
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : R -v- J [2017] WASC 53

CORAM : CHANEY J

HEARD : 7 DECEMBER 2016

DELIVERED : 2 MARCH 2017

FILE NO/S : CIV 1641 of 2016

MATTER : IN THE MATTER OF *the Wills Act 1970* (WA)

BETWEEN : R
Plaintiff

AND

J
Defendant

Catchwords:

Wills - Statutory will - Testator incapable of making will - Test to be applied by court - Wishes of incapable person

Legislation:

Administration Act 1903 (WA)
Family Provision Act 1972 (WA)
Mental Health Act 1983 (UK)
Mental Capacity Act 2005 (UK)
Mental Health Act 1959 (UK), s 102(1)(c), s 103(1)(dd)
Succession Act 1981 (Qld), s 24(d)
Succession Act 2006 (NSW), s 22(b)
Wills Act 1936 (SA), s 7(3)(b)

Wills Act 1968 (ACT), s 16E(b)
Wills Act 1970 (WA), s 40, s 41, s 42
Wills Act 1997 (Vic), s 26(b)
Wills Act 2000 (NT), s 21(b)
Wills Act 2008 (Tas), s 24(e)
Wills Amendment Act 2007 (Vic)

Result:

Application dismissed

Category: A

Representation:

Counsel:

Plaintiff	:	Dr J J Hockley
Defendant	:	No appearance

Solicitors:

Plaintiff	:	George Papamihail Barristers & Solicitors
Defendant	:	No appearance

Case(s) referred to in judgment(s):

Banks v Goodfellow (1870) LR 5 QB 549
Re C (a patient) [1991] 3 All ER 866; [1992] 1 FLR 51
Re D(J) [1982] Ch 237; [1982] 2 All ER 37
Re JR Fenwick & Re Charles [2009] NSWSC 530

- 1 **CHANEY J:** The plaintiff, R, is the daughter of J. R brings this application seeking to have the court make a will for J pursuant to s 40 of the *Wills Act 1970* (WA) (Wills Act) in terms of a draft will produced to the court.

Background

- 2 J is 91 years old. She is married to H, whom she married in September 1966.

- 3 On 9 September 2015, J and H attended upon solicitors for the purpose of instructing them to draw wills for each of them. Appropriately, the solicitors sought confirmation that J had testamentary capacity. Tests suggested that she did not. It is submitted that, were J to die intestate, her longstanding wishes in relation to the distribution of her estate would be defeated. It is in those circumstances that this application was made.

- 4 J had been previously married but her first husband died in April 1953. There were two children of the first marriage, G and K. G would have been 16 and K 18 when J married H. The plaintiff, R, is the only child of the marriage between J and H. She was born in 1967. J and H remain married, and it would appear that all parties are on good terms with each other.

- 5 It is not altogether clear on the evidence how many grandchildren J has. What can be gleaned from the notes taken by the solicitor as instructions for the wills is that R has four children, two of whom are minors, G has two children who are adults, and K has two adult children and possibly two grandchildren.

- 6 Upon her first husband's death, J inherited the house in Redcliffe in which they had both lived. After J's marriage to H, J sold the Redcliffe house and placed the proceeds in a separate bank account or bank accounts. R says that it had always been known to her and her half-sisters, and to H as a result of repeated conversations with J, that the proceeds of the sale of the Redcliffe house were to pass upon J's death solely to G and K.

- 7 R said that there were two bank accounts, a Bankwest Retirement Advantage account containing \$121,000, and a Bankwest Gold Term Deposit account containing \$50,000 which were said together to comprise the sums held by J arising from the sale of the Redcliffe property. How that sum relates to the proceeds of sale is not revealed by the evidence.

No evidence as to the amount realised from the sale is provided but the amounts held undoubtedly include substantial amounts of interest earned on the investment of whatever sum was realised. Whether any other funds had been introduced to, or any expenditures made from, those accounts is not in evidence.

- 8 R deposed that, in addition to those two accounts, the other assets owned by J include personal property with a value of approximately \$30,000, four different bank accounts containing a little over \$40,000 in total, and real property valued at approximately \$350,000. The reference to real property appears to be a reference to a half interest as a joint tenant with H in their home in Belmont. According to a statement of assets and liabilities which forms an annexure to the affidavit of Martin Muk, the solicitor with the conduct of the matter on behalf of R, that property has a total estimated value of \$700,000. R's evidence as to the J estate is, in some respects, inconsistent with other evidence filed - a matter to which I will return later.

