# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Spink v Russell* [2019] QCA 107 |
| PARTIES: | **CRAIG ANTHONY SPINK**<br>(appellant)<br>**v**<br>**MICHELLE RUSSELL**<br>(respondent) |
| FILE NO/S: | Appeal No 1986 of 2019<br>SC No 9009 of 2018 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane – Unreported, 4 February 2019 (Ryan J) |
| DELIVERED ON: | Date of Orders: 11 April 2019<br>Date of Publication of Reasons: 31 May 2019 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 11 April 2019 |
| JUDGES: | Gotterson and Morrison JJA and Bowskill J |
| ORDERS: | **Date of Orders: 11 April 2019**<br>**1. Allow the appeal.**<br>**2. Set aside Order 2 made on 4 February 2019.**<br>**3. Substitute for that order the following order:**<br>**"2. Pursuant to s 21 *Succession Act* 1981 (Qld), a statutory will be made on behalf of MAG in the form of the draft will attached to these orders."**<br>**4. Otherwise confirm the orders made on 4 February 2019.**<br>**5. The parties' costs of the appeal are to be assessed on the indemnity basis and paid from the assets of MAG.** |
| CATCHWORDS: | SUCCESSION – MAKING OF A WILL – TESTAMENTARY CAPACITY – LOSS OR LACK OF CAPACITY AND STATUTORY WILLS – where MAG had last made a will in May 2014 at the same time as her late husband – where, since the making of her will, there had been changes in MAG's family arrangements and MAG did not have testamentary capacity to make another will – where the appellant, as MAG's litigation guardian and appointed attorney, made an application for leave to apply for an order for the making of a statutory will on behalf of MAG pursuant to s 21 of the |

*Succession Act* 1981 (Qld) – where the learned primary judge granted leave to make the application and directed that a statutory will be made on behalf of MAG – where the will that was made was in the form of a draft provided by the appellant subject to one change which was to increase the provision for the respondent from a gift of $1 million to $4 million – where the learned primary judge concluded that, on the available evidence, it was probable that MAG would have increased the provision for the respondent in her will if she knew that the respondent was likely to bring a family provision application if her provision in the will was only for $1 million – where the appellant appealed against the statutory will made by the learned primary judge on the basis that the learned primary judge erred in finding that MAG "probably would have made" a will in which the respondent received a gift of $4 million – whether it was open on the evidence to conclude that a will which contained a gift of $4 million to the respondent was a will that MAG would probably have made – whether the appeal should be allowed

*Succession Act* 1981 (Qld), s 21, s 23

*GAU v GAV* [2016] 1 Qd R 1; [2014] QCA 308, considered
*Re Fenwick* (2009) 76 NSWLR 22; [2009] NSWSC 530, considered

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| COUNSEL: | R M Treston QC, with K J Kluss, for the appellant<br>C A Brewer with P J Coore for the respondent |
| SOLICITORS: | Spink Legal for the appellant<br>Thynne + Macartney for the respondent |

[1] **GOTTERSON JA:** This appeal was heard on 11 April 2019. Later that day, and after the hearing had concluded, this Court made orders allowing the appeal, setting aside an order that had been made at first instance and substituting another order for it. As well, an order for costs was made. I propose now to set out my reasons for those orders.

**The circumstances in which the litigation arose**

[2] **Background:** MAG is now 68 years old. She is the widow of Tony to whom she was married for many years. Tony died on 22 June 2014. There are two adult sons of that union, Shaun and Christopher, now 44 and 42 years of age respectively.

[3] Tony was also the father to Kevin and Michelle, now aged 53 and 52 years respectively, who are children of his first marriage. Both were born in the United Kingdom prior to Tony's departure for Australia. Kevin and Michelle are MAG's adult step-children. Michelle has remained a life-long resident of the United Kingdom.

[4] MAG has not remarried after Tony's death. Nor has she entered into a defacto relationship in the period.[1]

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[1] Affidavit CA Spink sworn 22 August 2018 ('Spink 1") paragraphs 13-18: AB 2 72-73.

