

## ‘AN INTERVENTIONIST, PATERNALISTIC JURISDICTION’? THE PLACE OF STATUTORY WILLS IN AUSTRALIAN SUCCESSION LAW

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### I INTRODUCTION

When the idea of a ‘statutory will’ – a will made by the court for a person lacking testamentary capacity – was proposed in Australia in the 1990s, Neville Crago of the University of Western Australia Law Faculty remarked that:

It would create an interventionist, paternalistic jurisdiction exercisable even though an applicant had no claim under an existing will of the incapacitated person, no claim on intestacy, no claim under family provision legislation, and no claim as a creditor of the estate.<sup>1</sup>

In using terms like ‘interventionist’ and ‘paternalistic’, the intention, and judgment, of the writer was clear: wills are for *capable* testators – and not for anyone else – to make:

[t]he very concept of a ‘statutory will’ (quite apart from this being a contradiction in terms) is foreign to the philosophy that has always informed wills legislation in Anglo-Australian law. Our courts have always emphatically disclaimed any jurisdiction to make a will, or any part of a will, for a testator. ... The fact is that the phrase ‘statutory will’ is a euphemism for a radical mode of compulsory property distribution from the estates of persons who were vulnerable to legal process in their lifetimes.<sup>2</sup>

What Mr Crago understood – and clearly – was that the very idea of statutory wills went to the heart and soul of testamentary freedom. This article rises to the challenge of Crago’s assessment to ask what is the place, and significance, of statutory wills in the landscape of modern Australian succession law.

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1 Neville Crago, ‘Reform of the Law of Wills’ (1995) 25 *Western Australia Law Review* 255, 258.

2 *Ibid* 260. Crago’s remark was prompted by the report: Law Reform Committee, Parliament of Victoria, *Reforming the Law of Wills* (1994), draft Wills Act s 6.

To set the scene, it is useful to introduce two fact situations from the cases, both from Victoria: *Secretary, Department of Human Services v Nancarrow*<sup>3</sup> and *Re will of Maria Korp; De Gois v Korp*.<sup>4</sup> The *Nancarrow* case concerned a child of 14 years of age, Zachary James Nancarrow, who had become severely disabled following physical abuse by his father when he was a child. Zachary received an award under the *Criminal Injuries Compensation Act 1983* (Vic); his father received a prison sentence. From the age of three months Zachary was in foster care and remained with his carers at the time of the relevant proceedings. If Zachary were to die intestate, his parents would benefit equally from his estate. Shouldn't the court – or someone – be able to do something about this? His carers would be most unlikely to be eligible to apply under the family provision legislation and, even if they were, the jurisdiction is based on meeting needs, not honouring kindness and devotion.

The *Korp* case concerned Maria Korp, in a coma on life support after having been found strangled and left for dead in the boot of her car in February 2005. Maria's husband Joseph and his mistress were charged with her attempted murder. She was expected to die within two weeks. Maria's will was a typical kind of family will. It appointed Joseph as executor and gave the whole estate to him, but if he predeceased her, she gave the whole of her estate to such of her children as survived her and attained the age of 21 years, equally as tenants in common.<sup>5</sup> In the circumstances leading up to her death, surely benefiting Joseph was the last thing she would have wanted? Once again, shouldn't the court – or someone – be able to do something about this?

Part II begins by reviewing the historical antecedents of the modern powers; Part III then traces the introduction of the contemporary statutory will-making powers. Part IV provides a comparative analysis of the judicial decisions on the differing powers and Part V reviews the threshold of testamentary capacity and its relationship to statutory wills provisions. Part VI considers the concept of autonomy in substituted decision making in general; and, in Part VII, a response is given to the challenge posed in Crago's article.

## II OF IDIOTS AND LUNATICS – THE ORIGINS OF DECISION MAKING FOR OTHERS

Making decisions for people who lack capacity has its origins in the law of lunacy. As William Blackstone explained in the mid 18<sup>th</sup> century, there was a distinction made between idiots and lunatics: where '[a]n idiot, or natural fool, is

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3 [2004] VSC 450 (Unreported, Cummins J, 1 November 2004) ('*Nancarrow*').

4 [2005] VSC 326 (Unreported, Mandie J, 18 August 2005) ('*Korp*'). The former case can be described as one of 'nil capacity'; the latter, one of 'lost capacity', an instructive categorisation suggested by Palmer J in *Re Fenwick; Application of JR Fenwick and Re Charles* [2009] NSWSC 530 (Unreported, Palmer J, 12 June 2009) ('*Fenwick*').

5 *Korp* [2005] VSC 326 (Unreported, Mandie J, 18 August 2005) [12].

one that hath had no understanding from his nativity';<sup>6</sup> '[a] lunatic, or *non compos mentis*, is one who hath had understanding, but by disease, grief, or other accident hath lost the use of his reason'.<sup>7</sup> The custody of an idiot and his lands was originally in the lord, but,

by reason of manifold abuses of this power by subjects, it was at last provided by common consent, that it should be given to the king, as the general conservator of his people, in order to prevent the idiot wasting his estate, and reducing himself and his heirs to poverty and distress.<sup>8</sup>

The right of the king was clearly stated in the document known as *Prerogativa Regis 1324*.<sup>9</sup> The king's power in relation to lunatics was also confirmed, but it was different in nature.<sup>10</sup> The distinction was important – particularly as it affected the revenue of the Crown. Sir William Holdsworth described it as follows:

In the [case of idiots] the right of guardianship was a profitable right analogous to the right of wardship: in the [case of lunatics] it was in the nature of a duty, and no profit could be made from it. This distinction is recognized by the cases. Blackstone mentions the income of idiots' estates as a source of revenue; but the 'clemency of the crown and the pity of the juries' gradually assimilated the condition of idiots to that of lunatics.<sup>11</sup>

With the shift from a right to a duty, the jurisdiction also moved from the Exchequer to Chancery, with a delegation to the Chancellor of the crown's powers and duties with respect to those of unsound mind.<sup>12</sup>

We start to see the distinct origin of the idea for statutory wills from the time when the development of the equitable jurisdiction of the power of administration of the estates of lunatics focused on the ability to dispose of surplus income after the person had been properly provided for.<sup>13</sup> In 1816, in the landmark decision in *Ex parte Whitbread; Re Hinde, a Lunatic*,<sup>14</sup> the Chancellor, Lord Eldon, commented that, while 'the situation of the Lunatic himself' is the principal duty of the court, making provision for others could be considered:

where the estate is considerable, and the persons who will probably be entitled to it hereafter are otherwise unprovided for, the Court, looking at what it is likely the Lunatic himself would do, if he were in a capacity to act, will make some provision out of the estate for those persons. So, where a large property devolves upon an elder son, who is a Lunatic, as heir at law, and his brothers and sisters are slenderly or not at all provided for, the Court will make an allowance to the latter for the sake of the former; upon the principle that it would naturally be more agreeable to the lunatic, and more for his advantage, that they should receive an

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6 William Blackstone, *Commentaries on the Laws of England* (first published 1765–69) vol 1, 292.

7 *Ibid*, vol 1, 294.

8 *Ibid*, vol 1, 292–3.

9 17 Edw II c 9. The precise date of the document is discussed by Frederic W Maitland, 'The "Prerogativa Regis"' (1891) 6 *English Historical Review* 367.

10 17 Edw II c 10.

11 Sir William Holdsworth, *A History of English Law* (first published 1903, 3<sup>rd</sup> edition, 1922) vol 1, 474.

12 *Ibid*. The jurisdiction in lunacy was consolidated in the *Lunacy Act 1890*, 53 & 54 Vict c 5.

13 The power is described in William G Thompson and Richard W Hale, 'The Surplus Income of a Lunatic' (1895) 8 *Harvard Law Review* 472.

14 (1816) 2 Mer 99; 35 ER 878 ('*Hinde*').

education and maintenance suitable to his condition, than that they should be sent into the world to disgrace him as beggars. So also, where the father of a family becomes a lunatic, the Court does not look at the mere legal demands which his wife and children may have upon him, and which amount, perhaps, to no more than may keep them from being a burthen on the parish, – but, considering what the Lunatic would probably do, and what it would be beneficial to him should be done, makes an allowance for them proportioned to his circumstances. But the Court does not do this because, if the Lunatic were to die to-morrow, they would be entitled to the entire distribution of his estate, nor necessarily to the extent of giving them the whole surplus beyond the allowance made for the personal use of the Lunatic.