The proposed will

- 9 The originating summons in these proceedings sought to have the court make a will in terms of a draft filed with the originating summons. That document was poorly drafted, and was not in a form acceptable if the court were inclined to make a will on J's behalf. When that was drawn to the attention of the plaintiff's counsel, the proposed will was redrafted into a more acceptable form. The amended proposed will revokes all previous 'testamentary acts'. It appoints H as executor and trustee, or in the event that H does not survive J, then appoints R to those offices. It gives the funds held in the two accounts said to contain the proceeds of the sale of the Redcliffe property to G and K in equal shares. It gives money in four other bank accounts to R. One of those accounts is expressed in the will to be held jointly with H, and would presumably become the property of H, provided he survives J, upon J's death and would not form part of her estate. The proposed will gives all remaining personal property to R. The residue of the estate is given to H provided he survives J for 30 days, failing which the residue passes to R.
- 10 Clause 9 of the will provides that if R does not survive J for 30 days, then she gives, devises and bequeaths her estate in equal shares to the four grandchildren who are the children of R and to her son-in-law W, who would appear to be R's husband. Presumably, cl 9 was intended to deal with that part of the estate which would otherwise pass to R if she predeceases J, and not, as presently drafted, to deal with the whole estate.

If the court is to make a will, then cl 9 would need to be drafted differently.

J's capacity

11 Filed in support of the application was an affidavit of Mr Martin Muk, the solicitor with the conduct of the present application, which annexed a letter dated 12 December 2015 from Dr P Ramanathan, who appears to have been J's general practitioner over a very long period. He said that he administered a Mini-Mental Examination questionnaire to J on 14 October 2015. She scored only 22 out of a maximum of 30. He also administered a set of standard questions regarding J's understanding of a will and power of attorney in response to which she 'failed to explain her understanding of POA and will'. He concluded that J had 'medical issues that would prevent her from making sound decisions'.

12 J was subsequently referred to a physician, Mr Mark Donaldson. He had been requested by R's counsel to express an opinion on J's cognitive state, and on whether J met the requirements of capacity identified in *Banks v Goodfellow* (1870) LR 5 QB 549. Mr Donaldson concluded that J suffered from a diminution of high mental function due to dementia of uncertain cause. After meeting with J, Mr Donaldson concluded that J was aware that she had no will and she wished to have one made. He was unable to confirm that J was aware of the nature, extent and value of the estate over which she has the disposing power, nor did she seem to be aware of who might reasonably be thought to have a claim upon her testamentary bounty. He said that she needed prompting on that subject and was incomplete and vague in her answers. Mr Donaldson concluded that J did not appear to have the ability to evaluate and discriminate between respective strengths of the claims of such persons because she had been unable to identify such persons. He did not believe that she was suffering from any delusions of the mind. He concluded that J lacked testamentary capacity.

13 I accept that J lacks capacity to make a will, and that she is a person in respect of whom a will could be made pursuant to s 40 of the Wills Act.

The statutory regime

14 The court's jurisdiction to make a will on behalf of a person who lacks testamentary capacity is found in s 40 of the Wills Act. That section enables the court, on an application made by any person, to make an order authorising the making of a will in specific terms approved by the court. An order cannot be made unless, at the time when it is made, the person

who lacks testamentary capacity is over the age of 18 years and is alive (s 40(2)). It is open to the court to authorise the making of a will that deals with the whole, or only a part, of the property of the person concerned (s 40(3)).

15 The criteria to be applied by the court are described in s 42. It provides:

(1) In exercising its powers under section 40 the Court must refuse an application if it is not satisfied that -

(a) the person concerned is incapable of making a valid will or of altering or revoking the person's will, as the case may be; and

(b) the suggested will, alteration or revocation, or that will, alteration or revocation as revised under section 43(1)(b), is one which could be made by the person concerned if the person were not lacking testamentary capacity; and

(c) the applicant is an appropriate person to make the application; and

(d) adequate steps have been taken to allow all persons with a legitimate interest in the application, including persons who have reason to expect any benefit from the estate of the person concerned, to be represented in the proceedings.

(2) Subsection (1) does not prevent the Court from refusing an application for any other reason.

16 It can be noted that s 42 specifies threshold requirements which, if not satisfied, require the court to refuse an application. Section 42 provides no guidance as to the test to be applied in making a will for an incapable person if the threshold requirements of s 42 are met.

