SUPREME COURT
OF QUEENSLAND

Queensland Law Society's 10th Annual Succession Law Conference

"Testamentary Dispositions: Benefits and Drivers of Judicial Intervention"
Friday 4 November 2011, 9am
Hyatt Regency Hotel, Coolum

The Hon Paul de Jersey AC
Chief Justice*

Introduction

I am very pleased to have been given the opportunity to deliver an address at this, the Queensland Law Society's 10th Annual Succession Law Conference, and I congratulate the QLS for its initiative in convening the conferences over the past decade.

One's mood is depressed today by the tragic passing of Peter Wilson, whose active contribution to the Society over two decades was of great value, including recently as Chair of the Succession Law Committee. I know he was widely respected. He would wish us to continue today, developing ourselves in the profession he respected.

Succession law over the last decade has changed substantially, in particular in the areas I will be discussing today, many of which would not have even been raised at the inaugural conference.

My address today is entitled "Testamentary Dispositions: Benefits and Drivers of Judicial Intervention". I will address the remedial jurisdiction of the Court in relation to testamentary disposition, some of it fairly recently conferred, or refined.

I will first seek to identify current trends in relation to family provision applications: as to applications on behalf of persons suffering incapacity and the social security implications of such applications; as to the increasing prevalence of aged care accommodation

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* I have been substantially assisted in the preparation of this paper by my Associate, Ms Stacey McEvoy.

arrangements, and the implications of this for estate planning; and as to levels of provision being awarded by the Court to deserving applicants generally.

Then I will turn to areas which have benefited from recent legislative reform, particularly the validity of purported wills irregularly executed, and the Court's extensive powers of dispensation, which have now been in operation for about four years. In that context, I will say something about the performance of the Supreme Court's probate registry, its significance and practical operation.

Finally, I will turn to the Court's fairly newly acquired, and rather radical, capacity to in effect make wills for persons without testamentary capacity, and for minors, providing opportunity for desirable judicial support for the position of the vulnerable.

I foreshadow for any persons who were in attendance at last year's WA Lee Equity lecture, and may find certain parts familiar, that this address draws from the material I raised in that lecture, with additional discussion of particularly important cases from 2011 and elaboration on certain areas. I was asked to do that.

Family Provision – Incapacitated Adults

I deal first with applications by adults with a disability, for provision or further provision from the deceased estate of a parent, usually the last surviving parent.

The Official Solicitor to the Public Trustee, Mr Mark Crofton, has identified an increasing frequency in such applications – a trend which is likely to continue with presently forecast concurrent growth in the number of persons with profound disabilities.

Last year, I had speculated that the reason such applications were necessary was because family members tended to rely on the provision of state-support for incapacitated persons. In the past, adults with decision-making incapacity were typically institutionalised

– a view reflected in the Courts, which tended to refuse applications on the grounds that "any provision made by the court would benefit the State rather than the applicant."[1]

As is well known, recent decades have witnessed the movement of these persons into the general community, and accordingly, Courts around Australia have developed more sympathetic attitudes towards provision which surpasses that provided by the State.

There is enhanced recognition of the need for further provision for intellectually incapacitated people. In *Costigan v Norton* [2005] VSC 208, two non-disabled adult children were unsuccessful in arguing that because their intellectually disabled brother had State-supplied accommodation and income, he was therefore not in financial need of provision. Justice Byrne ordered provision for the widow, and the balance of the estate to the disabled son, with the non-disabled children, the original beneficiaries, to receive nothing. His Honour observed that the disabled son's living arrangements were "Spartan albeit adequate and his basic needs [were] met". He was however influenced to allow further provision on the basis that with such provision, "his quality of life would improve and also his chance of improving his life skills and reaching his full potential".

It is clear that the public interest in preventing members of society from being left destitute is met, in some instances, by family provision orders – thereby relieving the need for social security. However the two methods of protection may also operate as alternates, and the granting of an application for provision may lead to an applicant's losing an entitlement to public funds.

What relevance then should be attributed to an applicant's entitlement to social security benefits? Is it significant that an applicant may be adequately provided for by public funds?

[1] de Groot and Nickel, "Family Provision in Australia", 3rd Ed, 2007, p 164; Englefield, "Australian Family Provision Law", 2011, p 125.

It has generally been held that the availability of such benefits to an applicant is a circumstance to be taken into account in determining a claim for provision, but should not be regarded as a substitute for such provision[2].

One of the results of the application of family provision legislation, as applying in this sort of situation, is to protect the public purse from unnecessary claims by compelling testators to recognize their moral responsibility[3].