[5] Tony and MAG were very successful in business. Over a 40 year period, they developed two principal businesses through a number of private companies known collectively as The Green Group. One of the businesses consists of two lifestyle estate communities in regional Australia for those over 50 years of age. The other is a commercial property development business.[2]

[6] As The Green Group is currently structured, a number of the companies within it are trading companies. However, there are five group companies, each of which acts solely as a trustee for a family trust. The beneficiaries of the family trusts are principally MAG and family members including Kevin, Shaun and Christopher, but not Michelle. MAG is the sole shareholder in many of the companies within the group. However, for reasons which I shall explain, she is not a director of any of them.[3]

[7] MAG is personally very wealthy. The value of her net assets at 15 November 2018 was estimated to be $99,992,015.[4] To a significant extent, the assets consist of debts owed to MAG by entities within the group arising out of documented loans made by her to the entities.[5]

[8] **MAG's wills:** MAG made a number of wills during her married life. Significantly, she and Tony both made wills on 16 May 2014. Tony's will[6] was the subject of a grant of probate made by the Supreme Court of Queensland on 19 November 2014. MAG's will[7] was in similar terms. She has not herself made a later will.

[9] Each of the wills made on 16 May 2014 gave the surviving spouse the whole of the estate provided that the spouse survived the deceased by 30 days.[8] Since MAG did survive Tony by 30 days, she received the whole of his estate. No proceeding by way of a family provision application has been brought in respect of Tony's estate.[9]

[10] Relevantly for present purposes, each will contained reciprocal provisions with respect to a gift to Michelle. It was the sole benefit that she was to receive under the wills. MAG's will contained the following provisions with respect to Michelle's gift which were to apply in the event that Tony did not survive her by 30 days:

> "(a) **I GIVE** the sum of **ONE MILLION DOLLARS ($1,000,000.00)** free of all duties and charges to **MICHELLE** absolutely and if she predeceases me leaving children who survive me, **I GIVE** that sum to those children in equal shares upon attaining the age of eighteen (18) years absolutely.
>
> (b) **FOR THE AVOIDANCE OF DOUBT** the gift of cash in clause 7.1.1(a) of this will is not to take effect if **MICHELLE** has received a similar amount under **ANTHONY's** will, my intention being that **MICHELLE** receive the total cash gift mentioned in clause 7.1.1(a) from the combined estates of **ANTHONY** and myself."[10]

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2 Spink 1 paragraphs 26, 27: AB 2 75.
3 Spink 1 paragraphs 28-35: AB 2 75-79.
4 Affidavit CA Spink sworn 15 November 2018 ("Spink 3") paragraph 8: AB 2 895-897.
5 Spink 1 paragraphs 41, 42: AB 2 80.
6 Spink 1 Exhibit CAS-14: AB 2 662-708.
7 Spink 1 Exhibit CAS-3: AB 2 98-120.
8 Clause 6.1.
9 Spink 1 paragraph 79: AB 2 89.
10 Clause 7.1.1: AB 2 99-100.

[11] **Management of MAG's financial affairs:** MAG had executed an Enduring Power of Attorney ("EPA") on 22 October 2014.[11] On 19 July 2016, Mr Craig Anthony Spink, solicitor, who is an experienced succession and commercial law practitioner, filed a consent to act as MAG's litigation guardian.[12]

[12] By an order of the Supreme Court of Queensland made on 20 July 2016, certain powers under the EPA relating to financial matters were, with the concurrence of the appointed attorneys, vested in Mr Spink.[13] This was one of a number of orders made on an application made by Mr Spink as litigation guardian and supported by evidence given by MAG's elder sister and by Dr Helen Siddle, psychiatrist. Dr Siddle testified by affidavit that she examined MAG on 17 December 2015 and diagnosed that MAG was suffering from dementia of the Alzheimer's type with early onset and moderate severity. MAG was unable to make commercial decisions relating to a restructure of the family business and trust and corporate structures within the group, in Dr Siddle's opinion. MAG was unable to display the capacity to update her EPA or to update her will.[14]