17 Guidance as to the matters to be considered by the court is found in s 41, which sets out the matters which must be furnished by an applicant to the court on an application under s 40. Section 41 provides:

(1) In an application under section 40, the applicant must furnish the following to the Court, except to the extent that the Court otherwise allows -

(a) a written statement of the nature of the application and the reasons for it;

- (b) an estimate of the nature and value of the assets of the person concerned and of the nature and amount of the person's liabilities, so far as that information is known to the applicant;
 - (c) a suggested draft of the proposed will or alteration or of the instrument of revocation;
 - (d) any evidence available to the applicant as to the wishes of the person concerned;
 - (e) evidence as to the likelihood of the person concerned having testamentary capacity at a later time;
 - (f) any will, or a copy of any will, of the person concerned in the possession of the applicant, or details known to the applicant of the contents of any will of the person concerned, and evidence that the applicant has made reasonable enquiry to locate such wills, or details of the contents of such wills, as may have been made by the person concerned;
 - (g) evidence that the applicant has made reasonable enquiry concerning the interests of any person who would be entitled to receive any part of the estate of the person concerned either under a previous will or if the person were to die intestate, and any evidence of those interests so far as they are known to the applicant;
 - (h) evidence that the applicant has made reasonable enquiry concerning the likelihood of an application being made under the *Family Provision Act 1972*, and evidence of any facts known to the applicant indicating such a likelihood;
 - (i) evidence that the applicant has made reasonable enquiry concerning the circumstances of any person for whom the person concerned might reasonably be expected to make provision under a will, and any evidence of those circumstances so far as they are known to the applicant;
 - (j) a reference to any gift to a body, whether charitable or not, or for a charitable purpose, that the person concerned might reasonably be expected to make by will;
 - (k) evidence of any other facts that the applicant considers to be relevant to the application.
- (2) In subsection (1) -

previous will, in paragraph (g), means a will made before a will furnished to the Court, or details of which are furnished to the Court, in accordance with paragraph (f);

will, in paragraphs (f) and (g), includes a document that is a will by operation of Part X.

18 It can be seen from s 41, that relevant considerations for the court include the reasons for the application, the extent of the estate, proposed terms of the will, any information available as to the applicant's wishes and the contents of any previous wills, the effect of the proposed will on beneficiaries under a previous will or under an intestacy, the likelihood of claims being made under the *Family Provision Act 1972* (WA), the circumstances of persons for whom the incapable person might reasonably be expected to make provision, any likelihood that the person concerned might reasonably be expected to make provision for a gift to a charitable or other body, and any other relevant matters.

19 Section 42 of the Wills Act differs from the provisions of each other Australian State or Territory dealing with statutory wills. In particular, s 42 requires the court to refuse an application if it is not satisfied that the suggested will 'is one which *could* be made by the person concerned if the person were not lacking testamentary capacity' (emphasis added). In New South Wales (*Succession Act 2006* (NSW) s 22(b)) and the Australian Capital Territory (*Wills Act 1968* (ACT) s 16E(b)) the court is required to refuse leave to make an application unless satisfied that the proposed will '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). In the Northern Territory (*Wills Act 2000* (NT) s 21(b)) the court is required to refuse the application unless satisfied 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' (emphasis added). In Queensland (*Succession Act 1981* (Qld) s 24(d)) the court must be satisfied that the proposed will 'is or may be a will ... the person would make if the person were to have testamentary capacity' (emphasis added). In South Australia (*Wills Act 1936* (SA) s 7(3)(b)) the application must be refused if the court is not satisfied that the proposed will 'would accurately reflect the likely intentions of the person if he or she had testamentary capacity' (emphasis added). In Tasmania (*Wills Act 2008* (Tas) s 24(e)) the application must be refused unless the court is satisfied that the proposed will 'is or is reasonably likely to be one that would have been made by the proposed testator if he or she had testamentary capacity' (emphasis added). Prior to amendment of the *Wills Act 1997* (Vic) the requirement in s 26(b) of that Act was couched in terms substantially the same as the relevant provision

in the *Wills Act 1936* (SA) referred to above. That section was, however, amended by the *Wills Amendment Act 2007* (Vic) s 3 with effect from 15 August 2007 so that the requirement is that the court must be satisfied that the proposed will '*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*, if he or she had testamentary capacity' (emphasis added).

20 The distinction between the Western Australian position and that in the other States (apart from the absence in this State of any requirement for leave) is the absence of any reference in s 42 to the likely intentions of the incapable person or any reference to the will being one that would have been, or would be reasonably likely to have been, made by the incapable person. All that s 42 requires in this regard is that the will be one which *could* be made by the incapable person.

21 By reason of those distinctions, care must be taken in seeking guidance from decided cases in other jurisdictions as to the application of what is described by Williams and McCulloch in *Statutory Will Applications: A Practical Guide* LexisNexis Butterworths 2014 as the 'core test'.