Particularly in relation to larger estates, it would not be appropriate to direct wealth away from less fortunate applicants in order to enhance their access to social security payments. This would only succeed in contemporaneously maximising the resources of the other beneficiaries. As put by Justice Bryson of the New South Wales Supreme Court, "the Court should not disregard the interests of the public and public funds, which can receive incidental protection from the workings of this legislation."[4]

Furthermore, as recognized in the Victorian case *King v White* [1992] 2 VR 417, there are strong public policy reasons against permitting testators to essentially avoid their moral obligations to make adequate provision for their dependents. The continued provision of public benefits is subject to political uncertainty, and the adequacy of the current level of State care is not necessarily the best predictor of future levels of provision. Where possible, individuals should not be left in a state of "pecuniary anxiety".

By contrast, the Victorian case of *Bruce v Matthews & Ors* [2011] VSC 185 decided earlier this year may at first blush have suggested a reversion to older attitudes in determining an application for further provision for a testator's sixty two year old son with "substantial needs". The application was dismissed, with the consequence that all four children were to

[2] *Shah v Perpetual Trustee Co* (1981) 7 Fam LR 97 at 100; *In Re Pope, Deceased* (1975) 11 SASR 571 at 574; *Re Barrot* [1953] VLR 308 at 318.
[3] *Parker v Public Trustee* (unreported, Young CJ, Sup Ct, NSW, 31 May 1988).
[4] *Whitmont v Lloyd* (unreported, Sup Ct, NSW, 31 July 1995), approved by Chesterman J in *Oswell v Jones* [2007] QSC 384.

share equally in the estate despite evidence that a more substantial legacy of $100,000 (rather than the $75,000 provided) would be appropriate in helping to improve the son's quality of life. This failure was not considered so great as to show the testator breached his moral duty to provide for his son.

While this would seem at first glance out of kilter with the modern trend towards finding such public support insufficient or 'irrelevant', the distinguishing factor there was that it involved "competing claims to a relatively modest estate", with each of the children dependent on government pensions and without other support. In particular, it was recognised the son was provided with income and accommodation by the State, and that it was "extremely difficult to foresee such a dramatic change in public policy that would result in a person with [the applicant's] disabilities and needs bereft of income or secure accommodation".

Similar results have been observed in many other cases involving smaller estates[5], and it has long been recognised that an applicant's access to public funds may become more relevant where there are "competing claims" on the capacity of the testator to provide for all dependents[6].

The other significant factor to be taken into account when considering applications made by physically or mentally incapacitated persons dependent on pensions, is that a higher level of family provision may detrimentally affect their entitlement to social security. In those cases, the applicant may be left no better off, or even worse off, with additional private support.

That situation arose in the Queensland case of *Oswell v Jones & Ors* [2007] QSC 384. The applicant for further provision was the testator's adult daughter, aged 51, who had

[5] *Ridge v Public Trustee* [2006] NSWSC 400*; Gunawardena v Kanagarantnam* [2007] NSWSC 151; *Warland v Reece* [2000] NSWCA 380.

been severely disabled since birth with cerebral palsy, and was "totally dependent upon others" to meet her everyday needs. She received a disability support pension, concession card, medical aid subsidy scheme, and specifically-built State-funded housing. In addition, she received the benefit of an Adult Lifestyle Support Package provided by Disability Services Queensland.

The provision left for the applicant, $100,000, was described as "small" in the context of a "reasonably substantial" though "not huge" estate of just under $1.5 million, with Justice Chesterman commenting it was difficult to understand the "paucity of the provision made for the applicant" given that the applicant and testator had enjoyed a "close and affectionate" relationship.

His Honour found that "the applicant's needs were great, and the provision for her was paltry." The difficulty concerned whether the form of provision should be moulded to take into account the availability of pension entitlements, and preserve them if possible. If the whole of the estate were given to the applicant, she would lose all of her means-tested social security benefits, with the "distinct possibility" that she would "completely consume" the estate within her lifetime, and then need to return to social security payment.

In this particular case, Chesterman J concluded that:

> "the better approach is to accept the applicant's disabilities are such that it is appropriate she continue to receive public benefaction in addition to provision from the estate so that she can have financial security for the rest of her life but that something of the estate is preserved for those whom the testator wished to benefit."

To that end, His Honour utilised the device of a "special disability trust", a mechanism created by 2006 amendments to the *Social Security Act* 1991 (Cth). The "special disability

[6] *Shah v Perpetual Trustee Co* (1981) 7 Fam LR 97 at 100; *Foster v Lisle* [2003] NSWSC 1243 at [56]; *Whitmont v Lloyd* (unreported, Sup Ct, NSW, 31 July 1995).

trust" was specifically designed to allow families with financial means to make provision for the future care and accommodation of severely disabled individuals on the basis that any trust income or assets up to the value of $500,000 will not affect the affected individual's social security payments. There are certain statutory stipulations which must be met under s1209L SSA (including a definition of 'disabled' in s1209M), there are reporting and auditing requirements, and the trust deed must be in a specified form. Chesterman J made orders, inter alia, establishing a special disability trust in the amount of $500,000, to provide a "substantial income" for the applicant as well as providing capital to which the trustees of the fund could have recourse if necessary.