[13] Later, by orders of the Queensland Civil and Administrative Tribunal made on 17 May 2018, Mr Spink was appointed with Ms Leanne Rudd to join Mr Peter Leslie Lollo as attorneys for financial matters for MAG under the EPA. Both Mr Lollo and Ms Rudd have had long-term associations with The Green Group, the former as its chief executive officer and the latter as its accountant and tax agent. This appointment was subject to an exception relating to decisions of MAG in her capacity as shareholder in the companies in the group. For that category of decisions, Mr Spink and Ms Angela Cornford-Scott, solicitor, who is experienced in succession law matters, were the appointed attorneys.[15]

[14] Since his appointment as litigation guardian, Mr Spink has supported MAG through various negotiations with members of her family and directors of companies within The Green Group. He has met with MAG on numerous occasions. He testified that she made it clear to him that her view was that the control of the group businesses should not pass to Shaun, Kevin and/or Christopher on her death. She considered that that would not be in the group's best interests.[16]

[15] Significant among the negotiations were those with Shaun. They culminated in the execution of a Deed of Family Arrangement ("DOFA") on 17 August 2017 between Shaun, MAG and various companies within The Green Group whereby his involvement with the group terminated and he received financial provision from MAG.[17] Mr Spink executed the deed as MAG's appointed attorney.

[16] In light of changes made in the family arrangements since 2014, primarily those made pursuant to the DOFA, it became appropriate that consideration be given to a new will for MAG. Such a will would revoke the will that she had made on 16 May 2014.[18]

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11 Spink 1 Exhibit CAS-4: AB 2 122-144.
12 Spink 1 paragraph 10(a): AB 2 71.
13 AB 2 489-491.
14 Spink 1 Exhibit CAS-5: AB 2 342-354.
15 Spink 1 Exhibit CAS-6 Orders 2, 4 and 5: AB 2 498.
16 Spink 1 paragraph 37: AB 2 79.
17 Spink 1 Exhibit CAS-12: AB 2 577-655.
18 Spink 1 paragraph 81: AB 2 89.

**The application for a statutory will**

[17] Mr Spink, with Ms Cornford-Scott's assistance, drafted a proposed will for MAG which would accommodate the changes in the family arrangements. According to Mr Spink's evidence, MAG was aware that he was preparing a draft for court approval.[19]

[18] On 22 August 2018, Mr Spink filed an Originating Application in the Supreme Court of Queensland.[20] The substantive orders sought by the application were that leave be granted to him pursuant to s 22 of the *Succession Act* 1981 (Qld) ("the Act") to apply for an order for the making of a statutory will on behalf of MAG; that pursuant to s 21 of the Act, a statutory will be made on her behalf in the form of the will drafted by Mr Spink and Ms Cornford-Scott; and that Mr Spink's costs be assessed and paid from MAG's estate on an indemnity basis.

[19] This application was made because, in Mr Spink's opinion, MAG did not then have testamentary capacity, primarily because of her lack of ability to understand the nature and complexity of her assets.[21] This opinion was supported by a further report of Dr Siddle who reassessed MAG on 23 October 2017.[22]

[20] In his principal affidavit in support of the application, Mr Spink deposed that he had met with MAG on numerous times both in Bundaberg and Brisbane to discuss her views and wishes. In the course of his interactions and discussions with MAG, her wishes were consistent. Mr Spink summarised them as follows:

> "(a) Peter, Leanne and myself be executors and trustees;
>
> (b) Kevin, Shaun and Christopher are to be treated as equally as possible from her estate;
>
> (c) Each of Kevin, Shaun and Christopher to receive a specific gift to a testamentary discretionary trust of $5,000,000.00 with the beneficiaries to be each of Kevin, Shaun and Christopher and their respective children and remoter issue.
>
> (d) Shaun's gift is to be adjusted pursuant to clause 7.3(c)(iii) of the DOFA;
>
> (e) Michelle is to receive a monetary gift of $1,000,000 as provided for Michelle in MAG's current will dated 14 May 2014;
>
> (f) Christopher's testamentary trust is to be held by a corporate trustee controlled by the executors;
>
> (g) A trust be established for MAG's grandchildren, with the exception of Lewis and Michelle's daughter, to hold $5,000,000.00 on trust for the benefit of each of her grandchildren for their education and maintenance with capital to be distributed to each grandchild at the discretion of the trustees;
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> (h) That a discretionary testamentary trust be established to hold the residue of MAG's estate."[23]

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19 Spink 1 paragraph 82: AB 2 89.
20 AB 2 18-20.
21 Spink 1 paragraph 51: AB 2 82.
22 Spink 1 Exhibit CAS-10: AB 2 560-571.
23 Spink 1 paragraph 83: AB 2 90.