22 Section 42(1)(b) appears at first instance to substantially reflect s 103(1)(dd) of the *Mental Health Act 1959* (UK). That subsection was introduced in 1967. Its effect was to confirm that a power of the court found in s 102(1)(c) extended to the making of a will. Section 102(1)(c) of the UK Act provided:

The judge may, with respect to the property and affairs of a patient, do or secure the doing of all such things as appear necessary or expedient -

...

(c) for making provision for other persons or purposes for whom or which the patient might be expected to provide if he were not mentally disordered ...

23 The new provision in s 103(1)(dd) confirmed that that power extended to:

(dd) the execution for the patient of a will making any provision (whether by way of disposing 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 ...

24 These provisions were subsequently re-enacted in pt VII of the *Mental Health Act 1983* (UK).

25 The power to the English courts was therefore a power to make a will 'making any provision ... which *could* be made by a will executed by the patient if he were not mentally disordered' (emphasis added). That power was however to be construed as a manner in which the power under s 102(1)(c) could be exercised, namely the power to make provision for other persons or purposes for which the patient 'might be expected to provide' if not mentally disordered.

26 The English provisions were considered by Palmer J who analysed the test to be applied under s 22(b) of the *Succession Act 2006* (NSW) in ***Re JR Fenwick & Re Charles*** [2009] NSWSC 530 where he said:

The power given in an application under s 102(1)(b) for a statutory will is *not* to do what the patient *would* have done if sane but, rather, to do whatever appears necessary or expedient to the Judge for the benefit of a family member. There is no enquiry required as to what provision the patient himself or herself might be expected to make. There is no requirement that the proposed will contain a testamentary disposition that *would* be made by the patient; all that is required is that the provision *could* be made. In other words, the statutory will cannot make a disposition of a kind which could not be effective in law if made by an ordinary will.

The words of s 102(1)(b) and s 103(1) strongly suggest that in an application under those provisions the approach is not that of the old lunacy cases - what would the patient have done himself, if sane - but, rather, what in all the circumstances is reasonably necessary or expedient for the benefit of the family member [64] - [65].

27 In ***Re D(J)*** [1982] Ch 237; [1982] 2 All ER 37, Sir Robert Megarry VC identified five principles to be applied to the making of a will by the court under the English legislation (at 243 - 244). Those principles were:

- (1) It is to be assumed that the patient is having a brief lucid interval at the time when the will is made.
- (2) During the lucid interval the patient has full knowledge of the past and full realisation that as soon as the will is executed he or she will relapse into the mental state that previously existed, with the prognosis as it actually is.
- (3) It is the actual patient who has to be considered and not a hypothetical patient. He rejected the proposition that the essential question was what, if anything, would be reasonable in all the circumstances for the various contestants, that being a test that indicated an objective approach made with the wisdom of the

court rather than the likely approach of the patient if he or she had capacity.

- (4) During the lucid interval the patient is to be envisaged as being advised by competent solicitors who would draw the patient's attention to matters that a testator should bear in mind.
- (5) The patient is envisaged as taking a broad brush to claims on his or her bounty.

28 Sir Robert Megarry VC described those principles or factors as sufficient in most ordinary cases although they were not either exhaustive or very precise. He said that he was not altogether convinced that the 'notional lucid interval is the best way of expressing what the court has to do'.

29 The approach suggested by Sir Robert Megarry VC, commonly referred to as the 'substituted judgment' approach, encountered difficulties in application in cases where the patient had never had capacity so that there was 'no material to construct an objective assessment of what the patient wanted to do': *Re C (a patient)* [1991] 3 All ER 866; [1992] 1 FLR 51. In *Re C*, Hoffmann J concluded that, in a case where the person never had capacity, the appropriate approach was to assume that she 'would have been a normal decent person, acting in accordance with contemporary standards of morality' (870).

30 The position in England is now governed by the *Mental Capacity Act 2005* (UK) which imposes a 'best interest' requirement rather than a substituted judgment test.

31 There is no provision in s 42 of the Wills Act which makes reference to what might reasonably be expected of the incapable person nor to provision being made for other persons or purposes. On the other hand, it is clear that the matters which must be furnished to the court under s 41 are relevant considerations, in the sense of matters to which the court is required to have regard, in exercising its discretion. Those factors suggest that, in exercising what appears to be a very broad discretion, the court will have regard to the incapable person's wishes so far as they might be ascertainable, and give objective consideration to appropriate provision for those who might reasonably expect to benefit from the incapable person's estate having regard to the nature and value of the assets and liabilities of the estate. The requirement to have regard to possible claims under the *Family Provision Act 1972* (WA) suggests that the court should be mindful to ensure adequate provision is made for those who would

have standing to apply for relief under that Act. The task of the court is to make a will which in the court's judgment reflects an objectively proper disposition of the incapable person's estate giving weight to, but not being bound by, the wishes of the incapable person insofar as they can be reliably ascertained. The test thus involves both subjective elements and objective elements.

