpreter for a will cannot benefit under the will (in case of undue influence over the mind of the testator). The Bill will now enable an attesting witness to benefit if the court is satisfied that the testator knew and approved of the making of the disposition and it was made freely and voluntarily; and all of the other beneficiaries consent in writing; and there are at least two other witnesses who are not beneficiaries under the will. Similar changes apply for interpreters of a will: **proposed new ss 11-12**;

- new provisions about the effect of marriage on a will, which, under present law, generally operates to revoke a will unless the will is made in contemplation of that marriage. Under the Bill, a disposition to a person to whom the testator is married at the time of death will not be revoked. An appointment of the person to whom the testator is married as executor, trustee, etc. will be valid. The effect of a testator's divorce/annulment will, subject to a contrary intention expressed in the will, automatically revoke the disposition to that former spouse and the former spouse's appointment as executor, trustee etc. However, the divorce/annulment will not revoke the appointment of the former spouse as trustee of property left for beneficiaries (e.g. children): **proposed new ss 14-15**;

- new provisions about the recognition of wills with a foreign connection (e.g. stating the law to be applied where there is more than one system of domestic law governing the validity of a will): **proposed new SS 33T-33Y**; and

- new categories of prescribed persons who are allowed to inspect and obtain a certified copy of a will to ensure that persons with a proper interest (e.g. beneficiaries or other claimants against the estate) can see the contents of it prior to probate of the will: **proposed new s 33Z**;

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[31] See also **proposed new s 33A** relating to protection of personal representatives who distribute property not earlier than 6 months after the testator's death without notice of the rectification application.

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