Legal practitioners drafting wills should take particular care to explain to a testator his or her obligation in relation to an incapacitated son or daughter, and to dispel suggestions that care or social security arrangements which have prevailed to date, either through informal family arrangements or public support, will necessarily obviate any need for special provision in the will.

In particular, we should be aware of the complex consequences gifts may have on the ongoing social security income of the incapacitated beneficiary, depending of course on the size of the potential estate, and the variety of available options to provide for incapacitated dependents should be fully canvassed with the testator.

A second continuing and increasing trend identified by the Official Solicitor rests in the fear that in estates administered outside the Public Trust Office, applications for provision for a child with an incapacity, which should be made, are not made. Often the executor of the estate will uniquely have the requisite knowledge to advance such an application.

In relation to minors, the New Zealand Court of Appeal, in *Re Magson* (1983) NZLR 592, 599 observed, of an estate administrator's duty (per Cooke J):

> "Although an administrator is not necessarily bound to apply on behalf of a minor ... in a clear case we think such a duty would arise."

In *Vasiljev v Public Trustee* (1974) 2 NSWLR 497, 504, Hutley JA said an executor was bound "to protect the interests of the infant to the full".

Analogously, a duty may be felt to arise in relation to an incapacitated adult.

But this situation is riven with potential conflict. That is because the executor will often be an adult sibling of the incapacitated brother or sister. The adult children with capacity will frequently benefit from the estate to the exclusion of their disabled brother or sister. Also, the incapacitated child's paraclete or representative – an informal decision-maker under s 9 of the *Guardianship and Administration Act* 2000 or an administrator appointed by the Queensland Civil and Administrative Tribunal (s 12 *Guardianship and Administration Act* 2000) – will often be a brother or sister who otherwise benefits from the will.

Again, there is an obligation on lawyers involved in the administration of such deceased estates to take steps to ensure that these conflicts do not prevail with the consequence that applications for provision which should be made are not made.

I turn now to my second subject, the impact of aged care on the content of wills.

Novel contemporary conditions

Another trend associated with the ageing population I discussed last year was the increasing recourse to nursing homes, specifically, the more widespread use of "accommodation bonds" to secure places in such facilities.

These bonds may be of substantial amount, typically in the hundred of thousands of dollars, with the amount refunded (subject to certain deductions) upon the resident's death

or departure from the home. And unsurprisingly, the parent loses not only the fund in the interim, but also its income earning potential.

A difficult situation in relation to such bonds arose before me in a testamentary situation in the case of *Helmore* (1888/2007), in which judgment was given on 26 November 2007.

A 90 year old husband died, survived by his widow and six children. He left an estate available for distribution worth approximately $340,000. By his will, he provided a legacy of $30,000 for the widow, and carefully disposed of the balance of the estate in favour of the children. On a family provision application, I considered the $30,000 allowed for the widow to be inadequate, and increased that sum to $120,000. But the wrinkle in the case concerned an accommodation bond.

The deceased made his will only 10 months before he died. At that time, he and his wife were living together in a house at Jacob's Well. "Jacob" fell "ill". Eight months later, the deceased moved into an RSL nursing home on a high care basis. His wife also moved in, on a low care basis. She was obliged to pay an accommodation bond to the tune of $185,000. It had not been paid by the time of the husband's death. By the time the case came before me, the widow was suffering considerable distress because of the uncertainty of her living situation.

The widow's counsel submitted I should order that the amount of the bond be paid from the deceased's estate to the widow outright. But that would have meant that on her death, what was left of it would pass to her beneficiaries. Having determined that apart from the increase in the legacy to $120,000 her remaining needs were limited to securing the bond, I ordered that the will be varied to provide:

> "Upon my wife ... executing and delivering to my executors an assignment of her entitlement to a refund of the accommodation bond payable under her residential care agreement ... I direct my executors to pay forthwith the

> balance accommodation bond payable under that agreement as if it were a liability borne by me."

A lawyer advising the 90 year old husband in making that will should probably in these times have canvassed with him mechanisms for the posting of such bond moneys should the need arise upon entry to such a facility by either of them.

Another unique situation involving retirement accommodation arose before the Supreme Court this year, in *The Trust Company Ltd & Anor v Zdilar & Ors* [2011] QSC 5.

Two years before her death, the testatrix had sold her house and moved into a unit in a retirement village. Under the sub-lease, she paid an "ingoing contribution" of $312,000, as an interest-free loan. Upon her death, the operator became obliged to pay to her estate an "exit entitlement" of $274,840, effectively the amount of the "ingoing contribution" minus an exit fee, calculated by reference to the resale value of the unit.