When asked specifically about it, MAG said that she did not wish to make any gifts to charity.[24]

[21] The will drafted by Mr Spink and Ms Cornford-Scott[25] reflected these wishes. Relevantly for present purposes, it contained the following provision:

> "3.2 **Gift for Michelle Russell**
>
> I give the sum of $1,000,000.00 to **MICHELLE JANICE RUSSELL** (**Michelle**) but if **Michelle** does not survive me then equally to those of Michelle's children who survive me and reach 21 years of age."

[22] Mr Spink deposed that MAG told him that the legacy to Michelle was to remain in the same form as her previous will because it gave effect not only to her wishes, but also to Tony's wishes. She said that she did not want any further provision made for Michelle.[26]

[23] The application was notified to persons who had a legitimate interest in it. They included Michelle.

**The orders made at first instance and the appeal**

[24] The application was heard on 20 November 2018. Michelle was represented by counsel at the hearing at which an affidavit she had made on 24 October 2018[27] was read. Judgment was reserved.

[25] The learned primary judge was informed in early 2019 that a need for an urgent determination of the application had arisen. Her Honour prioritised the matter and *ex tempore* reasons for orders that she proposed be made, were delivered on 4 February 2019.

[26] Consistently with those reasons, orders were made granting leave to make the application and directing that a statutory will be made on behalf of MAG in the form of a draft which replicated the provisions of the will drafted by Mr Spink and Ms Cornford-Scott with one exception. That was to substitute the amount of $4,000,000 for $1,000,000 in clause 3.2 in regard to the gift to Michelle. As well, the costs of all parties were ordered to be paid from MAG's assets on an indemnity basis.[28] On 5 February 2019, a will conforming to those orders was duly signed by a registrar of the Supreme Court on behalf of MAG.

[27] Mr Spink filed a notice of appeal to this Court on 25 February 2019.[29] Michelle is the respondent to the appeal. The substantive relief sought by way of appeal is that the statutory will made on 5 February 2019 be altered or revoked such that the amount of $4,000,000 in clause 3.2 is substituted with the amount of $1,000,000.

**Relevant provisions of the Act**

[28] Section 21(1) of the Act confers jurisdiction on the Supreme Court to make an order authorising a will to be made in the terms stated by the court on behalf of a person

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24 Ibid.
25 Spink 1 Exhibit CAS-15: AB 2 710-723.
26 Affidavit CA Spink sworn 12 October 2018 ("Spink 2") paragraph 17: AB 2 745-746.
27 AB 2 833-879.
28 AB 1 17.
29 AB 1-2.

without testamentary capacity. The jurisdiction is conditioned upon the person lacking testamentary capacity and being alive when the order is made, and upon court approval of the proposed will.[30]

[29] An application for an order under s 21 may only be made with the court's leave: s 22(1). Section 23 of the Act requires the applicant for leave to give the court information on a wide range of matters. They include a draft of the proposed will[31] and evidence of the person's wishes,[32] of the terms of any will previously made by the person,[33] and of the likelihood of an application for further provision being made under s 41 of the Act in relation to the person.[34]

[30] Section 24 of the Act permits the court to give leave under s 22 only if it is satisfied of certain matters. Those matters include that there are reasonable grounds for believing that the person does not have testamentary capacity;[35] that the proposed will **is or may be** a will that the person would make if he or she were to have testamentary capacity;[36] and that it is appropriate to make an order under s 21 in respect of the person.[37]