The Court does nothing wantonly or unnecessarily to alter the Lunatic's property, but on the contrary takes care, for his sake, that, if he recovers, he shall find his estate as nearly as possible in the same condition as he left it, *applying the property in the mean time in such manner as the Court thinks it would have been wise and prudent in the Lunatic himself to apply it, in case he had been capable*.<sup>15</sup>

The basis of the intervention was not because the people concerned were next of kin, nor because of any legal right in such capacity to an allowance, 'but because the Court will not refuse to do, *for the benefit of the Lunatic*, that which it is probable the Lunatic himself would have done'.<sup>16</sup> The principle, thus stated, formed the basis of what became known as the 'substituted judgment' approach.<sup>17</sup> The Court could intervene, in the administration of the incapable person's estate, on the standard of the 'wise and prudent lunatic', or, rather, the wise and prudent capable person in the position of the lunatic. It went beyond an administration of the estate during the person's incapacity, into his shoes and armchair. It was, according to one commentator, 'a remarkable thing':

In considering the lunatic's situation, [the Lord Chancellor] changed his perspective from an external point of view to an internal, subjective one. To achieve this change in perspective, Lord Eldon had to relinquish his position of judicial objectivity and enter the lunatic's mind. Once inside, the Chancellor had to look around and discover what the lunatic himself probably would have done. Once the probable desires of the lunatic were discovered, the Chancellor had to carry them out ...

While Lord Eldon purported to enter the mind of the lunatic, he seemed to have made no effort to discover what had once been in [his] mind. ... Instead of discovering anything about [the lunatic] and his former internal, subjective point of view, Lord Eldon seems to have just looked around and found a generic, reasonable lunatic – a generic, reasonable lunatic prone to giving his money away.<sup>18</sup>

Another commentator emphasised the distinction between the actual lunatic and the reasonable one:

the court will dispose of [the lunatic's] surplus property in accordance with the views of a reasonable and ordinarily liberal man, though such views would never

15 (1816) 2 Mer 99, 102–3; 35 ER 878, 879 (emphasis added).

16 *Hinde* (1816) 2 Mer 99, 103; 35 ER 878, 879 (emphasis added).

17 For an analysis of the history of this doctrine and its development from this case, see Louise Harmon, 'Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment' (1990) 100 *Yale Law Journal* 1. See also the excellent summary by Palmer J in *Fenwick* [2009] NSWSC 530 (Unreported, Palmer J, 12 June 2009).

18 Harmon, above n 17, 22, 23.

be entertained by the lunatic if he were sane. The courts will not hear evidence on the question how a miser or a spendthrift, if he were sane, would dispose of his surplus income. ...

[T]he test that Lord Eldon intended to lay down is not what the particular lunatic with whose estate he is dealing would have done if he had been sane, but what any reasonable man of the same condition in life with the lunatic would do under the circumstances.<sup>19</sup>

The cases post-*Hinde* were of a similar kind: ‘relatives of rich lunatics petitioning the Chancellor for allowances of “surplus income”’.<sup>20</sup> But it was a constrained jurisdiction. Before making any allowance, the Chancellors looked for evidence of the closeness of the family connection as well as evidence of the lunatic’s former intentional states.<sup>21</sup>

The powers of administration in such cases formed the basis of the modern law in relation to management of the property and affairs of those lacking capacity. The old law of lunacy was taken into the mental health arena, and the way was paved for the extension into the post-mortem domain through the introduction of powers to make statutory wills.

### III THE INTRODUCTION OF STATUTORY WILLS

A power to make a will for a person like Zachary Nancarrow or Maria Korp – the two examples given at the beginning of this article – was introduced in the United Kingdom (‘UK’) in 1969 by an amendment to the mental health legislation.<sup>22</sup> The provisions, in Part VII of the consolidated *Mental Health Act 1983* (UK), entitled ‘Management of Property and Affairs of Patients’, include the power to authorise:

The execution for the patient of a will making any provision (whether by way of disposition of property or exercising a power or otherwise) which could be made by a will executed by the patient if he were not mentally disordered.<sup>23</sup>

The key element in this power was that the will was one that ‘could’ be made by the person – the patient – if that person had capacity. The UK legislation was amended with the introduction of a new legislative framework in the *Mental Capacity Act 2005* (UK), which came into force on 1 October 2007. It uses a standard of the ‘best interests’ of the person who lacks capacity.<sup>24</sup> The Australian jurisdictions followed the idea of the earlier provisions, but not always with the

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19 Thompson and Hale, above n 13, 474–5. The authors then trace the application of Lord Eldon’s principle in later cases.

20 Harmon, above n 17, 23.

21 Ibid 25.

22 *Administration of Justice Act 1969* (UK) c 58, s 17 amended the *Mental Health Act 1959* (UK), 7 & 8 Eliz 2, c 72, s 103. In *Fenwick*, Palmer J analyses the development of this provision from its ‘forerunner’ in s 171(1) of the *Law of Property Act 1925* (UK), 15 & 16 Geo 5, c 20: [2009] NSWSC 530 (Unreported, Palmer J, 12 June 2009).

23 *Mental Health Act 1983* (UK) s 96(1)(e).

24 *Mental Capacity Act 2005* (UK) s 1(5). This is considered further below.

same wording. Significantly, the Australian provisions are not located in mental health legislation, but in legislation concerning wills.

Before tracing the introduction of the powers in Australia, it is worth observing the connection between the formulation of the power set out above and that of Eldon LC in *Hinde*, where, in considering the distribution of surplus income, his Lordship focused on 'what it is likely the Lunatic himself would do, if he were in a capacity to act'.<sup>25</sup> The immediately observable difference is that Lord Chancellor Eldon's language is that of 'would' as against the statutory formula of 'could'. Both approaches, however, are grounded in the person of the patient – what that person would, or could, do if he or she were not incapable. We will return to the differences in language, and their significance, after setting out the pattern of the powers in Australia.

In 1992 the New South Wales Law Reform Commission published a report, *Wills for Persons Lacking Will-Making Capacity*;<sup>26</sup> South Australia introduced a draft Bill in 1993;<sup>27</sup> and Victoria's Law Reform Committee made recommendations for statutory wills in 1985 and 1994,<sup>28</sup> the latter prompting Crago's comments quoted at the beginning of this article. The first to legislate, however, was Tasmania, in 1995;<sup>29</sup> then South Australia in 1996;<sup>30</sup> followed by Victoria in 1997;<sup>31</sup> Northern Territory in 2000;<sup>32</sup> and Queensland, New South Wales and Western Australia in 2006.<sup>33</sup> In the midst of all this activity a Model Wills Bill was produced in 1998, the result of the co-ordinated work of the Uniform Succession Laws project,<sup>34</sup> including a statutory will provision that captured the previous reforming efforts and became the reference point for the provisions that were introduced after it.<sup>35</sup> The model clause is rather like the

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25 (1816) 2 Mer 99, 102; 35 ER 878, 879.

26 New South Wales Law Reform Commission, *Wills for Persons Lacking Will-making Capacity*, Report No 68 (1992).

27 Wills (Miscellaneous) Amendment Bill 1993 (SA). The Act was passed in 1994, but omitted the provision about statutory wills. This had to wait for further specific amendment to the *Wills Act 1936* (SA): *Wills (Wills for Persons Lacking Testamentary Capacity) Amendment Act 1996* (SA).

28 Chief Justice's Law Reform Committee, Parliament of Victoria, *Wills for Mentally Disordered Persons* (1985); Law Reform Committee, Parliament of Victoria, *Reforming the Law of Wills* (1994).

29 *Wills Act 1992* (Tas) s 27A, inserted by the *Wills Legislation Amendment Act 1995* (Tas).

30 *Wills (Wills for Persons Lacking Testamentary Capacity) Amendment Act 1996* inserting s 25D into the *Wills Act 1936* (SA).

31 *Wills Act 1997* (Vic) s 26.

32 *Wills Act 2000* (NT) s 21(b).

33 *Succession Act 1981* (Qld) s 24(d) by *Succession Amendment Act 2006*, pt 2 div 4, subdv 3; *Succession Act 2006* (NSW) s 22(b); and *Wills Act 1970* (WA) s 42(1)(b).

34 In 1991 the Standing Committee of Attorneys-General approved the development of uniform succession laws for the whole of Australia. The project was co-ordinated by the Queensland Law Reform Commission. Succession law was divided among the participants and undertaken as separate discrete areas: the law of wills; family provision; intestacy; and the administration of estates (including the resealing and recognition of interstate and foreign grants). The project was completed in 2009 – at least in terms of producing model bills. It remains up to the State legislatures to implement it.