32 Against that background, I turn to the evidence in relation to each of the s 41 matters.

Section 41(1)(a) - Nature of the application and reasons for it

33 These matters are addressed under the heading 'Background' above.

Section 41(1)(b) - Estimate of the nature and value of the assets and liabilities of J

34 I have outlined above the evidence as to J's assets. There is no evidence of any liabilities. That evidence was provided by R in her affidavit of 24 August 2016. What was said in that affidavit is not consistent with other material filed in support of the application. The handwritten will instructions taken by the solicitor, Ms Radulovic, who took initial instructions from J and H recorded some, but not all, of the accounts referred to by R in her affidavit. The notes also made reference to a joint bank account, presumably between J and H against which the figure of \$117,000 was noted. That account does not appear to be any of those mentioned by R. Mr Muk's affidavit dated 19 April 2016, annexed a statement of assets and liabilities referring to four bank accounts, the balances and account numbers of which were not separately identified, but which were said in total to hold an estimated \$150,000. That is considerably less than the total of accounts referred to by R and presumably does not include the joint account referred to in Ms Radulovic's notes. In addition, reference is made to shares owned by J with a value of \$30,000. Shares are also referred to against J's name in the will instruction sheet completed by Ms Radulovic. Ms Radulovic's instruction sheet also makes reference to what appears to be a joint holding of 95,000 units in a fund, although it is difficult to decipher the details of that annotation. No mention of shares is made in R's affidavit.

35 Given those discrepancies, it is difficult to be confident as to the effect of the proposed will. That difficulty is compounded by the existence of assets jointly held by J and H, which would become assets of J's estate should H predecease her.

36 Attached to Mr Muk's affidavit of 19 April 2016 was a copy of a will of H dated 6 January 2016 apparently prepared by Ms Radulovic as a result of the instructions taken in September 2015. As a result of some observations I made during the course of directions hearings on this application as to the terms of that will, H executed a new will; a copy of which was annexed to an affidavit by Mr Muk dated 6 December 2016. The copy of that will does not bear a date. That will gives certain shares to R, and the residue of the estate to J if she predeceases H, failing which the residue is given to R, and if R does not survive H, then to R's children and husband in equal shares. Thus, if J were to survive H, then her estate would be increased by the amount of the residue of H's estate which would appear to comprise bank accounts which have an uncertain balance. In addition, J's estate would then include the presently jointly owned Belmont home with an estimated value of \$700,000.

37 The effect of the proposed will is that G and K would each receive an inheritance from J of approximately \$85,500 regardless of the size of J's estate. What R would receive would, on the figures in her affidavit, amount to just over \$70,000. If the suggestion in both Ms Radulovic's and Mr Muk's affidavits are correct, and J also has shares to the value of approximately \$30,000, then R would receive approximately \$100,000. In either case, R has the expectation that she will ultimately receive the value of her mother's half interest in the Belmont property valued at \$350,000. If H were to predecease J, then R's inheritance would be many times that of her mother's other children.

Section 41(1)(c) - Suggested draft of the proposed will

38 As noted a substituted suggested draft of the proposed will was attached to Mr Muk's affidavit of 6 December 2016. It requires redrafting of cl 9. That is a course which is available, if the will is otherwise acceptable in substance, by way of revision of the terms of the suggested draft will pursuant to s 43(1)(b) of the Wills Act. Its effect is otherwise as I have outlined above.

Section 41(1)(d) - Evidence as to the wishes of J

39 The fundamental basis of this application appears to be that J had always expressed a view that G and K should take the benefit of the proceeds of sale of the home which was inherited by their mother from their late father. It is quite understandable, and reasonable, that J would consider that G and K would have the benefit of the home which their father made for them and which J inherited (probably by survivorship) on his death.

40 The proposed will seeks to achieve that purpose. However, it goes one step further. It has the effect of shutting G and K out of any share of the assets their mother accumulated (presumably) after the death of their father and in the context of her new marriage. The scheme of the proposed will is that R takes the benefit of all of the assets of J accumulated during her marriage to H. It is necessary first to consider whether the evidence supports that scheme as being in accordance with J's wishes. The answer to that question requires a careful consideration of the evidence filed.