**The reasons at first instance**

[31] The learned primary judge was satisfied of all the matters referred to in s 24 of the Act.[38] Specifically she was satisfied that the proposed will was one that MAG may have made.[39]

[32] Turning to the approach to be taken to the substantive application, her Honour drew a contrast with the matter in s 24(d) of which she was to be satisfied for granting leave. Having regard to the wording of the relevant sections of the Act and the decision of this court in *GAU v GAV*,[40] she observed that the critical consideration at the substantive stage is whether the will proposed is the will the person **probably would have made** if the person had testamentary capacity.[41] Reference was also made to the views to similar effect expressed extra-judicially by Fraser JA of this Court[42] and by Applegarth J in *Re APB, ex parte Sheehy*,[43] in which his Honour followed *GAU*.

[33] The learned primary judge next considered the circumstance where there was evidence that if a will were to be made by the court as proposed by an applicant, one or more persons so entitled would likely bring an application under the Act for further provision. Her Honour referred to the reasons of Palmer J of the Supreme Court of New South Wales in *Re Fenwick*[44] and to a proposition drawn from it by the authors of *"Statutory Will Applications – A Practical Guide"* published in 2014 that "bearing in mind the hostility and ruinous expense which so often occur in family provision

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30 s 21(2).
31 s 23(e).
32 s 23(f).
33 s 23(g).
34 s 23(h).
35 s 24(c).
36 s 24(d).
37 s 23(e).
38 Reasons page 4 ll13-15: AB 1 6.
39 Reasons page 5 ll1-3: AB 17.
40 [2014] QCA 308; [2016] 1 Qd R 1.
41 Reasons page 5 ll11-20 and 44-47: AB 1 7.
42 *"Statutory Wills in Queensland and New South Wales; Is There Any Guiding Principle"*, August 2017.
43 [2017] QCS 201 at [125].
44 [2009] NSWSC 530 at [195], [196].

claims, the Court should endeavour to limit their occurrence to once only in the administration of the estate of anyone, alive or dead."[45]

[34] Her Honour then noted that MAG's estate is large; that a family provision claim was unlikely to cause ruinous expense to it; and that certain other beneficiaries under the proposed will, two children of a son, had reserved the right to make a family provision claim.[46] She said that she would proceed on the basis that MAG did not have long to live and that Michelle's circumstances were unlikely to change significantly in the period up to MAG's death.[47]

[35] Next, the learned primary judge listed the matters that she had taken into account in determining the will that MAG would, or probably would, have made had she had testamentary capacity at that point. Those matters were:

> "• Tony and MAG's clear instructions for the drafting of the 2014 wills were that the estates and entities were to be distributed equally between Shaun, Kevin and Chris.
>
> • On a fair analysis of the evidence, MAG was not at all close to Michelle.
>
> • Tony was not close to her, but felt a sense of obligation to her as her father, as is reflected in some of Michelle's evidence and in his assisting her financially in a small way throughout his lifetime. I say "small" in a relative sense.
>
> • Tony left both Michelle and Kevin as children in the UK.
>
> • At 17, Kevin came to Australia, found his personality to be similar to his father's and forged a close bond with him, which is reflected in the desire of Tony and MAG for him to be treated in the same way as their biological children.
>
> • Tony wished to provide something to Michelle.
>
> • When he received advice in 2014 about the likely consequences of a gift of $1 million to her, he believed that she would be happy with that amount and he took into account that she had lived rent free in a property in the UK for years which would pass to her. (I have read in the evidence suggestions that Tony was concerned that until what I assume is the family house was sold, there was not enough cash to give Michelle more, but I cannot reach any certain conclusions about that evidence, and I note that there is nothing in the 2014 wills which suggests that things might change for Michelle when the house was sold. Tony might also have been referring to his mother's house in that context, but I am not sure.) Tony did not wish to increase the provision in his will for Michelle beyond $1 million, even though he was advised that Michelle might be successful in a $4 million claim for family provision.
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> • MAG was prepared to honour Tony's wishes in her own 2014 will and to make a gift for Michelle of $1 million.

