STEP QLD Trusts and Estates Conference
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The Hon Catherine Holmes
Chief Justice

May I congratulate you in working in one of the great growth areas of the profession. Our statistics show that the number of applications for probate has risen by 23% in the last four financial years and the rate of increase is actually accelerating. That is not a bad indicator of the amount of estates work that is around. You could only be in a more active area if you were doing crime, the number of lodgements having doubled over the same period.

On a more anecdotal level, I might say in sitting in the applications court this year for the first time in a decade, I have been staggered by the number of succession related applications, I seem to have done almost nothing else. I had a civil trial last Friday and it was someone claiming that a will had been wrongly admitted to probate through a mistake of fact. Some of this is new to me at a practical level; the statutory will provisions and the power to dispense with execution of a will altogether, because they came with amendments to the *Succession Act* in 2006, at about the same time I was appointed to the Court of Appeal. Having studied Succession Law in the 1970s, when such attention was paid to the catastrophic results of any departure from execution requirements, the new s18 approach comes, as you can imagine, as something of a shock to me.

But what strikes me more about this jurisdiction, and I'm indebted to an article of Professor Rosalind Croucher's[1] for stimulating my thinking about this, is how we have moved from the 19th century liberal concept of testamentary freedom which underpinned the first significant legislation, the *Wills Act* passed in 1837. It combined the devise and testament into the single will and enabled a testator in one document to dispose of all his property, including what he had yet to acquire.

Consistent with the views of Locke, Bentham and John Stuart Mill on the absolute nature of the rights of the property-owner, Cockburn CJ in *Banks v Goodfellow*[2]*,* the seminal case on testamentary capacity, said this about testamentary power and property:

> The power of disposing of property in anticipation of death has ever been regarded as one of the most valuable of the rights incidental to property…the English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of the general law.

Fun fact: I don't know much about Sir Alexander Cockburn's caprices and passions, but I do know that Queen Victoria refused him a peerage on the ground of his notoriously bad moral character.

[1] Rosalind F. Croucher. 'How free is free? Testamentary Freedom and the Battle between 'Family' and 'Property' (2012) 37 *Australian Journal of Legal Philosophy* 9.
[2] (1870) LR 52B 549 at 564.

I am very fond of 19th century literature, and so many of the novels of that period turn on will plots – the testator's use of his will as a mechanism for dispossessing the deserving, as in Emily Bronte's *Wuthering Heights,* or as an exercise of testamentary power to control his heirs, as in Dickens' *Our Mutual Friend* and George Eliot's *Middlemarch. Middlemarch* is my favourite novel, and in it the miserable old husband of the heroine, Dorothea, makes a will which disinherits her entirely if she marries a particular impoverished man. She does, and she is. None of these novels would work today. The heroes and heroines who missed out would simply apply for family provision, the dispossessing effects of the will would be overridden and the plot twist would be gone.

There can be no doubt that availability of family provision under statute has done a great deal to diminish the notion of testamentary freedom. That erosion began in Queensland in 1914 with the *Testator's Family Maintenance Act*, being stepped up considerably with the *Succession Act* 1981*,* which expanded the categories of people who could apply for provision beyond the spouse and children of the deceased.

I can point to no better illustration of how a testator's wishes can be defeated than the decision in *Mead v Lemon*[3] in Western Australia last year, in which the plaintiff seeking family provision was the daughter, through an extra-marital affair, of the deceased. Himself the son of Lang Hancock's mining partner, he'd left a very large estate, about $400 million, to the two daughters of his first marriage. But he had set up a $3 million trust for her which would vest when she was 30, provided she had not become involved with illegal

[3] [2015] WASC 71.

drugs, or become an alcoholic, or been convicted of a felony, or joined a non-traditional church. (That kind of beyond-the-grave control is right out of a 19th century novel.) The testator was at pains to point out in his will that, given his past financial support and his setting up of the trust for the girl, he considered that he had properly provided for her.

The trial judge, in fact Master Sanderson of the Supreme Court, did not think so, so it fell to him to make an order for adequate provision. The plaintiff was 19 years old. In identifying what she would need, at a total cost somewhere between $15 and $20 million dollars, she specified, among other things, a $1.5 million concert grand piano, a bass guitar worth $250 000, $30 000 annually for shoes and pets – a dog, a rabbit, a ferret and an axolotl, otherwise known as a Mexican walking fish, which would each cost on her estimate several thousands of dollars per year to maintain, although the axolotl, which would live in a tank was cheaper, only about $2000 per year. I think she had a sense of humour.

