A BOOK REVIEW BY REBECCA TRESTON QC

"STATUTORY WILL APPLICATIONS – A PRACTICAL GUIDE" BY RICHARD WILLIAMS AND SAM MCCULLOUGH

As Justice Thomas Gray records in the forward to "Statutory Will Applications – A Practical Guide", it is rare for there to be a dramatic development in the field of succession law, but the jurisdiction to make statutory wills is such a development. This scholarly text on statutory wills (sometimes loosely referred to as court ordered wills), gives the reader even more than it sets out to provide. Certainly it is a useful, practical and helpful guide for practitioners delving into this relatively new area of the law. However it is also a comprehensive examination of the legislative development of the law throughout Australia accompanied by a thorough examination of the published cases.

The need for a statutory will or codicil arises in circumstances where the testator does not have capacity to make a will or codicil for themselves. The most frequent examples are those of persons who have lost capacity by virtue of an accident or injury or those persons who have lost capacity through the onset of dementia.

A typical example of the former is *Bock v Bock*,[1] where a young man, aged 14, suffered severe brain damage as a result of medical misadventure. His damages claim was settled for approximately $5.375M. Had he died without a will, his estate would have passed on intestacy equally between his mother and his father. The evidence however demonstrated that his father had had little contact with him over the years, whilst his mother was devoted to his fulltime care. A statutory will substantially favouring his mother over his father was made. In the latter category *Re Estate of S*[2] is an example of a successful application for a statutory will on behalf of a testator with dementia. The court was satisfied the testator's circumstances had changed since her last will in 1955, and a new will was therefore ordered.

Naturally, more sensational factual circumstances can also give rise to the need for a statutory will. Take the case of *De Gois v Korp*[3] where Mrs Korp's body was found in the boot of her car, and her husband and his mistress were charged with her attempted murder. Whilst she remained alive although in a persistent vegetative state, her daughter made an application for a statutory will on the basis that if one was not made, one of her alleged murderers, her husband, would take on intestacy.

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1 *Bock v Bock* (unreported, Supreme Court of Queensland, No. 8794 of 2010, de Jersey CJ, 23 September 2010); *McKay v McKay* (2011) QSC 230 per Anne Lyons J.

2 [2012] NSWSC 1281.

3 [2005] VSC 326.

These cases and many more are set out at length in this most helpful text.

The text commences with an overview of the origins of the jurisdiction in England and Wales from 1959 and importantly the legislative changes which then occurred expressly confirming that the power to do all things necessary and expedient with respect to the property and affairs of a mental health patient extended to the making and execution of a will. The authors then examine the development of the "substituted judgment" approach which developed at common law[4] and the practical problems which attended such an approach,[5] ultimately leading to a structured decision making process with a new focus on the person's "best interests".[6]

The text then follows the process of law reform throughout Australia which ultimately led to the introduction of the power to make statutory wills throughout the country.[7]

A detailed examination of the statutory framework has been carried out on a State by State basis by the authors. Whilst the provisions throughout Australia are broadly similar, the text identifies some of the subtle differences from State to State. The learned authors examine these differences and identify the developing jurisprudence in each jurisdiction by reference to the statutory idiosyncrasies. This is a most helpful discussion for practitioners in all jurisdictions to assist their understanding of the nuances of the decision making in different jurisdictions.

Every practitioner considering the making of a statutory will application to the court would benefit from the comprehensive checklist of matters about which evidence must be obtained before bringing such an application; this is found in Chapter 4. An example of such practical advice is the discussion as to whom is the most appropriate person to bring such an application when issues of self interest might be raised against an applicant and further when costs orders are considered. Chapter 4 otherwise sets out the evidence needed to support such an application and it should be carefully followed by practitioners. Another such example is the exposition of the "core test", loosely being the evidence necessary to establish whether the testator, if they had capacity, would or might make a will in the terms proposed. While the text accurately describes the ways in which the "core test" varies slightly from one jurisdiction to another, the suggested evidence gathering exercises will no doubt be of considerable use in all jurisdictions.

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4 *Re D (J)* [1982] Ch 237; [1982] 2 All ER 37.

5 *Re C (a patient)* [1992] 1 FLR 51; [1991] 3 All ER 866.

6 *Mental Capacity Act 2005* (UK).

7 *Wills (Wills for Persons Lacking Testamentary Capacity) Amendment Act 1996* (SA) amending the *Wills Act 1936* (SA); *Wills Legislation Amendment Act 1995* (Tas) amending the *Wills Act 1992* (Tas); *Wills Act 1997* (Vic); *Wills Act 2000* (NT); *Succession Act 1981* (Qld) as amended by *Succession Amendment Act 2006* (Qld); *Wills Act 1970* (WA) as amended by *Wills Amendment Act 2007* (WA); *Succession Act 2006* (NSW) and *Wills Act 1968* (ACT) as amended by *Justice and Community Safety Legislation Amendment Act 2010* (ACT).

Chapter 8 of the text contains a thorough review of all the decided cases in Australia which have been published. In some jurisdictions, such as New South Wales, only a limited number of decisions have been published because the court has dealt with straightforward, uncontested applications in chambers without the giving of reasons. In Tasmania, the jurisdiction is shared between the Supreme Court and the Guardianship and Administration Board and as such there have been only a small number of cases where reasons have been given in that jurisdiction. The chapter however sets out in detail the 51 cases for which reasons had been given and published in Australia as at the date of the publication of the text. The detailed discussion of these cases serves as a worthwhile compendium of the jurisprudence to date.

I found the text most easy to read and use. It is well-indexed and referenced throughout.

The text is a most worthwhile addition to the libraries of any court, law firm or barristers' chambers, but importantly is a must-have for any practitioner seeking to practice in this expanding jurisdiction. It was a pleasure to be asked to review it.

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