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45 Reasons page 7 ll37-47: AB 1 9.
46 Reasons page 8 ll1-6: AB 1 10.
47 Ibid ll27-29.

- Michelle is, in fact, not happy with that amount, contrary to Tony's expectations, and is likely to bring a family provision application if she does not receive significantly more than that."[48]

Her Honour described the last mentioned matter as a "changed circumstance".[49]

[36] As well, her Honour said that she had taken into account the toll that a family provision claim might have on the family, both emotionally and by delaying the administration of the estate, and also the advice that she considered a competent solicitor would provide to MAG in order to avoid estate litigation.[50]

[37] Addressing the will proposed by Mr Spink, the learned primary judge identified as "the most difficult aspect of the case", the provision to be made for Michelle.[51] At the hearing, submissions were made for Michelle that the gift to her should be $5,000,000 on the footing that her Honour ought "prioritise" any anticipated family provision application on her behalf over any inference that might be drawn by the court about the will that MAG might make.[52]

[38] Her Honour then made the following observations:

> "The evidence establishes, as I have said, that Tony, having been advised that Michelle would be likely to be awarded as much as four million dollars from a Court in a family provision application, nevertheless determined that she would receive in his will $1 million, and that such a gift would be honoured by MAG in her will, which it was.
>
> I note that in reaching that decision to allow only $1 million for Michelle, Tony proceeded on the basis that Michelle would be happy with $1 million and noted that she would inherit his mother's house. As I have already said, as it turns out, he was wrong. She is not happy with $1 million.
>
> I have proceeded on the basis that it is appropriate to consider whether MAG's intentions towards Michelle would have changed had she known that Tony proceeded on the incorrect assumption that Michelle would not take the matter further having been left with $1 million in MAG's will.
>
> I have proceeded on the assumption that a careful and competent solicitor would advise MAG to avoid the cost and acrimony which can arise out of a family provision application subsequent to death. I have also borne in mind the fact that the estate is large, and providing for Michelle in a larger amount could not be said in any reasonable sense to cause detriment to the provisions for others. I have also borne in mind that $1 million is a lot of money and it was not submitted that it would not meet her needs."[53]

[39] After referring to awards made in two family provision proceedings involving very large estates,[54] the learned primary judge then stated the following important factual conclusion that she had reached:

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48 Reasons page 8 l34 – page 9 l22: AB 1 10-11.
49 Reasons page 9 l24: AB 1 11.
50 Reasons page 9 ll26-29: AB 1 11.
51 Reasons page 10 l34: AB 1 12.
52 Transcript 1-59 ll4-47: AB 2 959.
53 Reasons page 10 l39 – page 11 l15: AB 1 12-13.
54 *Darvenisa v Darvenisa* [2014] QSC 37 and *Lemon v Mead* [2017] WASCA 215; (2017) 53 WAR 76.

> "I consider that it is probable that, knowing Michelle was likely to bring a family provision application if her provision in the will was only for $1 million, MAG was likely to attempt to avoid a family provision claim by increasing the provision for Michelle in her will."[55]

[40] In light of that conclusion, her Honour proceeded to determine "the appropriate amount" by which the gift to Michelle ought to be increased. She referred to a range of factors and to statements made by Ormiston J of the Supreme Court of Victoria in *Collicoat v McMillan* [1999] 3 VR 803 at [43] concerning moral claims and moral obligations in family provision matters. Her Honour continued:

> "Bearing these statements in mind, and doing the best I can on the evidence provided to me about Michelle, I consider $4 million appropriate provision for her.
>
> In reaching that conclusion, I have not simply followed the amount nominated by Tony and MAG's solicitor in 2014. I have taken into account, as best I can, the likely cost of a very comfortable home in the UK, the fact that Michelle will be able to rent out her existing unit if she buys such a home, and that she would be left, after the purchase of a comfortable house, with a substantial amount of money which, if invested wisely, would leave her with a very comfortable income for the rest of her days."[56]

The substantive order made under s 21(1) of the Act by her Honour reflected that conclusion.