35 New South Wales Law Reform Commission, *Uniform Succession Laws – The Law of Wills*, Report No 85 (1998); Model Wills Bill cll 19–26.

earlier UK provision, under which a statutory will is one that ‘could’ be made by the person, if he or she had capacity.<sup>36</sup>

While a goal of uniformity for the Australian provisions was proclaimed, the reality turned out somewhat differently – particularly with respect to the central element of the provision. Under clause 21 of the Model Wills Bill the ‘guiding principle’<sup>37</sup> for the exercise of the jurisdiction was for the Court to be satisfied, inter alia, that the proposed will ‘is or *might* be one that *would* have been made by the proposed testator if he or she had testamentary capacity’.<sup>38</sup> The Western Australian provision, introduced in 2007, uses the formula of ‘could’<sup>39</sup> – like the former UK provision. But the language of the other provisions varies from this – from ‘might’ or ‘could’ be made’, to ‘likely’, to ‘would’.<sup>40</sup>

The ‘would’ form of the provision is found in Tasmania, Northern Territory, Queensland and New South Wales. The guiding principle is that the will is one that ‘would have been made by the proposed testator if he or she had testamentary capacity’.<sup>41</sup> This is closest to Lord Chancellor Eldon’s formulation in *Hinde*.<sup>42</sup>

South Australia and Victoria – that is, until amendment in 2007 – use the language of ‘likely intentions’ of the person.<sup>43</sup> The South Australian provision picked up the proposed wording of the *Wills Act 1997* (Vic).<sup>44</sup> But then in 2007 the Victorian provision was amended,<sup>45</sup> so that a will could be made for a person who lacks capacity if the proposed will ‘reflects what the intentions of the person would be likely to be’ – which is the prior ground – or, ‘what the intentions of the person might reasonably be expected to be’ – the new, additional ground.

The UK amendments in 2005 continue the facility of authorising a statutory will for a person lacking capacity,<sup>46</sup> but introduce a ‘best interests’ standard,<sup>47</sup> in assessing which a range of matters are to be taken into account, including:

36 *Mental Health Act 1983* (UK) s 96(1)(e).

37 New South Wales Law Reform Commission, *Wills for Persons Lacking Will-making Capacity*, Report No 68 (1992) [2.20].

38 New South Wales Law Reform Commission, *Uniform Succession Laws – The Law of Wills*, Report No 85 (1998), 101–2, Model Wills Bill cl 21(b) (emphasis added).

39 *Wills Act 1970* (WA) s 42(1)(b).

40 Tasmania – ‘as nearly as practicable, the will which would have been made’: *Wills Act 1992* (Tas) s 27E; Northern Territory – ‘that would have been made’: *Wills Act 2000* (NT) s 21(b); Queensland – ‘is or may be a will ... that the person would make’: *Succession Act 1981* (Qld) s 24(d); Western Australia – ‘which could be made’: *Wills Act 1970* (WA) s 42(1)(b); South Australia – ‘proposed will ... would accurately reflect the likely intentions’: *Wills Act 1936* (SA) s 7(3)(b); Victoria – ‘reflects what the intentions of the person would be likely to be, or what the intentions of the person might reasonably be expected to be’: *Wills Act 1997* (Vic) s 26(b).

41 New South Wales Law Reform Commission, *Uniform Succession Laws – The Law of Wills*, Report No 85 (1998), 101–2, Model Wills Bill cl 21(b). See, eg, *Wills Act 2000* (NT) s 21(b); *Succession Act 1981* (Qld) s 24(d); *Succession Act 2006* (NSW) s 22(b), commenced on 1 March 2008; *Wills Act 2008* (Tas) s 24(e), commenced on 1 March 2009.

42 *Hinde* (1816) 2 Mer 99, 102; 35 ER 878, 879.

43 *Wills Act 1936* (SA) s 7(3)(b); *Wills Act 1997* (Vic) s 26.

44 *Wills Act 1936* (SA) s 7(3)(b).

45 *Wills Amendment Act 2007* (Vic), commenced on 15 August 2007.

46 *Mental Capacity Act 2005* (UK) s 18(1)(i).

- (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
- (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
- (c) the other factors that he would be likely to consider if he were able to do so.<sup>48</sup>

The patient must be given the opportunity to participate, if possible,<sup>49</sup> and the views of, for example, a carer and any deputy appointed by the court are to be taken into account, 'if it is practicable and appropriate to consult them'.<sup>50</sup>

The position is not therefore uniform. While the wording of the provisions seems similar at first glance, they are different in emphasis. Are the differences just a matter of semantics? Do they represent and reflect different perspectives on the problem of substituted decision making more generally? How should a court give substance to the statutory standard in the area of will-making? This has been the judge's dilemma when considering applications for statutory wills – to which we will now turn, followed by reflections on the ethical issues in substituted decision making and the interactions with testamentary capacity.

#### IV THE JUDGE'S DILEMMA – STATUTORY WILLS IN COURT

When the different formulations for statutory wills have arisen in court, the nuance in the language has indeed generated differences. The decisions under the earlier UK provision show a distinct connection with the law of lunacy, and particularly Lord Chancellor Eldon's reference to a 'wise and prudent' person in the position of the lunatic,<sup>51</sup> which became the basis for the 'normal decent person approach' evident as a clear thread in the case law. The different standards can be imagined as reflecting an 'intentions spectrum', sliding from an objective to an increasingly subjective characterisation – at the one end lies the will that is in the patient's best interests, or 'could' be made; at the other, the will that 'would' be made. But where does 'likely' sit? If a person never had capacity, the difference in wording is arguably less critical than when a person had capacity, but has lost it, as in such circumstances there is more for a word like 'would' to bite on – a track record of action, perhaps even including will-making – something that would enable a more subjective assessment to be made.

##### A 'The Normal Decent Person'

Let us return to Zachary Nancarrow's case.<sup>52</sup> He never had capacity; nor any ability to formulate actual testamentary plans. He was the quintessential tabula

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47 *Mental Capacity Act 2005* (UK) s 1(5).

48 *Mental Capacity Act 2005* (UK) s 4(6).

49 *Mental Capacity Act 2005* (UK) s 4(4).

50 *Mental Capacity Act 2005* (UK) s 4(7).

51 (1816) 2 Mer 99, 103; 35 ER 878, 879. The connection with the lunacy cases, and particularly *Hinde* is also made by Palmer J in *Fenwick* [2009] NSWSC 530 (Unreported, Palmer J, 12 June 2009).

52 [2004] VSC 450 (Unreported, Cummins J, 1 November 2004).

rasa of testamentary powers.<sup>53</sup> For a person like him, what the court was being asked to do was to decide *against* the intestate distribution that would otherwise apply, and to anticipate the potential family provision claims that might be made – and, indeed, the claims that may not even be able to be made in the relevant jurisdiction, but in which, broadly viewing the situation, there may be said to be a moral claim of one kind or another. For example, Zachary’s carers were not his next of kin, nor would they be eligible to apply for family provision in most jurisdictions, but they may be precisely the sorts of people he would be likely to have benefited if he had capacity. In most jurisdictions, a family provision order is based on dependence and need, not gratitude for past actions. As it was, Zachary’s carers sought nothing. Rather, an application was made for a will that would prevent his parents from taking anything by placing his estate into a trust fund solely for the purpose of providing funds to persons who were intellectually or physically disabled as a result of family violence.

In reviewing the proposed statutory will in *Nancarrow*, Cummins J of the Victorian Supreme Court found the English judges’ experience in this field helpful, particularly the approach of Hoffmann J in relation to ‘Miss C’ in *Re C (A Patient)*.<sup>54</sup>

Miss C was 75 years of age and had inherited £1.6 million when her father died, comprising substantial property from both sides of the family, her mother’s as well as her father’s. Since the age of ten years, Miss C had lived her whole life in care, in a hospital near London at public expense. Hoffmann J considered that both factors would have been relevant if she were able to make a will. What the court must do in such a case, he concluded, was to

assume that [the person] would have been a normal decent person, acting in accordance with contemporary standards of morality. In the absence of actual evidence to the contrary, no less should be assumed of any person.<sup>55</sup>

Such a normal decent person, he suggested, would have recognised that the money had come to her through her family, and that the community had provided institutional support. The will was drawn up reflecting these dual moral obligations, including, for example, a legacy of £10 000 to Miss B, a volunteer carer who had been one of the only people to take an interest in Miss C – and therefore quite different from the scheme of distribution on intestacy that would otherwise have applied.

In *Nancarrow*, Cummins J adopted Hoffmann J’s approach, saying:

in my view in Victoria the proper test to apply is that of a normal decent person acting in accordance with contemporary standards of morality. The test is not reasonableness but decency and fairness.<sup>56</sup>

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53 ‘[A] blank on which nothing has been written’: *Re C (A Patient)* [1991] 3 All ER 866, 870 (Hoffmann J); or a ‘nil capacity’ case in Palmer J’s categorisation in *Fenwick* [2009] NSWSC 530 (Unreported, Palmer J, 12 June 2009).

54 [1991] 3 All ER 866 (*‘Re C’*).

55 *Ibid* 870.

