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The Unreasonable Will

Although introduced in 2006, the regime concerning court authorised wills under sections 21-28 of the *Succession Act 1981* was little-used for the first 5 years of its life. There were a very small number of decisions by the Supreme Court of Queensland, authorising wills on behalf of persons who lacked testamentary capacity until approximately 2011. Those first cases, approached tentatively by the Supreme Court, as well as litigants, ultimately paved the way for more complex applications for court approved wills for persons lacking capacity, evident by the increase in reported judgements concerning the issue from 2013 onwards. Some of the more comprehensive decisions have effectively established a helpful precedent for how the Supreme Court would approach those matters.

In 2019, the Court of Appeal in its decision of *Spink v Russell* [2019] QCA 107 was required to determine whether the considerations affecting the authorisation of making a will on behalf of a person lacking capacity, and specifically, whether a will could be authorised in what may be seen as unreasonable terms. It ultimately decided that a court-authorised will, can be made in unreasonable terms.

The matter concerned the estate planning for a lady with a substantial estate, valued up to approximately $99,000,000. She and her late husband had decided in their wills made in 2014 to leave their estates to one another in the first instance, and then upon their respective passing, the leave their estates to their children and step-children, among others, in unequal shares. Three children would each receive $5,000,000 and the last child would only receive $1,000,000.

After the husband died, a change in family circumstances occurred so that a gift of $5,000,000 to one child was no longer appropriate. The testator had lost capacity to make a will, and so a court-authorised will was sought to amend her will to a more appropriate circumstance. Ultimately, the court made the will, but it increased the gift to the last child from $1,000,000 up to $4,000,000. This was ostensibly to reduce the likelihood of a further provision claim by the last child.

What the Court of Appeal determined, however, is that the court must be satisfied that the will proposed **is or may be one that the testator would make**. The testator in this instance had always intended to provide a smaller benefit to one child, and the court was not convinced that the will making increased provision of $4,000,000 to that child is one that the testator would or might have made – even if a proposed will appears unreasonable to an impartial bystander, it does not grant the authority to make that will unless the court is satisfied that the will proposed is or may be one that the testator would make. On this basis, the Court of Appeal concluded there was no evidence that the testator would have made increased provision for the last child, even when advised about issues of further provision, and so there was no basis to make the will approved in the first instance.

Loss of testamentary capacity is a serious issue, and can have significant implications for all facets of estate planning. This just reiterates the importance of trusted estate planning advice, including resort to court proceedings in appropriate circumstances to ensure that a testator's testamentary intentions are upheld and fulfilled.

Thomas Ashton
Estate Administration Solicitor
Robbins Watson Solicitors