The question for determination was whether the testatrix "owned" the unit as a "substitute house property" for her original house at the time of death. If so, the proceeds from the disposition of the property were a specific gift to her grandchildren; if not, they fell into residue, to which her great-grandchildren were entitled.

After considering the authorities and dictionary definitions of the disputed terms, Justice Margaret Wilson doubted that the unit in the retirement village would have fallen within the description of "substitute house property". Moreover, Her Honour held it was not a property "owned" by the testatrix when she died, because of her limited rights in relation to the property, contrasted with her rights at the time of drafting the will: she then owned a property in fee simple.

The opposite result ensued in the Victorian case, *Re Blake Dec'd* [2009] VSC 184, where an alternative form of words had been used: the testatrix made a specific gift of "any other

accommodation facility occupied by me as my residence at my death". The case was immediately distinguishable on the basis the will had been made by the testatrix while living in a retirement village, and while she had subsequently moved to a nursing home (using the "sale proceeds" from the retirement village to pay the accommodation bond), that form of words showed a "clear intention…to ensure that the gift did not fail in the event of her moving to another facility".

Lawyers take note of these increasingly various ways of funding the accommodation and care needs of the elderly. It is important that you clearly understand your client's intentions in making specific gifts of property, and give appropriate advice on the drafting of gifts to ensure that, if appropriate, the gift covers entitlements to be paid upon death by retirement or nursing homes.

I move now to the third matter, the level of further provision.

Family provision applications : quantum of awards

In their well-used text, Dr de Groot and Mr Nickel mention (pages 5-6) the view expressed by the editor of the Australian Law Journal in 1941, referring to testator's family maintenance legislation, that "Dominion Equity judges had given the jurisdiction here a settled body of practice which made it possible to advise clients with accuracy as to claims under the legislation". The authors' own view was that the editor's sentiment represents "the triumph of hope over experience". And they add that "even with the wealth of decided cases (both reported and unreported) that are accessible today, outcomes cannot be predicted with precision."

Family provision applications are these days frequently compromised, subject to the sanction of the Court. That may suggest either a sufficiently marked out playing field, from which one may discern the likely result of any court adjudication, or, on the other hand, an unpredictability which militates in favour of compromise.

Whatever the true position, there is in fact a rather limited raft of current precedents, in consequence of the frequency of mediated resolutions. This would ordinarily mean that lawyers giving advice these days could not draw on a comprehensive bank of up-to-date prior jurisprudence when considering likely outcomes. But this is quintessentially an area where the outcome depends on the facts of the particular case, and the discretion of the Court is very broad. Importantly, the underlying principles have remained constant over many decades, most recently affirmed by the High Court in *Vigolo v Bostin* (2004) 221 CLR 191.

A case illustrating the breadth of the discretion, drawn from my own work, is *Goold v Field* [2005] QSC 310, in which I gave a decision on 25 October 2005. The case also illustrates the poignancy, if not tragedy, which invariably attends these situations.

The 43 year old applicant was the only child of her deceased mother, a daughter. During the applicant's infancy, the mother demanded that her father leave and take the child with him. The applicant was eventually confined to an orphanage and foster homes until she reached the age of 15. She made repeated attempts to make contact with her mother which were always rebuffed. She implored her grandmother to act as an intermediary, but the grandmother declined, lest her daughter cut off all contact with her own parents.

The estate was worth approximately $450,000. With a minor exception, the deceased left all of it to her next door neighbour. That neighbour had thought the deceased always intended that he purchase the property from her estate upon her death, so would have been surprised at the provision made for him, which he did not seek to sustain.

The applicant lived a life of substantial deprivation. She occupied a barely habitable one bedroom former worker's cottage "left over" after the construction of the Somerset Dam. She drove an unreliable 1964 model car. She had few assets. Her health was in a parlous state. Outstanding dental treatment alone would cost of the order of $40,000.

Counsel for the executor, urging circumspection, submitted that there being no competing claims, an award should not exceed 40% to 60% of the available estate, and he referred to previous judicial observations to that effect. As it turned out, I ordered that three quarters of the estate pass to the applicant.

Awards in favour of intellectually and otherwise disabled applicants have become more appropriately generous over the last decade. Likewise there is generally, I suggest, an increasing acceptance that where need is identified, it should be satisfied so far as the size of the estate and other competing demands allow. In short, the stipulation against the "rewriting" of the will does not condemn the court to parsimony.

I move now to my second subject, the regularisation of irregularly executed wills, in the course of which I will say something of the operation of the Supreme Court's Probate Registry.