56 [2004] VSC 450 (Unreported, Cummins J, 1 November 2004) [27]. Hoffmann J’s approach had already been applied in Victoria in *Re Palmer* [2003] VSC 21 (Unreported, Ashley J, 10 February 2003).

In the South Australian case of *Hoffmann v Waters*,<sup>57</sup> DeBelle J faced a similar fact situation when an application for a statutory will was made for the 31 year old Adam Waters. Adam was the eldest of three children, and when he was three years old he was injured in a motor vehicle accident leaving him intellectually disabled. A damages award in his favour of close to \$500 000 was being held on his behalf by the Public Trustee. Adam's parents divorced in 1990 and his mother was his full time carer, apart from a period of ten years when she had suffered a breakdown. By applying for a statutory will, Adam's mother sought to exclude any possible benefit to his father, her former husband, with whom Adam had had very little contact since 1994. The will would benefit her, if she survived Adam; but if she did not, Adam's estate would go to his siblings.

Justice DeBelle referred to English cases, like *Re C*, and although the notion of 'likely intentions' used in the South Australian and Victorian legislation at the time of *Nancarrow* differs from the language of 'could' in the UK provision at the time, it did not require a different approach:

in many cases such as this, where the person who lacks testamentary capacity has never been able to comprehend what is involved in making a will, it will be especially difficult, if not quite realistic, for the Court to be able to determine what his likely intentions are.<sup>58</sup>

In other words, where the person never had capacity, one can only make an objective assessment from the perspective of the individual – a substituted judgment – and the differences in the wording of the statutes are not particularly significant. Indeed there is a certain artificiality in the process in such circumstances.<sup>59</sup> Hence the approach of Hoffmann J in *Re C* could be of assistance, notwithstanding the different wording. In the circumstances of this case, DeBelle J considered that:

The will that is proposed is of a kind that one would reasonably expect would be made by a young man whose mother has cared for him and who has had little contact with his father. Similarly, the provision by which Adam's siblings will take if Adam survives his mother is the kind of provision commonly made in circumstances such as these. It might be added that, if Adam were to predecease his mother, she would have a stronger claim to his estate than his father.<sup>60</sup>

Also to similar effect is the South Australian decision in *Bryant v Blake*.<sup>61</sup> Like Zachary Nancarrow, the person in question, 38 year old Tracy, had been severely injured as a child; in her case through a motor vehicle accident leaving her requiring 24 hour care. Tracy's mother was her full-time carer, assisted by her son Stewart – Tracy's half-brother – and his wife. Like Zachary and Adam, Tracy's estate comprised the award of compensation she had received, which was

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57 (2007) 98 SASR 500.

58 Ibid 507.

59 As identified by Palmer J in *Fenwick* [2009] NSWSC 530 (Unreported, Palmer J, 12 June 2009). See in particular the discussion of *Re C* at [89]–[96].

60 *Hoffmann v Waters* (2007) 98 SASR 500, 508. Such a claim would be under the *Inheritance (Family Provision) Act 1972* (SA) s 6. This is the only jurisdiction that provides for this ground. The closest is Victoria, which has one ground of eligibility, those for whom the deceased 'had responsibility to make provision': *Administration and Probate Act 1958* (Vic) s 91(1).

61 [2004] SASC 369 (Unreported, Besanko J, 19 November 2004).

being managed by the Public Trustee. Tracy's father had had virtually nothing to do with her. He had separated from her mother three months before she was born, and had had minimal contact with her since the accident. If Tracy died, her next of kin were her parents equally. Her brother and her mother would be eligible family provision applicants in South Australia, which includes as eligible applicants a parent or brother or sister who had cared for, or contributed to the maintenance of the deceased.<sup>62</sup> As in *Hoffmann v Waters*,<sup>63</sup> Besanko J authorised the making of the will to leave all Tracy's estate to her mother, but if she did not survive her, then to Stewart.

Even where the statutory language is the strictest – the formula of 'would' – the 'normal decent person' approach is evident, so long as the person never had any effective testamentary capacity.<sup>64</sup> But what of a situation where a person *had* expressed their intentions – their real intentions – when they had capacity, even by making other wills? Here the difference in wording has proved critical.

### B From 'Could' to 'Likely'

Where there was an active – real – subjective view to take into account, the differences in wording are crucial; here the shades of light between 'could' and 'might', 'would' and the notion of 'likely' or 'reasonably likely' intentions, come into focus. In the UK, where the formula was one of 'could', the approach of Megarry VC has been influential. In *Re D (J)* he set out five principles for a consideration of the making of a statutory will:

The first ... is that it is to be assumed that the patient is having a brief lucid interval at the time when the will is made. The second is that during the lucid interval the patient has a full knowledge of the past, and a full realisation that as soon as the will is executed he or she will relapse into the actual mental state that previously existed, with the prognosis as it actually is. ...

The third ... is that it is the actual patient who has to be considered and not a hypothetical patient. One is not concerned with the patient on the Clapham omnibus. I say that because the will is being made by the court, and so by an impartial entity skilled in the law, rather than the actual patient, whose views while still of a sound disposing mind might be idiosyncratic and far from impartial. ... Before losing testamentary capacity the patient may have been a person with strong antipathies or deep affections for particular persons or causes, or with vigorous religious or political views... [T]he court must take the patient as he or she was before losing testamentary capacity...[S]ubject to all due allowances, ... the court must seek to make the will which the actual patient, acting reasonably, would have made if notionally restored to full mental capacity, memory and foresight. ... [T]he court is to do for the patient what the patient would fairly do for himself, if he could.

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62 *Inheritance (Family Provision) Act 1972 (SA)* s 6. See also *Hoffmann v Waters* (2007) 98 SASR 500, 507.

63 98 SASR 500.

64 *Deecke v Deecke* [2009] QSC 65 (Unreported Mullins J, 1 April 2009). The fact situation is very similar to that in *Bryant v Blake* [2004] SASC 369 (Unreported, Besanko J, 19 November 2004). The mother was the full-time carer, the father not in the picture, the will left everything to the mother, but if she died before the incapable person, then to the siblings. Applying the assumption of what the patient would do if sane has been described as 'highly artificial': *Fenwick* [2009] NSWSC 530 (Unreported, Palmer J, 12 June 2009), from [53].

Fourth, ... that during the hypothetical lucid interval the patient is to be envisaged as being advised by competent solicitors. The court will in fact be making the will, of course, and the court should not make a will on the assumption that the terms of the will are to be framed by someone who, for instance, knows nothing about lapse and ademption. ...

Fifth, in all normal cases the patient is to be envisaged as taking a broad brush to the claims on his bounty, rather than an accountant's pen.<sup>65</sup>

The court was to do for the patient 'what the patient would fairly do for himself'; what the 'actual patient, *acting reasonably*' would do. It was this notion that provided the foundation for Justice Hoffmann's decision in *Re C (A Patient)*.<sup>66</sup> It is also strongly reflective of the approach of Eldon LC in *Hinde*.<sup>67</sup> But the language of the legislation in question may not be amenable to the width of the approach of Megarry VC, prompting the question: just how broad a brush can a judge take in such cases? This is tested best in the jurisdictions where the legislation uses the formula of 'likely intentions', as in South Australia, Victoria (pre-2007), the Northern Territory and New South Wales. There have been only a few cases so far on this formula,<sup>68</sup> and only one of them in Australia is a decision of an appellate court – the Victorian Court of Appeal decision in *Boulton v Sanders*.<sup>69</sup>

### C 'Likely Intentions'?

In *Boulton v Sanders*, the court was asked to approve a will for Miss Amy Sanders, who was 90 years old and suffering from dementia. In 2000, Mrs Boulton, a longstanding family friend, was appointed administrator of Amy's estate under the *Guardianship and Administration Act 1986* (Vic). Mrs Boulton now sought leave authorising a statutory will under section 26 of the *Wills Act 1997* (Vic) (in the form it was then). Amy had a valid existing will, but as the principal beneficiary, her long-term friend Ruth Coulsell, had predeceased her, and there was no gift over in that event, an intestacy would occur. The residuary estate was valued at approximately \$929 000. Pursuant to the applicable intestacy provisions, Amy's ten surviving nieces and nephews would have taken the residuary estate as her next of kin.<sup>70</sup> The proposed will reflected the overall

65 [1982] 2 All ER 37, 42–3; 1 Ch 237, 243–4. See the meticulous critical analysis of these principles by Palmer J in *Fenwick* [2009] NSWSC 530 (Unreported, Palmer J, 12 June 2009) [67]–[85].

66 [1991] 3 All ER 866, 870.

67 (1816) 2 Mer 99, 103; 35 ER 878, 879.

