legal update

Statutory Wills

Chris Young summarises recent developments in the Court's approach to the creation of Wills for persons who lack testamentary capacity.

Statutory Wills are, as their name suggests, creatures of statute. They arise from a defined process through which the Court authorises the creation, alteration or revocation of a Will on behalf of a person who lacks testamentary capacity.

The *Succession Act* 2006 (NSW) ('the Act'), which came into force on 1 March 2008, contains provisions which deal with the creation of statutory Wills.

In February 2009 a joint decision of the Supreme Court of New South Wales gave the Court an opportunity to reflect on the historic approach to such matters and provide new guidance and direction under the new legislation.

STATUTORY WILLS IN NEW SOUTH WALES

Until the introduction of the Act, New South Wales did not have legislation dealing with the creation of statutory Wills for adults lacking testamentary capacity.

This new legislation was recently considered in *Re Fenwick; Application of J.R. Fenwick & Re Charles* [2009] NSWSC 530. In considering the new legislation, Palmer J undertook a detailed review of the legislation and case law relating to statutory Wills in both England and other Australian jurisdictions before deciding that the Court should not *'attempt to seek guidance from earlier authority…[but] should start with a clean slate'*.

The key to the new legislation is found in s 22(b) of the Act which states that '*the proposed will, alteration or revocation is, or is* ***reasonably likely*** *to be, one that would have been made by the person if he or she had testamentary capacity'.* (emphasis added)

Palmer J raised and discussed various interpretations of *'reasonably likely'*, including *'a fairly good chance that it is likely'*, *'some reasonable people that this it is likely'* and *'some reasonable people could think that there is a fairly good chance that it is likely'*.

In determining which approach should be adopted Palmer J distinguished between different types of persons on whose behalf statutory Will applications are likely to be made.

ADULTS WITH PRIOR TESTAMENTARY CAPACITY ('LOST CAPACITY')

This concerns adults who have previously had testamentary capacity.

Palmer J steered a pragmatic line between the objective and subjective courses previously undertaken by Courts in both England and Australia but determined that an objective assessment would form the cornerstone of the test.

In such circumstances, the Court will first look to the actual intention of the person (established either by the person themselves or through the existence of supporting evidence) in determining the terms of the Will. Only if such intentions cannot be clearly established will the Court examine the *'reasonably likely'* subjective intention of that person.

Palmer J also raised the question of what if the person intended to die intestate – will the Court 'impose' a Will in such circumstances? In answering such a question the Court will need to be satisfied that, on the evidence available, there is a *'fairly good chance'* that the person would have made a Will at some time had not testamentary incapacity supervened. The burden of proof falls on the party making the application for the statutory Will.

PERSONS WHO HAVE NEVER OBTAINED TESTAMENTARY CAPACITY ('NIL CAPACITY')

When a person (including a minor) has been mentally incapable since birth a two-stage process is required.

The first stage is to establish whether the person would have made a Will in the first place had they possessed the required testamentary capacity. Although each application will be different it appears that the threshold for such a test will be fairly low given that *'the Court can be satisfied by reference to common experience that if the incapacitated minor had attained testamentary capacity and had assets of any significant worth, then it is reasonably likely – in the sense of a fairly good*

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chance – that, in common with most people, he or she would have chosen to make a will'.

Once that stage has been satisfied then the Court will ask itself *'is there a fairly good chance that a reasonable person, faced with the circumstances of the incapacitated minor, would make such a testamentary provision?*'. Hence, in the absence of any possible evidence of the person's own intentions, the Court will take an entirely objective approach.

MINORS WITH PRIOR TESTAMENTARY CAPACITY ('PRE-EMPTED CAPACITY')

Such persons fall somewhere between the two previous categories. Whilst they will have not obtained legal majority they may well have started to form meaningful relationships and demonstrate longer terms intentions, albeit it unlikely that such intentions will have been expressly cloaked with testamentary intentions.

Again, a two stage process is required. Given that an application for a statutory Will is likely to be made only if there are sufficient current or future assets to warrant it the Court likely to find that it is reasonably likely that the minor would have made a Will at some point had they obtained testamentary capacity.

The second stage then requires a pragmatic approach combining both the subjective and objective tests made in relation to adult testators. The Court will take into consideration all the relevant subjective evidence and circumstances, including the minor's history and current intentions, but ultimately the decision will be objective in nature. As Palmer J states:

> *Given what is known about the teenager's relationships and history, is there a fairly good chance that a reasonable person, weighing up those circumstances, would have made the proposed statutory will?*

LOOKING FORWARD

Balancing the highly personal nature of testamentary dispositions and the need for a uniform approach to statutory Wills is, and one suspects always will be, a very difficult path for the Court to tread.

By adopting an objective approach, the legislation (as interpretated by the Court) attempts to provide a degree of certainty whilst retaining sensitivity to a particular person's circumstances.

HOW CAN TEECE HODGSON & WARD ASSIST?

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