41 Ms Radulovic's evidence in her affidavit of 16 May says that she met with J and H to prepare their wills. Surprisingly, it does not appear that she met with them separately. In any event, she prepared a will instruction sheet. That, to the extent that it can be deciphered, gives no indication of J's wishes. Ms Radulovic said that after completing the will instruction sheet, she recalled receiving further oral instructions in respect of J's wishes. She did not disclose from whom those instructions came nor what they were, save that she said that pursuant to those oral instructions she prepared a will. She said that she visited J in early October 2015 with the draft will and that J orally informed her that the draft will was consistent with her wishes. Details of that conversation, apart from the statement as to its conclusion, are not in evidence. In any event, shortly afterwards she received a letter from J's doctor stating that J did not have the mental capacity to make a will.

42 Ms Radulovic filed a further affidavit dated 20 September 2016 in which she elaborated on her earlier affidavit. She confirmed that, on taking initial instructions, she questioned J and formed a belief that she did not have capacity to make a will. She continued:

I also recall J informed me that:

- (a) she had two children from her first marriage being:
 - (i) [G]; and
 - (ii) [K];
- (b) when her first husband passed away, the matrimonial home was transferred to J's sole name;
- (c) sometime after marrying [H], [J] sold the first matrimonial home;
- (d) the remainder of the proceedings of sale from the first matrimonial home were currently in her Bankwest Retirement Advantage Account ('retirement account');

- (e) [J] wished for the money in the retirement account to be gifted to the children from her first marriage;
- (f) the reason she did not include [R] is because [H] would provide for [R] in [H's] will.

43 R made an affidavit dated 24 August 2016 in which she sought to address the requirements of s 41(1) of the Wills Act. In relation to s 41(1)(d), she referred to Mr Muk's affidavit of 19 April 2016 without specifying any particular part of that affidavit. The only thing that Mr Muk says about J's wishes is in par 12 of that affidavit, in which he said that '[J] has indicated that she does not wish for her estate to be distributed pursuant to the Administration Act provisions'. It is not apparent that Mr Muk was involved in the taking of instructions for the will, and the manner in which, and to whom, J is said to have 'indicated' that wish is unclear. In any event, a wish that the estate not be distributed pursuant to the *Administration Act 1903* (WA) provisions says nothing about how she wished it to be distributed.

44 On 17 October 2016, Ms Radulovic made a further affidavit in which she set out what she said was her 'understanding' of J's instructions. She said:

- 4. My understanding of [J's] instruction is that:
 - a. The specified bank accounts containing proceeds from the sale of the property inherited from [J's] first husband were to be given to [G] and [K] in her Will ('Specific Gift').
 - b. [G] and [K] are the children from [J's] first marriage ('First Marriage Children').
 - c. [R] is the child from [J's] second marriage ('Plaintiff').
 - d. [J] said the Specific Gift would be:
 - i. Adequate provision for the First Marriage Children; and
 - ii. The only provision allowed for the First Marriage Children.
 - e. If any of [G], [K] or [R] pre-deceased [J], the gift they would receive would pass under their wills.
 - f. That is, if for example, [R] pre-deceased [J], the gift to [R] would pass under her will to her children and husband. If

either or both of [G] and [K] pre-deceased [J] the gift to them would pass via their wills.

- g. It was [J's] intention that once a gift was given to one side of the family then that gift would stay with the families of the recipients of that gift.
- h. In accordance with [J's] intentions and instructions as set out above at page 5 of the First Affidavit, I noted the instruction I received about the grandchildren of [J].

45 Paragraph 4(d) set out above is the only evidence of an intention by J to limit G's and K's entitlement under J's will to a share in the bank accounts containing the proceeds from the sale of the Redcliffe property. A number of things can be said about that evidence.

46 The first is that the basis of the 'understanding' is undisclosed. Even if, which is by no means clear, all of those matters were expressed by J to Ms Radulovic, Ms Radulovic acknowledges that she appreciated at the time that J lacked testamentary capacity. There is no evidence that Ms Radulovic gave advice as to potential claims against the estate or discussed with J the consequences of a will in those terms. There is no evidence that Ms Radulovic discussed the vastly different inheritance that might flow to R depending on whether H predeceases J.

47 Second, the instruction referred to in par 4(e), namely that there would be a gift over in the event of a beneficiary predeceasing J, is inconsistent with cl 3 of the will drafted by Ms Radulovic. The substance of that clause was to provide that a gift to a beneficiary is contingent upon the beneficiary surviving the testator for at least 30 days and would not take effect before that period. There was no provision for the gifts to G and K to pass to their children in the event that G or K predeceased J. There is still no such provision in the will now proposed to be made by the court. There was a provision in the will drafted by Ms Radulovic, which was inconsistent with cl 3 of that will, and inconsistent with the other substantive distributions under the will, providing that if R predeceased J, then J gave 'my estate in equal shares to my grandchildren and son-in-law' then naming R's children and wife. The draft will contained a definition of 'grandchild' or 'grandchildren' as referring only to the children of R.