68 In particular: *Monger v Taylor* [2000] VSC 304 (Unreported, Gillard J, 2 August 2000); *Hill v Hill & Cat Protection Society of Victoria* [2001] VSC 83 (Unreported, Byrne J, 28 March 2001); *Re Fletcher; Ex parte Papaleo* [2001] VSC 109 (Unreported, Byrne J, 1 May 2001); *State Trustees Ltd v Hayden* (2002) 4 VR 229; *Re Palmer* [2003] VSC 21 (Unreported, Ashley J, 10 February 2003); *Secretary Department of Human Services v Nancarrow* [2004] VSC 450 (Unreported, Cummins J, 1 November 2004); *Bryant v Blake* [2004] SASC 369 (Unreported, Besanko J, 19 November 2004); *De Gois v Korp* [2005] VSC 326 (Unreported, Mandie J, 18 August 2005); *Plowright v Burge* [2005] VSC 490 (Unreported, Hansen J, 16 December 2005); *Jeavons v Chapman (No 2)* [2009] SASC 3 (Unreported, Gray J, 12 January 2009); *Re Fenwick* [2009] NSWSC 530 (Unreported, Palmer J, 12 June 2009).

69 (2004) 9 VR 495.

70 *Administration and Probate Act 1958* (Vic) s 52.

pattern of prior wills; it also included a \$10 000 bequest to Mrs Boulton. This, it was argued, reflected Amy's 'likely intentions'. The application was dismissed at first instance, and on appeal.

The Court held that an accurate reflection of 'likely intentions' required a substantial degree of precision and 'precludes the authorisation of a will which no more probably reflects likely intentions than any number of other possible wills, although it may accord with an assumed desire to avoid intestacy'.<sup>71</sup> As Dodds-Streeton AJA commented:

The question is not whether the testator would probably have preferred the proposed will to intestacy; nor whether the proposed will is one of a number of possible proposed wills, all of which might be equally likely to reflect the testator's likely intentions. If the proposed will no more probably reflects 'likely intentions' than a number of other possible dispositions, in my view the requirements of s 26(b) will not be satisfied.<sup>72</sup>

Here there was no subjective evidence of Miss Sanders' actual intentions, except what might be inferred principally from prior wills. As she had made a new will 'relatively frequently', and 'often changed her mind', Dodds-Streeton AJA was not persuaded that the prior wills were in fact evidence of a compelling pattern, as urged in argument in favour of the proposed will. While there had been a residuary gift in each of the prior wills, the pattern of disposition was different – and not enough to say that one, or another, was more 'likely'. As remarked by Palmer J of the New South Wales Supreme Court in *Fenwick*, 'in the view of the Court of Appeal the words of s 26(b) forcefully mandate a focus on the actual intention of the incapacitated person'.<sup>73</sup>

In *State Trustees Ltd v Hayden*, Mandie J of the Victorian Supreme Court remarked that the use of the word 'accurately' in conjunction with 'likely intentions' was significant and indicates 'the need for the proposed will to reproduce the person's intentions with a substantial degree of precision and exactitude'.<sup>74</sup> 'Likely intentions' also requires more than knowing that the existing will does not accurately reflect likely intentions – the inverse proposition from that required – as was argued in the South Australian case, *Jeavons v Chapman (No 2)*.<sup>75</sup> Further, proof of intentions must be assessed carefully, as testators may express quite different intentions to different people at different times. As Gray J remarked of the 88 year old Mrs Torrie Stoddard Chapman in that case:

It is possible that Mrs Chapman was making different statements to different people about the disposition of her property following her death either because of inclination or failing memory or diminishing mental capacity.<sup>76</sup>

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71 (2004) VR 495, 515.

72 Ibid 515–16.

73 *Fenwick* [2009] NSWSC 530 (Unreported, Palmer J, 12 June 2009) [145]. Of the single instance decisions in Victoria prior to *Boulton v Sanders* [2004] 9 VR 495, Palmer J commented that they were 'groping their way forward' with the statutory will provision at the time: [140].

74 (2002) 4 VR 229, 241.

75 [2009] SASC 3 (Unreported, Gray J, 12 January 2009).

76 Ibid [25].

The Victorian case of *Re Fletcher; ex parte Papaleo*<sup>77</sup> followed the approach of *Boulton v Sanders* and the application was refused. Luigi Papaleo sought the making of a statutory will for Olive Mary Fletcher. Olive had Alzheimer's disease, and she was a widow. Her affairs were being administered by Mr Papaleo under the *Guardianship and Administration Act 1986* (Vic). He was also appointed administrator of the affairs of her husband. Olive had two children, John Fletcher and Celia Cox. She made a will in 1967 and a codicil in 1970, leaving all of her estate to her children equally.

The application was prompted because of events that had 'disturbed' the plan for equality between the children, which it sought to restore. John owed his parents money, but he then became bankrupt, therefore discharging the debts in due course. So if he received an equal share this would be notwithstanding that he had received \$63 555 already. (The estate was only \$259 000).

The application for the statutory will sought to restore equality between the children. In rejecting the application to authorise the statutory will, Byrne J considered that:

It is a serious step to make or to modify a will. It is not for me to impose upon Mrs Fletcher an intention which I think she might or ought to have. The section requires that I make a finding as to her supposed likely intentions. The application requires me to make a finding that her likely intentions are those set out in the proposed statutory will. This I am unable to do.<sup>78</sup>

In contrast, in another Victorian case, *Hill v Hill*,<sup>79</sup> Byrne J authorised the making of a will after compelling evidence, including that of independent witnesses, that the testator, prior to losing capacity, had decided to leave her whole estate to her daughter.

The task of assessing likely intentions may take a different shape where a dramatic intervening event has occurred, as happened in the case of Maria Korp. The statutory will in the *Korp* case<sup>80</sup> illustrates a use of the provisions that is in contrast with that in *Boulton v Sanders*.<sup>81</sup> It is also quite a different situation from one of vacillating affections. Factually it is closer to a case like *Nancarrow*.<sup>82</sup>

Maria's first marriage was to Manuel de Gois. They had a daughter, Leonie. After Mr de Gois died, Maria married Joseph Korp. They had a son, Damien. Maria was found in her car boot on 15 February and remained in a coma until her life support was terminated and she died on 5 August. Her husband's mistress, Tania Lee-Ann Herman, was found guilty of her attempted murder. Mr Korp was

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77 [2001] VSC 109 (Unreported, Byrne J, 1 May 2001) ('*Fletcher*').

78 Ibid [22]. The conclusion in *Boulton v Sanders* (2004) 9 VR 495 and *Fletcher* was similar to that in the cases in New South Wales in relation to the rectification power, particularly as reflected in *Re Estate of Spinks; Application of Mortensen* (Unreported, Supreme Court of New South Wales, Needham J, 22 August 1990) and the Court of Appeal decision which confirmed it: *Mortensen v State of New South Wales* (Unreported, Supreme Court of New South Wales Court of Appeal, Mahoney, Meagher and Sheller JJA, 9 December 1991).

79 [2001] VSC 83 (Unreported, Byrne J, 28 March 2001).

80 [2005] VSC 326 (Unreported, Mandie J, 18 August 2005).

81 (2004) 9 VR 495.

82 [2004] VSC 450 (Unreported, Cummins J, 1 November 2004).

also charged with the attempted murder of his wife, but died in an apparent suicide attempt on the day after his wife's funeral. On 29 March Leonie de Gois was appointed as the administrator of her mother's estate by the Victorian Civil and Administrative Tribunal. In this capacity she severed the joint tenancy of the residential property in the names of Mr and Mrs Korp. On 28 April the Public Advocate, Julian Gardner, was appointed to be Mrs Korp's guardian. In late July, Mr Gardner decided that Mrs Korp's medical treatment should cease. On 27 July Mrs Korp's feeding tube was removed and she was expected to die within two weeks. On 25 July an application was made by her daughter Leonie under section 21 of the *Wills Act 1997* (Vic) to authorise a will for her mother.

As noted in the opening part of this article, Maria Korp's own last will was unsurprising. She appointed her husband as executor and gave the whole estate to him, but if he predeceased her, she gave the whole of her estate to such of her children as survived her and attained the age of 21 years, equally as tenants in common.<sup>83</sup> Leonie de Gois sought approval for a will that removed Mr Korp as executor and beneficiary on the basis that it was the likely intentions of her mother to exclude him from the will. How do we know this? Mrs Korp knew of her husband's affair with Ms Herman. She had locked him out of the matrimonial home and obtained an order precluding him from coming within 200 metres of it. He was also allegedly involved with Ms Herman in the attempted murder of Mrs Korp.