The validity of purported wills irregularly made

The requirements for the due execution of a will were substantially simplified by amendment of the *Succession Act* operative from April 2006. A major improvement was the removal of the long-standing requirement that a signature be applied at the "foot or end" of the will, a requirement which had produced a welter of case law, with its apogee, or perhaps more appropriately nadir, on one view reached in *Smee v Bryer* (1848) 1 Rob Ecc 616; 163 ER 1155. I can make my point by reading the headnote for the case as reported in the English Reports:

> "A holograph will, in which an executor was appointed, and the residue disposed of, being written on three sides of a sheet of paper, ended on the third side, leaving eight-tenths of an inch of that page blank; the signature of the testatrix was not placed there; the upper part of the fourth page was

> in blank (for which a reason was assigned), and more than half-way down that page, opposite to the attestation clause (for which clause there was not space on the third page), her signature was placed. It was held that the will was not signed "at the foot or end thereof," that it ought to have been signed at the bottom of the third page."

It was that absurdly narrow approach which is said to have led the frustrated Sir Edward Sugden, first Baron St Leonards, to promote as Lord Chancellor what became known as the liberalizing "Lord St Leonards' Act". The even more liberal position we have now reached in Australia exhibits a level of common sense of which the early English jurisprudence was utterly devoid.

That Lord St Leonards, many of us may recall from Tony Lee's lectures, was the otherwise fastidious testator who managed to lose his own will, the complicated contents of which were proved after his death by the oral testimony of his daughter who knew it "by heart" (*Sugden v Lord St Leonards* (1876) 1 PD 154). When I say His Lordship lost his will, there was I think the possibility it had been stolen from its repository.

In any event, the subject on which I briefly touch in this address is the commonsensical dispensing power introduced by s 18 in 2006, replacing the previous stipulation for at least "substantial compliance" with the formal requirements. Under the new current provision, the Court may declare a document or part of a document constituted the deceased person's will simply if satisfied that "the person intended (it) to form the person's will".

The 2006 amendments brought Queensland into line with the legislative position in the other States and Territories. The beneficially broad scope of the provision may be gathered from the variety of documents admitted to probate.

These have included:

- an unwitnessed hand-written note on the reverse page of a diary[7];
- an unsigned will prepared for the testator but inadvertently signed by his wife[8];
- suicide notes[9];
- unsigned photographs[10];
- computer files;[11] and even
- audio tapes.[12]

While as yet there are no authorities, it seems that video tapes and recordings, such as made on a mobile phone or perhaps even posted on Youtube, could also be considered a "document" and admitted to probate.[13]

In Queensland this year, there has been one published decision relating to section 18: *Mahlo v Hehir & Ors* [2011] QSC 243. The document was in electronic form: a Microsoft Word document entitled "This is the last will and testament of Karen Lee Mahlo.docx". While that was considered a document of the kind which could be a will under s18 (1), the plaintiff was ultimately unsuccessful in having it admitted to probate. It could not be demonstrated the testatrix intended it to form her will. The testatrix had taken the further step of printing and signing the physical copy of that document, and she had subsequently described that paper document as "her will". As the paper document could not be found, the electronic document could not be admitted as a will; an outcome described the trial

[7] See *In the Estate of Stephen Windus Deceased* [2007] QSC 391
[8] See *In Estate of Blakely* (1983) 32 SASR 473.
[9] See for example, *Public Trustee v Alexander* [2008] NSWSC 1272 and *Ryan v Kazacos* (2001) 183 ALR 506.
[10] In *Estate of Torr* (2005) 91 SASR 17 unsigned photographs of personal property were admitted to probate as a codicil to the will of the testator.
[11] See *Re Trethewey* (2002) 4 VR 406.
[12] *Treacey v Edwards* (2000) 49 NSWLR 739.
[13] See *Treacey v Edwards* (2000) 49 NSWLR 739 where despite clearly not satisfying the requirement of "writing" for the purposes of the normal formalities, an audio tape was considered a "document" for the purposes of the dispensing power. Emphasis was placed on s21 of the *Interpretation Act* 1987 (NSW) which defines a "document" as "anything from which sounds, images or writing can be reproduced with or without the aid of anything else". Thus, whether a video recording is considered a "document" will depend largely upon the interpretation statutes in each jurisdiction. It is, however, worth noting that in Queensland section 36 of the *Acts Interpretation Act* 1954 contains a similar definition of "document" to that in s21 of the *Interpretation Act* 1987 (NSW).

judge as "far from satisfactory, because according to the evidence and my findings, Dr Mahlo made a document which she intended to be her will". The decision is under appeal.

Another potential application of section 18 is where the testator has signed the wrong will. In a recent case from the UK, *Marley v Rawlings & Anor* [2011] EWHC 161, a husband and wife had each mistakenly executed the other's mirror will, rather than his or her own. The sole beneficiary, the couple's adoptive son, who stood to lose the entire estate, brought an application for rectification under the *Administration of Justice Act* 1982 (UK) on the basis it involved "clerical error". The application was refused, on the ground that although the term "clerical error" bears a wide meaning, it could not extend beyond rectifying incorrect drafting of the will, with Justice Proudman commenting that "much as I regret the blunder, I cannot repair it". No doubt the solicitors responsible for the blunder were also regretful, as since the application did not succeed, the beneficiary would be pursuing his claim against them.