**The grounds of appeal**

[41] The notice of appeal as filed contained three grounds of appeal. Ground 1 challenged the correctness of the test adopted by the learned primary judge as the one to be applied in deciding whether to make an order under s 21(1) of the Act, namely, whether the will proposed by Mr Spink was one that MAG "probably would have made" had she had testamentary capacity. Shortly prior to the hearing of the appeal, the appellant notified that he no longer proposed to pursue this ground.

[42] Ground 2 was advanced on the alternative basis that the test adopted by the learned primary judge was correct. This ground contended that her Honour erred in finding that MAG "probably would have made" a will in which Michelle received a gift of $4,000,000 when such a finding was against the weight of the evidence.

[43] Ground 3 alleged error on the part of the learned primary judge by failing to give primacy to the interests of MAG over the potential for Michelle to bring a family provision application against MAG's estate on her death.

**The test adopted at first instance**

[44] Although Ground 1 was not pursued, I propose to make some observations with respect to the test adopted by the learned primary judge referred to in that ground. I do so in circumstances where the respondent, Michelle, did not file a notice of contention that proposed some other test as the correct one to be applied in order to support the orders made at first instance.

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55 Reasons page 12 ll23-26: AB 1 12.

56 Reasons page 13 l40 – page 14 l5: AB 1 15-16.

[45] In oral submissions, counsel for Michelle submitted that the discretion under s 21(1) of the Act is unfettered.[57] That submission tends to overlook the principle enunciated by this Court in *GAU* that the making of an order under that section is an exercise of jurisdiction which is protective in nature and is informed by what is for the benefit, and in the interests, of the person who requires protection.[58]

[46] It is uncontroversial to propose that it will be in the interests of such a person that the court authorise a will that the person would likely have made had he or she had testamentary capacity.[59] A corollary of that proposition is that it will not be in the interests of such a person for the court to authorise a will which is not one that the person would, or probably would, have made. The validity of the corollary is supported by the provision in s 24(e) of the Act which conditions a grant of leave upon the court being satisfied that the proposed will is or may be one that the person **would** make.

**Ground 2**

[47] **Appellant's submissions:** The appellant submitted that the evidence before the learned primary judge demonstrated a consistent attitude on the part of MAG during the preparation of the will executed in 2014 and thereafter that the gift to Michelle should be $1,000,000 and that any testamentary instrument executed by her should not accommodate a potential family provision claim by Michelle to the extent that it might result in an award in excess of that amount. Support for the submission was based on contemporaneous notes and written advice prepared and given by Mr Peter Rowe, the solicitor who prepared the wills in 2014 for both MAG and Tony, and to an absence of evidence of a change of intention on MAG's part thereafter.

[48] This evidence, the appellant submitted, warranted a finding that any will that MAG might have made at the time when the application was decided would, in all probability, have maintained the gift to Michelle at $1,000,000. The evidence also precluded a finding that it was likely that MAG would have increased the provision for Michelle beyond that point.

[49] **Respondent's submissions:** The respondent did not directly contend that the notes and written advice given by Mr Rowe, together with MAG's instructions at the time, did not evidence an intention on her part to limit the gift to Michelle to $1,000,000 notwithstanding the potentiality of a family provision claim. The thrust of the respondent's submissions was to question MAG's soundness of mind at the time when she made her will in 2014 and hence the reliability of her statements and actions as an evidential basis for drawing inferences concerning her intentions then and adherence to them thereafter.

[50] **Discussion:** Mr Rowe prepared handwritten notes[60] of a conference held on 28 April 2014 in which he took detailed instructions from MAG and Tony concerning new wills that he had prepared in draft for them. Each draft will provided for a gift to Michelle of $4,000,000. Mr Rowe then diarised observations he had made during his discussions with MAG and Tony at the conference in a file note dated 28 April 2014.[61]

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57 Appeal Transcript ("AT") 1-34 ll23-24.
58 At [52].
59 At [63].
60 Spink 1 Exhibit CAS-26: AB 2 799-806.
61 Spink 1 Exhibit CAS-26: AB 2 807-809.