Justice Mandie was satisfied that the proposed will reflected the likely intentions of Mrs Korp and that it was reasonable to authorise the making of the proposed will. Mrs Korp was likely to die before the determination of guilt or innocence of Mr Korp. Justice Mandie considered that 'even if acquitted, or otherwise not committed for trial or tried for any reason, it appeared that Mr Korp bore, at the very least, considerable moral responsibility for what had happened to her'. In the circumstances, Mandie J held that it was 'inconceivable that Mrs Korp, properly advised, would not have excluded Mr Korp from her will'.<sup>84</sup>

Had Mr Korp been found to have caused the death of his wife then, as a matter of the forfeiture rule in succession, he would not have been able to benefit from the estate, nor would he have been able to take by survivorship as joint tenant.<sup>85</sup> Due to the intervention of the actions of the administrator and the authorisation of the statutory will, the impact of the forfeiture rule did not arise.

The decision in *Boulton v Sanders*<sup>86</sup> prompted the amendment of the Victorian legislation, although not until 2007.<sup>87</sup> As noted above, under the amended provision a will can be made for a person who lacks capacity if the proposed will 'reflects what the intentions of the person would be likely to be' or,

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83 [2005] VSC 326 (Unreported, Mandie J, 18 August 2005) [12].

84 Ibid [22].

85 *Troja v Troja* (1994) 33 NSWLR 269. In some jurisdictions there is now a statutory embodiment of the common law rule: *Forfeiture Act 1982* (UK); *Forfeiture Act 1991* (ACT); *Forfeiture Act 1995* (NSW).

86 (2004) 9 VR 495.

87 *Wills Amendment Act 2007* (Vic), commenced on 15 August 2007.

now, 'what the intentions of the person might reasonably be expected to be'. The idea in the Victorian amended provision perhaps gets closer to that reflected in the former UK provision – what the intentions 'might reasonably be expected to be' is more amenable to the interpretation of 'what the patient would fairly do for himself'.

How fine a distinction will be made in future depends on how broad a brush is taken between, for example, what the person's intentions 'might be expected to be' – the Victorian provision post-amendment – and a will that is 'reasonably likely to be one that would have been made' – the New South Wales provision. There is a distinct difference that can be drawn between the latter phrase and the Victorian provision pre-amendment which required a finding of what the intentions 'would be likely to be'. When comparing section 22(b) of the *Succession Act 2006* (NSW) and section 26(b) of the *Wills Act 1997* (Vic) in *Fenwick*, Palmer J of the New South Wales Supreme Court commented that the words of the amended Victorian provision

clearly give the court far more latitude in applying an objectively reasonable approach to identification of testamentary intention than did the words of the previous section. Indeed, the words of the new s 26(b) are very close in substance to the words of s 22(b) in the New South Wales Act.<sup>88</sup>

Moreover, Palmer J emphasised the need for the court in New South Wales to take a 'clean slate' approach:

it must interpret the words of the section in the light of the problems and difficulties which the legislation seeks to remedy, bearing in mind that legislation of this kind should receive a benevolent construction.<sup>89</sup>

The emphasis in the 'likely intentions' cases is one that is grounded in the idea of autonomy – a concept that is strongly evident in the medical ethics context of substitute decision-making.<sup>90</sup> The substituted judgment approach is also linked to the idea of autonomy as it is anchored in what the person would have done. The interrelationship with, and distinction from, the standards used in medical decision making will be considered further later. First, however, we will consider the latest standard in the statutory will-making arena, that of 'best interests'.

## D 'Best Interests'

As noted earlier, the *Mental Capacity Act 2005* (UK) shifted the ground in the context of statutory wills again, with the introduction of a 'best interests' standard. According to Lewison J, in his 2009 decision in *Re P*, the *Mental Capacity Act* 'marks a radical change in the treatment of persons lacking capacity'.<sup>91</sup> The 'best interests' standard also affects the approach to the making

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88 *Fenwick* [2009] NSWSC 530 (Unreported, Palmer J, 12 June 2009) [147].

89 *Ibid* [148].

90 An excellent exposition of the subject is found in Tom L Beauchamp and James F Childress, *Principles of Biomedical Ethics* (5<sup>th</sup> ed, 2001).

91 *Re P* [2009] EWHC 163 (Ch), [36].

of statutory wills and moves away from that of Megarry VC in *Re D(J)*.<sup>92</sup> As Lewison J commented:

This is not (necessarily) the same as inquiring what P would have decided if he or she had had capacity. As the explanatory notes to the Mental Capacity Bill explained:

‘Best interests is not a test of “substituted judgment” (what the person would have wanted), but rather it requires a determination to be made by applying an objective test as to what would be in the person’s best interests.’<sup>93</sup>

... The goal of the enquiry is not what P ‘might be expected’ to have done; but what is in P’s best interests. This is more akin to the ‘balance sheet’ approach than to the ‘substituted judgment’ approach.

... Having gone through [the steps set out in the Act], the decision maker must then form a value judgment of his own giving effect to the paramount statutory instruction that any decision must be made in P’s best interests. In my judgment this process is quite different to that which applied under the former Mental Health Acts.<sup>93</sup>

In terms of how this test compares with the other formulations, one key element is the role of the patient’s own wishes or intentions, as noted above.<sup>94</sup> Justice Lewison considered that while he had to consider the matters listed, he was not necessarily required to give effect to them.<sup>95</sup>

[Counsel] stressed the principle of adult autonomy; and said that P’s best interests would be served simply by giving effect to his wishes. That is, I think, part of the overall picture, and an important one at that. But what will live on after P’s death is his memory; and for many people it is in their best interests that they be remembered with affection by their family and as having done “the right thing” by their will. In my judgment the decision maker is entitled to take into account, in assessing what is in P’s best interests, how he will be remembered after his death.<sup>96</sup>

Comparing the formula of ‘best interests’ to the others considered so far, it would appear to add another dimension or step to the intentions spectrum suggested earlier in this article. What is in the best interests of a person seems to be what the person ought to have done, even if their known wishes – reasonably likely and even mean and petulant – were to the contrary. What this characterisation prompts is a reflection on the role of will-making and its threshold capacity through the conceptual lens of reward and punishment.

## V THE CAPABLE TESTATOR – REWARD AND PUNISH

The common law trusted the ‘capable’ man – his judgment was preferred in matters of property, both before and after death. This was the strongly 18<sup>th</sup> and

92 Justice Palmer considered that the UK cases had reached a ‘best interests’ approach even under the prior wording of the legislation, referring in particular to the decision in *G v Official Solicitor* [2006] EWCA Civ 816: *Fenwick* [2009] NSWSC 530 (Unreported, Palmer J, 12 June 2009) [97]–[105].

93 *Re P* [2009] EWHC 163 (Ch), [37]–[39].

94 *Mental Capacity Act 2005* (UK) s 4(6).

95 *Re P* [2009] EWHC 163 (Ch), [41].

96 *Ibid* [44].

19<sup>th</sup> century view of him, at least. As explained by Cockburn CJ in the 1870 English case of *Banks v Goodfellow*,<sup>97</sup> to establish the requisite mental capacity to make a will, a person has to have an understanding of the property available for disposal and the claims 'to which he ought to give effect'.<sup>98</sup> It was a view strongly reflective of Enlightenment thinking, in the English form, and distanced from the European civil law preference for fixed shares.<sup>99</sup> English law trusted its property owners – its testators – to make better wills and more nuanced dispositions than the civil law mandated, because, as Cockburn CJ concluded:

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 a general law.<sup>100</sup>

Over a century later, Kirby P, then in the New South Wales Court of Appeal, remarked that:

The starting point is the acceptance that, in our society, the law recognises and upholds freedom of testamentary disposition. This is not a universal principle of legal systems. Thus, the Roman and Napoleonic systems of testamentary succession are quite different. ... Strong arguments exist for greater control by the law upon the right of one generation to determine the passage of capital to the next, by will. In the past, various rules and conventions (including primogeniture) have controlled the absolute freedom of testamentary disposition. So have modern statutes. But the basic principle of testamentary freedom remains. It is, in a sense, an attribute of economic liberty. It is reflected in the expectation of testators that, ordinarily their wills will be observed unless the law, for very good reason, provides otherwise. I remind myself of the judicial warning against the anger of the shades of disappointed testators, who await judges on the other side of the Styx, to take vengeance on those who have unduly interfered with their testamentary provisions.<sup>101</sup>

In the 1941 High Court decision in *Timbury v Coffee*,<sup>102</sup> Rich ACJ reiterated the test of mental capacity as set out in *Banks v Goodfellow*, in saying that the testator

must know what he is about, have sense and knowledge of what he is doing, and the effect his disposition will have, knowledge of what his property was, and who those persons were that then were the objects of his bounty.<sup>103</sup>

Testamentary capacity, in the sense of a mental threshold, was defined therefore not merely by reference to the property that would be subject to an exercise of that power, but also as having some moral component – of knowing the 'objects of his bounty' or the claims 'to which he ought to give effect'. A person was required to be *aware* of such claims; and so, if a will deliberately

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97 (1870) LR 5 QB 549.