That case highlights the importance of diligence in execution – although, as I foreshadowed, it is arguable that in Queensland section 18 may offer relief in such circumstances. Similar provision in South Australia was held adequate to rectify the error (*In the estate of Hennekam (dec'd)* [2009] SASC 188). However, the previous "substantial compliance" provisions of the *Succession Act* were held not to validate such a will (*Re Goward* [1997] 2 Qd R 54), and the new amendments have yet to be tested in this area – it is still obviously best to avoid the need for court intervention, and for practitioners to ensure adequate and accurate execution to ensure there are minimal delays in the administration of the estate.

I speak later of the sensitivities which potentially arise in the administration of deceased estates. One very practical consideration, especially sensitive because it falls so proximately upon the death, concerns securing a grant of probate, and for that purpose, a certificate of death. Financial institutions will ordinarily require a grant of probate before

allowing access to the deceased's accounts. Any undue delay will occasion not only inconvenience, but often serious emotional distress at a time of great vulnerability.

In that context, I say a little now about the work of the Probate Registry in the Supreme Court.

In the 2009-10 financial year, the Registry processed 6779 grants of probate and 760 grants of letters of administration. That reflected a 26% increase in grants of probate and a 36% increase in grants of letters of administration since the year 2006. Much of the increase has resulted from applications made at the behest of organisations holding a bond, such as nursing homes, as a pre-requisite for the release of the bond moneys. The Registry has sought to meet this increased demand by streamlining administrative processes, to facilitate faster response times. The Registry aims to enter and store all relevant application data in the probate case management system within two working days of a filing for probate, and issue the grant within the ensuing 10 working days. The Registry is currently achieving those time goals. Interestingly, 24% of deaths recorded in Queensland in the last two financial years have resulted in succession law applications made to the Court.

Earlier in the year, I received a letter from the QLS President identifying a number of problems for practitioners in dealing with the Probate Registry. I will tell you of my responses to those concerns.

The first concern was delay in the processing of probate applications, with some practitioners reporting delays of up to eight weeks. In 2011, processing timeframes have not exceeded six weeks. The long standing practice has been that, where a stamped addressed envelope is provided in accordance with Rule 969, the relevant documents and order will be posted to the practitioner when available. If that envelope was not supplied, it was assumed that notification was not required and that the firm would regularly check eCourts and attend the Registry to collect the grant when available. It appears this often

resulted in orders and documents remaining uncollected for lengthy periods feeding the perception of even longer delays, especially where Town Agents were involved.

The Registry has now commenced emailing practitioners when probate is ready for collection. It would be beneficial for all practitioners to include email addresses with the initiating application, pursuant to Rule 17(3).

While the President also raised concerns about inconsistencies between the actual filing date of the probate application and that recorded on the eCourts database, I am pleased to advise that the current operation of eCourts is such that all probate information will be available on eCourts within 24 hours of the document being filed. The Registry is also working towards providing monthly updates on expected processing times for probate applications through the Courts' website.

Finally, the President detailed the difficulties some practitioners had with unusual requisitions by the Registry, in particular in relation to:

- the use of old forms; and
- the provision of further affidavit material relevant to Practice Directions 25/99 and 32/99 (publication of Notices of Intention to Apply for Grant)

Requisitions on these grounds were not issued unless there were also other requisitions relating to that probate application.

As the new forms were only approved on 28 February 2011 the Registry has been accommodating in not requisitioning matters where the application is otherwise in order. I would not expect the Registry to continue this accommodating practice.

Under Rule 599(3)(b) Notices of Intention to Apply for Grant must be published (if the deceased's last known address is less than 150km from Brisbane) in a newspaper

circulating throughout the State (The Courier Mail or the Australian) or a newspaper approved by practice direction for the area of the deceased's last known address.

The Registry not uncommonly receives affidavits deposing to the publication of notice within 150 km which do not rely on Rule 559(3)(b) but instead Rule 599(3)(a) which provides only for services outside the 150km radius. In these instances the Registry would reasonably requisitions for an additional affidavit pursuant to Rule 599(3)(b).

One of the major potential problems besetting the quick turn-around of probate applications is delay when the cause of death is unknown and has to be determined by autopsy. Where this occurs, the Registry of Births, Deaths and Marriages issues a certificate without nominating a cause of death, and the Probate Registry must requisition any probate application pending the resolution of that issue. Currently, 1 in 6 probate applications are being requisitioned by the Registry for that reason.

I believe that given the large and increasing number of probate applications annually received by the Registry, despite difficulties in some particular cases, probate applications are being handled in an overall quick and efficient manner. This processing could be even further improved with the co-operation of practitioners in the ways I have mentioned.