Master Sanderson regarded these aspirations as unrealistic, but he nonetheless gave her $25 million from the estate, more than she'd asked for, to be paid within 60 days. He said that the testator could have distributed his assets while he was alive, he knew that he had terminal cancer, but instead he chose to avoid gift duty by giving his estate by will. The price he paid was acceptance of the statutory duty of adequate provision for his dependent illegitimate daughter. And, reassuringly, Master Sanderson pointed out the upside for the two existing beneficiaries who'd fought the application. They would be able to rest easy in the knowledge that their half-sister would be

financially secure for the rest of her life. He may have a sense of humour of his own.

So the testator's wishes in that case, so Victorian in their expression, were over-ridden to the considerable advantage of a young millennial. Chief Justice Cockburn may not have been impressed by what the rules of the general law achieved there. Although to do him justice, I should tell you that, never having married, he did leave most of his estate to his illegitimate son, without any conditions so far as I know. On the other hand, his illegitimate daughter missed out, but she was safely married.

I think an even more radical change is the ability of the court not merely to override the testator's intention, but to decide what a testator's intention would be under the statutory will provisions. That contrasts with the fact that the testator's power to dispose of his property by will has always been regarded as something which could not be delegated: *Lutheran Church of Australia v Farmer's Cooperative Executors and Trustees Ltd*[4]*.* The notion of the court making or altering a will for somebody without testamentary capacity would, I think, astound our forebears. As you know, it turns on the premise that the proposed will or alteration is or may be one that the person would make if he or she had capacity.

One of the most interesting of the Australian cases in this area is *re Will of Maria Korp*, *de Gois v Korp*[5]*.* Mrs Korp was strangled and left for dead by allegedly her husband and certainly his mistress. Six months afterwards, Mrs Korp remained in a coma, and her life support had just been turned off; the

4 (1971) 21 CLR 628.
5 (2005) VSC 326.

mistress had pleaded guilty to attempted murder, possibly in some haste so as to avoid a murder charge; and the husband faced a committal hearing. Mrs Korp's children sought the court's approval of a will removing the husband as executor and sole beneficiary of the estate, instead leaving it to them. Under the original will, they were to benefit if the husband predeceased their mother. The judge hearing the application found it inconceivable that Mrs Korp would not have excluded her husband from her will had she had been able to do so. That was so even though he hadn't been convicted: he'd had an affair, he'd been charged, the evidence supported his complicity in the attack. The postscript, for which I'm again indebted to Professor Croucher[6], was that Mrs Korp died four days after the court heard the application and altered her will, and her husband killed himself the day after her funeral.

The closest local case to the *Korp* decision, much less dramatic, was *VMH v SEL*[7] decided by Justice Jackson earlier this year. It concerned a 91-year-old woman who had lost testamentary capacity. She had a friend and carer to whom she had made some large gifts in her will. She had trusted him to make withdrawals from her bank account and he helped himself. Sorting out the will she would have made was a complicated process for other reasons, but one of the easier decisions for the judge was that she would not have intended to leave anything to this man if she had known that he was stealing from her.

The statutory will jurisdiction is an odd one, of deciding what the testator's actual intention would have been, which can usually be discerned if you have someone who has made a will before becoming incapacitated, or at least

[6] Rosalind F. Croucher. 'Statutory Wills and Testamentary Freedom: imagining the testator's intention in Anglo-Australian law' (2007) 7(2) *Oxford University Commonwealth Law Journal* 241.
[7] (2016) QSC 148.

been of sound mind and expressed views; but the greater difficulty is arriving at any view for someone who has never had capacity. There is no authoritative view in Queensland as to whether one operates on the basis of what a reasonable person would have done in the circumstances, or what this person would have done in the circumstances, and perhaps it doesn't make much difference. Either way there's an element of 21st century legal fiction. It's an insertion of the judge into the position of the testator that our 19th century forerunners would never have countenanced.

So I say in observation, not criticism, we have moved a long way from the patriarchal approach, because usually it was a male testator, that the individual should have sole unfettered power to decide where his property should go, moral claims notwithstanding, to a position where the State through the judiciary often decides what should happen. All of which must be grist to your mill as practitioners in succession law.