98 Ibid 565.

99 See, eg, the exposition of themes of this kind by Jeremy Bentham, 'Principles of the Civil Code', in *The Works of Jeremy Bentham* (1843) vol 1 pt II, ch 5, 'Of Wills', 337.

100 (1870) LR 5 QB 549, 564.

101 *Re Estate of Griffith; Easter v Griffith* (1995) 217 ALR 284, 294 (Kirby P).

102 (1941) 66 CLR 277.

103 Ibid 280.

excluded the next of kin, affirmative proof of capacity could become an issue, as it also could if the preparer of the will, being a stranger in blood, took substantial benefits under it.<sup>104</sup> But the basic point remained, to quote Kirby P again, that ‘[t]he freedom of testamentary disposition includes a freedom to be unfair, unwise or harsh with one’s own property. As one can be in one’s lifetime, so, by law, a testator can be at death’.<sup>105</sup>

The will maker’s judgment was important, and in deciding questions of testamentary capacity judges ‘must steadfastly resist the temptation to rewrite the wills of testators which they regard as unfair, unwise or harsh’.<sup>106</sup> A will maker can change his or her mind. Such an approach was also evident once testator’s family maintenance legislation was introduced, namely that the legislation was not a jurisdiction to rewrite the will.<sup>107</sup> There is also a leaning towards capacity, where a will is properly signed, in a case of doubt.<sup>108</sup>

The cases that have considered the various statutory wills formulas reveal recurring themes that are strongly reflective of the conceptual lens of capacity articulated in *Banks v Goodfellow* – and as a power to reward or to punish. But not all formulations of the statutory wills power enable the court to fulfil this role in precisely the same way. The difference in wording has not prevented the exercise of the jurisdiction to excise certain people, as in *Nancarrow* and *Korp*, where wrongdoing was effectively punished through the statutory will.<sup>109</sup>

When it comes to benefiting – rewarding – through the exercise of the statutory will, the difference in wording, however, is crucial. Where a person had capacity but lost it, evidence of actual intentions may be required if the court must consider what the person would do or be likely to do – and this can be difficult to pin down. This may be compared with the exercise of a power using the formula of ‘could’ or ‘might’. Here the courts have been able to go much further into the field of rewarding as, for example, is illustrated by the fifth principle set out by Megarry VC in *Re D (J)*:

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104 *Billinghurst v Vickers* (1810) 1 Phill Ecc 187, 161 ER 956; *Brogden v Brown* (1825) 2 Add 441, 162 ER 356; *Dew v Clark* (1826) 3 Add 79, 162 ER 410; *Waring v Waring* (1848) 6 Moo PC 342, 13 ER 715; *Wintle v Nye* [1959] 1 WLR 284, 1 All ER 552.

105 *Re Estate of Griffith; Easter v Griffith* (1995) 217 ALR 284, 294 (Kirby P).

106 *Ibid* 296.

107 *Re Allardice; Allardice v Allardice* (1910) 29 NZLR 959, 969 (Stout CJ); *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463, 477–8; *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9, 19 (Dixon CJ).

108 ‘*Omnia praesumuntur rite esse acta*’. *Barry v Butlin* (1838) 2 Moo PC 480, 484, 12 ER 1089, 1091; *Cleare v Cleare* (1869) LR 1 P & D 655, 658; *Re Estate of Griffith; Easter v Griffith* (1995) 217 ALR 284 (Kirby P).

109 Another such example is found in *Public Trustee v Phillips* [2004] SASC 142 (Unreported, Doyle CJ, 28 May 2004), concerning an 83 year old widow who had come under the influence of a Mr Venning, who, amongst other things, persuaded her to make a will in his favour, revoking a former will in favour of her son. Venning was imprisoned for breaches of a restraining order obtained by another woman with whom he had formed a relationship. The Public Trustee successfully applied for the revocation of the will and the restoration of the earlier will. Another punishment case is that of *State Trustees Ltd v Hayden* (2002) 4 VR 229, where the provisions of a will which conferred substantial benefits on the defendant, who had behaved reprehensibly in the management of her affairs, were revoked.

in all normal cases the patient is to be envisaged as taking a broad brush to the claims on his bounty, rather than an accountant's pen. There will be nothing like a balance sheet or profit and loss account. There may be many to whom the patient feels morally indebted; and some of that moral indebtedness may be readily expressible in terms of money, and some of it may not. But when giving legacies or shares of residue few testators are likely to reckon up in terms of cash the value of the hospitality and gifts that he has received from his friends and relations, and then seek to make some form of testamentary repayment, even if his estate is large enough for this. Instead, there is likely to be some general recognition of outstanding kindnesses by some gift which in quantum may bear very little relation to the cost or value of those kindnesses.<sup>110</sup>

In this case the patient was a widow of 80, who had suffered from dementia for eight years and was rapidly deteriorating. It was 'common ground' that the patient's daughter, Mrs A, had borne the burden of caring for her mother and that she should get more than her siblings in any statutory will. The question was, how much? In the end Megarry VC held that it was 'about right' that Mrs A received half of the estate, the remaining half to be divided equally among her siblings. The basis of this allocation was Mrs A's 'care and devotion':

The advantage of having a settled home with a daughter, instead of living on her own, or being moved every few weeks or months from the house of one of her children to the house of another, or living in some old persons' home, is one which must stand very high, not only in its own right but also as showing the strength of filial affection and duty.<sup>111</sup>

The 'could' test allows a more objective approach to the making of the statutory will as an exercise of substituted judgment, and the decision about rewarding and punishing. The more subjective the test, however, the clearer the court has to be about what the particular person really wanted. And in this way the tests which require a focus upon 'likely intentions', or what the person 'would' want, are more closely allied to the individual concerned – not so much a 'substituted' judgment, but rather a surrogate judgement, *as* the person concerned. The UK test of 'best interests' is quite another thing. The judgment is not 'as' the person concerned, but what ought to be the case to ensure, amongst other things, that the person is 'remembered with affection by their family'.<sup>112</sup> As the Code of Practice that accompanied the *Mental Capacity Act 2005* explained:

In setting out the requirements for working out a person's 'best interests', section 4 of the Act puts the person who lacks capacity at the centre of the decision to be made. Even if they cannot make the decision, their wishes and feelings, beliefs and values should be taken fully into account – whether expressed in the past or now. But their wishes and feelings, beliefs and values will not necessarily be the deciding factor in working out their best interests. Any such assessment must consider past and current wishes and feelings, beliefs and values alongside all other factors, but the final decision must be based entirely on what is in the person's best interests.<sup>113</sup>

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110 [1982] 2 All ER 37, 43, 1 Ch 237, 244.

111 *Ibid* 47; 249.

112 *Re P* [2009] EWHC 163 (Ch), [44].

113 Department of Constitutional Affairs, *Mental Capacity Act 2005: Code of Practice* (2007) [5.38] <<http://www.dca.gov.uk/legal-policy/mental-capacity/mca-cp.pdf>> at 2 August 2009 (also extracted in *Re P* [2009] EWHC 163 (Ch), [41].

This marks a significant change in the approach to statutory will-making, and prompts consideration of the role of autonomy in substituted decision making more generally.

## VI AUTONOMY AND SUBSTITUTED DECISION MAKING

As seen in the discussion of testamentary capacity in the preceding section, the law of property, and the power of will-making as a key part of it, places great emphasis on the property owner, the individual, and the exercise of that person's 'will' or authority in relation to that property. One can also say that this reflects strongly an idea of autonomy, a concept which has become a driving force in the biomedical arena. As Beauchamp and Childress explain, where the word 'originally referred to the self-rule or self-governance of independent city-states',

*Autonomy* has since been extended to individuals and has acquired meanings as diverse as self-governance, liberty rights, privacy, individual choice, freedom of the will, causing one's own behaviour, and being one's own person.<sup>114</sup>

Surrogate decision making in the medical context gains its most public exposure in examples like blood transfusion to a child against the expressed wishes of Jehovah's Witness parents; or the termination of life support or sterilisation of an incompetent minor. In such contexts the ethical debates concern the appropriate standard to apply: 'substituted judgment', 'pure autonomy' or the patient's 'best interests'.<sup>115</sup> Beauchamp and Childress observe that different standards may be appropriate in different contexts. For example, in relation to the substituted judgment standard, which is considered earlier in this article under the 'normal decent person' approach,

if the surrogate can reliably answer the question, 'What would *the patient* want in this circumstance?' substituted judgment is an appropriate standard. But if the surrogate can only answer the question, 'What do *you* want for the patient?' then this standard is inappropriate, because all connection to the patient's former autonomy has vanished.<sup>116</sup>

On this basis they argue that substituted judgment is an inappropriate standard for never-competent patients and that it 'helps us understand what we should do for once-competent patients whose relevant prior preferences can be discerned'.<sup>117</sup> But, viewed in this light, they conclude that it 'collapses into a pure autonomy standard that respects previous autonomous choices' and, accordingly, that

we should abandon substituted judgment altogether in law and in ethics and substitute a pure autonomy standard whenever explicit prior autonomous judgments are identifiable.<sup>118</sup>

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114 Beauchamp and Childress, above n 90, 58.