I move now to my final subject, the Court's capacity to make wills for persons without testamentary capacity.

Court made wills

Provisions empowering the Court to authorise the making, alteration or revocation of a will for a person without testamentary capacity, including minors, were introduced into the *Succession Act* in the year 2006.

Among other matters set out in a carefully crafted raft of provisions, the Court must be satisfied that "the proposed will, alteration or revocation is or may be a will, alteration or revocation that the person would make if the person were to have testamentary capacity" (s 24(d) *Succession Act* 1981). Other provisions are designed to ensure that a court called upon to make that apparently difficult judgment proceeds from a comprehensively informed platform.

The reference to a will which is "or may be" a will the person would make, assuming testamentary capacity, allows the Court an interesting degree of latitude. Some cases may be clear enough to allow the Court to reach a conviction that the proposed will is the one the incapacitated person would have made. Otherwise, the Court would need to be satisfied that the proposed testamentary disposition is within the range of disposition that the person would (not could) have made.

In discussing this topic last year in the WA Lee Equity Lecture, I mentioned there had been six instances of court-ordered wills thus far in Queensland: *Payne* [2010] QSC 45, *Deecke* (2009) QSC 65, *Weick* (7033/2009), *Joachim* (12325/2008), *Winstanley* (11203/2007), and *Bock* (8794/2010).

This year, as far as I am aware, there have been three more: *Hickson v Humphrey* (384/2011); *Re Keane; Mace v Malone* [2011] QSC 49; and *McKay v McKay & Ors* [2011] QSC 230.

The case of *Re Keane; Mace v Malone* [2011] QSC 49 is significant as the first (and thus far only) case in Queensland where an application for the making of a statutory will was refused. The applicant, Josephine, was the sister of Patrick, the proposed testator, who was aged 91 and lacked testamentary capacity.

The significant and distinguishing feature of the case was that Patrick had made a prior will when he had capacity, and the proposed will would have "completely change[d] Patrick's

testamentary dispositions" from benefiting his sister Mary's family to benefiting Josephine and Joan (his other sister). The applicant submitted the changes were justified because of family events which had occurred since the prior will had been made. The principal beneficiary of his prior will, his sister Mary, had misused her power of attorney in improperly transacting with Patrick's property.

In determining to refuse the application, being "far from satisfied that Patrick would adopt such a retributive approach", Justice Daubney held that consideration of section 24 (d) should be informed by the five principles articulated by Sir Robert Megarry VC in *Re D* (1982) 1 Ch 237, 243-4, in relation to the corresponding English legislation.

His Lordship there proposed a five-stage consideration: first, assume the patient is having a brief lucid interval when the will is being made; second, assume the patient then has a full knowledge of the past, and a full realisation that as soon as the will is made, he or she will relapse into the incapacitated state; third, consider the position of the actual, not a hypothetical, patient; fourth, assume that during the lucid interval the patient is being advised by a competent solicitor; and fifth, envisage the patient "taking a broad brush to the claims on his bounty, rather than an accountant's pen".

In my paper last year, I suggested there was much to commend that practical approach.

These principles have subsequently been criticized in the UK, as stipulating a "highly artificial" procedure requiring the Courts to perform "mental gymnastics"[14].

In Australia, Justice Palmer of the NSW Supreme Court offered robust criticism in *Re Fenwick* (2009) 76 NSWLR 22, the first New South Wales decision dealing with statutory wills. He criticised the approach of *Re D* as establishing a "substituted judgment approach", requiring the court to impute an actual dispositive intention to a person who

[14] *Re P* [2010] 2 WLR 253 at 264 [38] per Lewison J.

was never able to form any intention at all. He argued that what was occurring was that the court was not actually imputing the intention of the patient, but what a person, "doubtless a reasonable person", in that position would do. He suggested this approach had come to be applied in a way which amounted to the Court's objectively assessing what a reasonable person with testamentary capacity would do in the circumstances applying to the patient.

That judge said that approach would be "inconsistent with contemporary ideas about mental health", and rather reverted to the approach of the old lunacy cases in doing what the patient would have done for himself or herself.

This sort of criticism led to statutory changes in the UK in 2005, so that the overarching governing principle is that decisions made on behalf of incapacitated people must be made in their best interests, rather than substituting the Court's judgment for the person and inquiring what the person would have decided if with capacity: rather, it requires a determination by applying an objective test of what would be in the person's best interests.

While it may be interesting to consider the procedure adopted in other jurisdictions, in Queensland, the relevant criterion under s 24(d) is whether "the proposed will ... is or may be a will ... that the person would make if the person were to have testamentary capacity." Accordingly, in line with the approach of Daubney J in *Mace v Malone*, the statutory provision in Queensland may best lend itself to application in line with Megarry VC's approach in *Re D*.