48 In the circumstances, I am not prepared to conclude that it was ever J's intention to limit G's and K's inheritance only to the proceeds of the sale of the Redcliffe property. At its highest, the evidence might support the conclusion that J did intend that G and K should have the benefit of

their father's estate, but not that that should be the limit of their entitlement to J's estate.

Section 41(1)(e) - Likelihood of J having testamentary capacity at some later time

49 I accept that, given the nature of J's incapacity, it is unlikely that she will regain testamentary capacity at any future time.

Section 41(1)(f) - Evidence as to prior wills

50 In the initial affidavit in support of the application, Mr Muk deposed to a belief that J had no previous will. The source of that belief was undisclosed. When the inadequacy of that evidence was pointed out, further enquiries were made. In R's affidavit of 24 August 2016, she deposed to having made various enquiries in order to locate any will. She produced a letter to J dated 23 September 1966 (being the month in which J married H) from John H O'Halloran & Co, then a firm of solicitors in Perth. The letter enclosed a memorandum of costs and confirmed that that firm was holding 'the will in safe custody for you'. The memorandum of costs itemised taking instructions for and drafting a will, an attendance when minor alterations to the draft were made and instructions given for engrossing the will and forwarding to [J] for execution. It is apparent from the covering letter that the will must have been executed and was held by the solicitor's firm. Enquiries were then made to the Legal Practice Board of Western Australia but it was unable to assist beyond advising that Mr O'Halloran's last practice certificate expired on 30 June 1994. Further information was provided to the plaintiff's lawyers by the court as to the possible succession of the firm J H O'Halloran & Co. In counsel's final written submissions, reference is made to a further affidavit of Mr Muk 'sworn in December 2016' which is said to set out further investigations into the location of the will drafted by the law firm RJ O'Halloran [sic]. It is said that the solicitor who obtained the wills has been traced but 'his last firm prior to his retirement in 2015 has no knowledge of any will for [J]'. No affidavit has been filed of Mr Muk sworn in December 2016 deposing as to those matters. For present purposes, however, I am prepared to accept that enquiries have been made and no prior will can be located.

Section 41(1)(g) - Enquiries concerning the interests of any person who would be entitled to receive any part of the estate under a previous will or under intestacy

51 As noted above, no previous will can be located. If J were to die intestate, then the estate would be divided in accordance with the provisions of the table in s 14 of the *Administration Act 1903* (WA). In effect, if H were to survive J, H would receive all household chattels, \$50,000 with interest, and one-third of the residue. R, G and K (or their children in their place if they do not survive) would receive the remaining two-thirds of the residue in equal shares. If H did not survive J, R, G and K (or their children in their place if they do not survive) would receive the whole of the property in equal shares.

Section 41(1)(h) - Evidence of any facts known in relation to the likelihood of claims under the *Family Provision Act 1972*

52 Attached to the affidavit of Mr Muk dated 19 April 2016, were forms of consent signed by each of H, R, G and K. Those forms recited that each had been provided with a copy of the proposed will of J (being the will drafted by Ms Radulovic which is not now the will sought to be made by the court), and confirmed that each was in agreement with the contents of the proposed will and consented to its making under s 40 of the Wills Act. The consent forms concluded with a recital of an understanding that the consent could be withdrawn at any time in the future. Those consents appear to have been signed following a meeting which Mr Muk had with counsel and the four proposed beneficiaries of the proposed will in March 2016. There was no indication that the proposed beneficiaries had been advised to take independent legal advice. As a result of the court raising that matter, it is apparent that they were so advised. In her affidavit of 6 October 2016, R advised that G had sought independent legal advice, the effect of which was that she should not indicate her consent to this application. R said that, notwithstanding that advice, G told her that she wished to provide consent. G signed a document entitled 'Confirmation of Advice', which recorded that the advice to her was that the gift in the proposed will was less than her entitlement under the rules of intestacy, but notwithstanding that fact, she consented to the making of a will in those terms.

53 In relation to K, R said that from her discussions with K, K understood the suggestion to take legal advice, but did not wish to do so.

54 In her supplementary affidavit of 24 August 2016, R expressed a view, the basis of which was not disclosed, that her two half-sisters would

stand a very high chance of succeeding in a claim to the funds derived from the sale of the Redcliffe property which their mother had inherited from her first husband.

Section 41(1)(i) - Circumstances of persons for whom J might reasonably be expected to make provision under her will

55 In relation to this matter, R said that she had made enquiries of her two half-sisters and her father 'who verifies my own belief that my mother might reasonably have been expected to make provision under her will for the two daughters of her first marriage to the extent of the value of the house she inherited from her first husband'.