115 Ibid 98–104.

116 Ibid 100.

117 Ibid.

118 Ibid.

The difficulty, however, lies in the application of this conclusion in the medical context where advance directives about possible future medical questions may not be explicit enough.<sup>119</sup>

The 'best interests' standard requires the surrogate decision maker to determine

the highest net benefit among the available options, assigning different weights to interests the patient has in each option and discounting or subtracting inherent risks or costs. ... Those applying best interests standards should consider the formerly autonomous patient's preferences, values, and perspectives only as far as they affect interpretations of quality of life, direct benefit and the like.<sup>120</sup>

In the biomedical ethical context Beauchamp and Childress argue that the first two standards should be viewed as one, based on autonomy:

The principle of respect for autonomy provides their only foundation, and it applies if and only if either a prior autonomous judgment itself constitutes an authorization or such a judgment supports a reasonable basis of inference for a surrogate. Where the previously competent person left no reliable traces of his or her wishes, surrogate decision makers should adhere only to [the best interests standard].<sup>121</sup>

What this analysis poses for the topic of this article is the relevance of the differing approaches in the context of making wills – in advance – for a person who lacks capacity. While decision making about one's body and one's property can be articulated similarly in terms of autonomy, the introduction of a concept of 'best interests' into the wills arena does not sit comfortably with its conceptual history and theoretical underpinnings. The UK framework for statutory wills has always been one located in the mental health arena and it is perhaps understandable therefore that the standard of 'best interests' is now the guiding standard. In the Australian context statutory wills have always been the creature of wills legislation; in that context a 'best interests' standard would be distinctly out of kilter.<sup>122</sup>

## VII CONCLUSION

The introduction of statutory wills is a significant feature of Anglo-Australian succession law, which has long insisted upon the importance of testamentary freedom. However, returning to the challenge posed by Crago's assessment of statutory wills at the beginning of this article, is it valid to claim that the power is interventionist and paternalistic; and is this necessarily a basis for criticism? Statutory wills *are* 'interventionist', in that the court is intervening into the affairs of a person through the exercise of making, altering or revoking, a will for that person. The New South Wales Law Reform Commission commented,

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119 Ibid 102.

120 Ibid.

121 Ibid 103.

122 And not necessarily a next stage on an 'evolutionary cycle': compare Palmer J in *Fenwick* [2009] NSWSC 530 (Unreported, Palmer J, 12 June 2009) [108]–[109].

however, that while, on the one hand, the exercise of a judicial will-making power may be considered to be ‘a significant intrusion on the person’s freedom and autonomy’,<sup>123</sup> on the other,

[a] statutory will-making scheme would greatly enhance the rights and dignity of persons with disabilities by enabling their property to be devised appropriately by having regard to their situation.<sup>124</sup>

‘[T]o be devised appropriately by having regard to their situation’ – it bears repeating; and interrogating. In an article in 1995, Nicholson J, then of the Federal Court and formerly Chairperson of the Guardianship and Administration Board of Western Australia, agreed with this assessment, arguing that such provisions would ‘clearly place a person with an intellectual disability on a more equal footing in terms of will-making than presently’.<sup>125</sup>

From the viewpoint of persons who have an intellectual disability of such a nature as to affect testamentary capacity, prior to the making by them of a will, they are under present law permanently deprived of the opportunity to determine how their estate should vest on their death. At the moment, the law requires their estate to be distributed in accordance with the laws related to intestacy. Such distribution may or may not see their property descend to persons who were close to the person with the intellectual disability during their lifetime. The adverse effects of the present law are seen to be acute where they result in the estate of a married person descending to a spouse from whom he or she was separated at the time of acquiring the intellectual disability after having formed a new relationship.<sup>126</sup>

As recognised by the New South Wales Law Reform Commission and by Nicholson J, in cases of lack of capacity – either because a person never had it, or because, through illness or injury a person loses it – it may often be the case that the burden of caring falls disproportionately upon one person more than others, whether family or otherwise. The moral claim of such a person may be high and growing, the longer the period of disability continues. The lack of capacity means that the person may never be able to repay the moral obligation for the caring. The very thing that leads to the loss of capacity may also generate the moral claim – and in circumstances outside the reach of intestacy and family provision legislation. As noted above, the latter legislation is not about rewarding; it is essentially a maintenance-based jurisdiction. Only South Australia has a ground of eligibility where a parent or sibling has cared for the relevant person, rather than vice versa, but even here this only brings a carer into consideration – there is no entitlement to repay that caring. The *bona vacantia* provision may enable some *ex gratia* payment to be made in such circumstances, but this only arises in the complete absence of next of kin. Therefore, it can be argued, the defence of the jurisdiction lies in the very fact that it may be exercisable in favour of an applicant who had, as Crago commented, ‘no claim on intestacy, no claim under

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123 New South Wales Law Reform Commission, *Wills for Persons Lacking Will-Making Capacity*, Report No 68 (1992) [2.10].

124 *Ibid* [2.4].

125 Robert D Nicholson, ‘Waving the Magic Wand: Solving Key Legal Issues Relating to Intellectual Disability’ (1995) 2 *Journal of Law and Medicine* 270, 285.

126 *Ibid* 283.

family provision legislation, and no claim as a creditor of the estate'.<sup>127</sup> It is here that the idea of 'reward or punish' – the foundation of testamentary freedom and testamentary capacity – has its greatest resonance. Indeed, the idea that moral claims, not just legal claims, can be recognised is also hardly novel, when one sees the roots of contemporary statutory will-making powers in the law with respect to surplus income of a lunatic as articulated by Eldon LC in the early 19<sup>th</sup> century.

In concluding an article I wrote on the subject of statutory wills in 2007, I commented that:

A power to make a will for a person without capacity is consistent with testamentary freedom, as it is an imagined exercise of it. ... It provides an opportunity for the court, acting as the wise and just spouse and parent, to reward the virtuous; and to punish the cads.<sup>128</sup> This is consistent with the role of testamentary powers, in the form encapsulated in the moral responsibility expressed in the English writers and judges of the 18th and 19th century – one that is not possible otherwise than through a will. Statutory wills viewed in this way, therefore, fit properly and elegantly into the landscape of testamentary freedom as embodied in Anglo-Australian law.<sup>129</sup>

So the criticism of statutory wills being interventionist is met. What about the charge of their being paternalistic? On one level it can deftly be said that statutory wills *are* 'paternalistic' because they are an expression of the *parens patriae* jurisdiction of the court. But this is not really the answer – or at least a sufficiently full one. Statutory wills which are based on the intentions of the real person, as best they can be fathomed, can be seen to be an extension of that person, and his or her autonomy, exercised in a surrogate sense. Where the person lacks capacity, he or she lacks the ability to exercise that autonomy to make decisions – including about their property on death. The statutory will-making power, by allowing a court to step into the person's place, can be seen to be giving back that autonomy, though exercised by a judge.

However when the lens takes another focus, not that of the testator, and moves away from the subjective to a more objective idea of the testator – the one who does 'the right thing' and will be 'remembered with affection by their family' – the *charge* of paternalism, and not just a description of the power as paternalistic, is soundly brought. It also shifts the functions of will-making to a more dynastic role than one of autonomous acts of property owners, with their ability – indeed their right – to make unfair judgments, and all. This doesn't sit well with the role and function of wills, even the justification of will-making, in the common law.

The Australian powers are all, albeit to differing extents, anchored in the idea of autonomy, especially the jurisdictions that use 'would' or focus on 'reasonably

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127 Crago, above n 1.

128 As in *Plowright v Burge* [2005] VSC 490 (Unreported, Hansen J, 16 Decemeber 2005); *Public Trustee v Phillips* [2004] SASC 142 (Unreported, Doyle CJ, 28 May 2004); *De Gois v Korp* [2005] VSC 326 (Unreported, Mandie J, 18 August 2005); *State Trustees Ltd v Hayden* [2002] (2002) 4 VR 229; *Re Davey* [1980] 3 All ER 342.

129 Croucher, above n \*, 264.

likely intentions'. Such standards sit appropriately in the history of will-making. While the application of an autonomy-based standard to a person who never had capacity, like Zachary Nancarrow, is not entirely an easy one, it is not too much of a stretch to use the 'normal decent person' approach in such cases, as the Australian experience has shown.