The Queensland provision is, as I have previously remarked, unique when compared to the statutory formulation in other states, which often require the Court to have regard to whether the proposed will is "likely" or "reasonably likely" to be one the person would have made if possessed of testamentary capacity[15].

[15] Cf *Succession Act* 2006 (NSW) ss 18-26; *Wills Act* 1936 (SA) s 7; *Wills Act* 1997 (Vic) ss 21-30; *Wills Act* 1992 (Tas) ss 27A-27I, 48A; *Wills Act* 2000 (NT) ss 19-26.

One commentator, on the introduction of these provisions in Australia, remarked that they would create "an interventionist, paternalistic jurisdiction" contrary to the Anglo-Australian tradition of courts protecting and upholding testamentary freedom[16].

However, the assets of incapacitated individuals, as with all members of society, may not be most suitably distributed under the standard intestacy provisions, and without the provisions for statutory will making, those people would be "permanently deprived of the opportunity to determine how their estate should vest on their death."[17]

My decision in *Hickson v Humphrey* (384/2011), given in April this year, illustrated how distribution upon intestacy may be patently inappropriate. The applicant was the mother of an impaired young woman, Jessica. Jessica's parents had been separated for a number of years. Her mother had moved to Cairns from Brisbane with Jessica and her sister, adopting all responsibility for Jessica's care, and had been granted sole custody by a Federal Magistrate. The father opposed the application for a statutory will. He primarily contended that a litigation guardian should be appointed for Jessica. He also contended that no will was necessary, or that his proportion should be raised from 10 to 30 per cent, or that the entirety or part of the residue should go to charity.

I found that none of those positions was appropriate. A litigation guardian would not have been appropriate simply because Jessica could not give instructions. A will needed to be made because of Jessica's considerable assets, and because a distribution upon intestacy would be inappropriate in the circumstances which had developed in relation to her care. Accordingly, I was satisfied that the proposed will giving the lion's share of the residue to the applicant may be, in terms of the legislation, a will Jessica would have made were she possessed of testamentary capacity.

[16] Neville Crago, 'Reform of the Law of Wills' (1995) 25 *Western Australia Law Review* 255, 258.
[17] Robert D Nicholson, 'Waving the Magic Wand: Solving Key Legal Issues Relating to Intellectual Disability' (1995) 2 *Journal of Law and Medicine* 270, 285

Judicial intervention in this area of the law is fundamentally important in allowing incapacitated persons the same testamentary freedom of disposition, albeit "imagined" by the Courts[18], as all other members of society.

Conclusion

I now seek to draw these themes together.

The legislative amendments giving the Court an extensive power to dispense with the need for compliance with formal requirements in the making of wills, and giving the Court the important power to authorise the making of wills for incapacitated persons, grew out of the Uniform Succession Laws Project. That was a mammoth 14 year exercise initiated by the Standing Committee of Attorneys-General in 1991, designed to achieve national consistency through uniform succession legislation. Significantly, the National Committee which directed the project was co-ordinated by the Queensland Law Reform Commission. The amendments to which I have referred this morning were two of a range including many others. They reflect, I suggest, a measured though appropriately progressive legislative response in a particularly sensitive area of human life.

In referring to the raw sensitivity of this area, I have in mind a spectrum of concerns: the dismay and disappointment of surviving family members at perceived poor treatment, sometimes vindictiveness, on the part of a deceased testator; the potential fracturing of relationships among siblings through claims which can lead to protracted and expensive litigation; at the anterior will-making stage, the range of motivation of the errant testator, from fecklessness to unkindness to venom; the disquieting uncertainty, for those left behind, whether an apparent expression of testamentary disposition will be rejected as just too informal; then there may be the careless or even, regrettably, callous disregard of some testators towards vulnerable and disadvantaged family members; and even at a

[18] R Croucher, 'Statutory Wills and Testamentary Freedom – Imagining the Testator's Intention in Anglo-Australian Law' (2007) 7(2) *Oxford University Commonwealth Law Journal* 241.

very practical level, the potential for major disruption and personal deterioration through delays and uncertainties in the issue of death certificates and grants of probate.

The legislative scheme seeks to work through that potential minefield in a sensitive way, with a view to securing good social outcomes, and I believe it does so effectively, addressing reasonable contemporary expectations, one of which is, of course, relative freedom of testamentary disposition, but subject to proper provision for one's needy survivors; another being avoiding undue formalism in determining what is or is not a "will".

The legislation works because of the carefulness applied in its implementation by the courts. But that should be seen as building on what has gone before, by way of administrative governmental response to a death, and the advice tendered to surviving family members and other interested parties both privately and through the public agency.

I have referred today to the important role of the private legal profession in tendering good advice to prospective testators, and in the administration of deceased estates. This is the occasion to acknowledge, as well, the great utility of the work routinely accomplished with vitality by the Public Trustee of Queensland and within the Probate Registry of the Supreme Court.