56 There is no evidence as to the circumstances of any of the proposed beneficiaries other than H. It is therefore impossible to assess needs, or the extent of any claims that any beneficiary might have on J's bounty. It can be accepted, however, that those who might be reasonably expected to have provision made for them under J's will do not oppose the making of the will proposed.

57 Similarly, there is no evidence of the relationship between J and her children, or the level of support provided by her children. There is no evidence to suggest that the moral claims as between J's children are greater for one than the others. In the circumstances, it must be assumed that the moral claims on J's bounty of each of R, G and K are the same.

Section 41(1)(j) - References to gifts to charitable or other bodies which J might reasonably be expected to make

58 It would appear that J has for the vast majority of her life lived a productive and independent family life. Unlike cases where an incapable person may have received significant support from charitable organisations, there is, save in relation to the Uniting Church which is discussed below, no reason to conclude that there is any body, charitable or otherwise, which might be expected to be provided for under J's will.

59 In Dr Donaldson's report of 21 September 2016, he reported that on his examination of J, she identified the persons that she would usually be expected to provide for as the Uniting Church, great grandchildren, grandchildren, R, and after some prompting, G and K. In response to Dr Donaldson's reference to the Uniting Church, R said that she asked H whether J had discussed the Uniting Church as a recipient of gifts in a will, and that H had said that Dr Donaldson's report was the first time he had become aware of that potentiality. She said that prior to being

admitted to respite care, J's involvement with the Uniting Church involved weekly attendance, volunteering for the Op Shop and weekly donations. The fact that J made inter vivos financial contributions to the Uniting Church suggests that she might reasonably be expected to have made provision for that organisation in her will, notwithstanding that she had not communicated that intention to H.

Section 41(1)(k) - Other factors that the applicant considers to be relevant to the application

60 No separate factors are identified by the applicant as relevant to the application.

Should the court approve the proposed will?

61 Having considered all of the above matters, I have reached the conclusion that the court should decline the application to make the proposed will. There are a number of reasons for that conclusion.

62 First, the inconsistencies in the evidence as to the size of J's estate makes it difficult to identify the likely practical effect of the proposed will.

63 Secondly, in the event that H were to predecease J, the benefit to R under the will would be quite disproportionate to the benefit to each of G and K. I do not consider that the evidence supports a finding that that disproportionate distribution would be in accordance with J's wishes.

64 Thirdly, it is unclear whether intestacy would result in each of G and K receiving an amount equal to or greater than the sums arising from the sale of the Redcliffe property, or whether they would receive less than that amount. That would, of course, depend upon what assets are ultimately comprised in the estate. It can be noted that independent advice obtained by G is that she would receive more in an intestacy than would be received under the proposed will. The assumptions as to the size of the estate which underlie that advice are not apparent on the papers filed in these proceedings. There is, however, a significant risk that the proposed will would result in G and K receiving less, and possibly very significantly less, than they would be entitled to on intestacy.

65 Fourthly, there is no reliable basis to conclude that J's wishes were that G's and K's entitlements to her estate should be capped at a share of the proceeds of the Redcliffe property. Indeed the evidence as to J's wishes is generally unreliable and incomplete.

66 Fifthly, the entitlements under intestacy would ensure that the grandchildren of J would receive a benefit from her estate in the event that their parent predeceased J. The proposed will does not provide for that eventuality.

67 Sixthly, there is no evidence in which to make any objective assessment as to needs, or moral claims which any of the proposed beneficiaries have on J's bounty.

68 Seventhly, there is no reason to conclude that the rules as to intestacy would give rise to any claims under the *Family Provision Act 1972* (WA). Nor in the circumstances of this case is there any reason to consider that those provisions would be unfair to any beneficiary.

69 A feature of this case is that the likely beneficiaries of J's estate, whether under the proposed will or under intestacy, consent to the making of the proposed will. That is a not insignificant factor in favour of making the proposed will. It is not, however, determinative. The object of s 40 is not to, in effect, confer will making power of an incapable person on the likely beneficiaries of that person's deceased estate. It is for the court to exercise its discretion, having regard to the information provided in accordance with s 41 of the Wills Act, as to whether a will in the terms proposed should be made. If J were to die intestate and her estate be at a size which did not result in G and K inheriting an amount equal to the proceeds of sale of the Redcliffe property, it would be open to the other beneficiaries to enter into a deed of family arrangement to achieve their mother's wish as to disposition of those proceeds.

70 For the reasons set out above, I do not consider that the will proposed in this case should be made by the court.

71 The application will be dismissed.