[51] The file note contains the following:

> "3. We then had a lengthy conversation as per the attached hand written note at the table and Tony and MAG were heavily involved in the conversation. I took them through what the current position with the will was and how Shaun was ultimately in control through the testamentary trust. We talked about Michelle and he said that the four (4) million dollars that was being set aside in the draft was clearly too much having thought about it. I said in the context of the estate it was not too much but he said they are ordinary people and they will be happy after more discussion he admit (sic) he wanted just a million dollars to her as she was also getting his mother's house which she had in England and which Michelle already lived in and he said she would be very happy with all of that."[62]

[52] This paragraph reflected instructions as recorded in the handwritten notes. Those notes also included references to a statement by Tony that he did not think that Michelle would "sue".[63]

[53] Following the conference, Mr Rowe wrote a letter of advice to MAG and Tony dated 5 May 2014[64] which enclosed a revised draft will for Tony and explained that MAG's will would be "a mirror image". The letter of advice contained the following:

> "3. I have stated that you are then giving one million dollars ($1 Million) to Michelle. As discussed, this would be seen as insufficient provision for Michelle if she were to challenge the will and she would certainly succeed in gaining a higher share of the estate if she did that. For simplicity, rather than create an annuity and given that it is only a million dollars now instead of four (4) million dollars the will states it goes outright to Michelle. Please let me know however if you would prefer to deal with this in another way."[65]

[54] Mr Rowe met with MAG and Tony again on 16 May 2014 at their residence. He had with him wills as revised, ready for execution. Mr Lollo and Ms Rudd were also in attendance. In a file note dated that day,[66] Mr Rowe recorded that he sat down with them and went through the will item by item. No specific reference was made to the gift to Michelle. MAG and Tony then duly executed their wills.

[55] In his affidavit sworn on 12 October 2018,[67] Mr Spink spoke of discussions that he had had with MAG concerning the gift for Michelle in clause 3.2 of the will that he and Ms Cornford-Scott had prepared. He stated:

> "17. MAG told me that this gift was to remain in its current form because it gives effect not only to her wishes, but also to Tony's wishes. She also told me that she did not want any further

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62 AB 2 807.
63 At AB 2 799, 805.
64 Spink 1 Exhibit CAS-26: AB 2 828-830.
65 AB 2 828.
66 Spink 1 Exhibit CAS-26: AB 2 819-821.
67 Spink 2.

provision to be made for Michelle. I discuss this in further detail below in under heading "Family Provision."[68]

"Family Provision"

"71. I have raised with MAG on numerous occasions the differential treatment of Michelle to Shaun, Kevin and Christopher. However, MAG has consistently told me words to the effect:

a. she has no relationship with Michelle;

b. she and Tony were not close to Michelle;

c. she has not seen Michelle since 2010;

d. she and Tony did not want to treat Michelle the same as Kevin, Chris and Shaun

and accordingly I have kept the gift to her in the same terms as that contained in MAG's 2014 Will and Tony's will."[69]

[56] Mr Spink was not cross examined on this or any other of his affidavits. In fact, no deponent was required for cross examination at the hearing of the application.

[57] Turning to MAG's mental soundness at the time she made her 2014 will, I note that the only direct evidence relevant to that is in Mr Rowe's file note date 28 April 2014. There, he recorded the following:

"11. During all conversations MAG spoke to me clearly about the various things. She said to me that several of the family members had said that she was losing her mind and she had been to numerous doctors at their instance. I said what was the conclusion and she said they all said she was fine but everyone in the family kept saying that she wasn't. On several occasions she said it had been very demanding doing what she had been doing but she had obviously had to do the right thing by Tony but she had not really been out of the house for ages and it was very difficult. Tony himself said to me on various occasions that he was worried about MAG's ability to run the businesses but Peter Lollo would be there to assist her. He said he was worried that given that MAG's mother had lost her mind that MAG was starting to lose hers as well. The only thing I observed with MAG was that she had very minor tremor in her hands which I thought seemed to worsen when stressful issues came up such as discussions about _____, MAG is under considerable stress but clearly mentally capable in my view. The only point was she seemed a little focused on Shaun's return from wherever he had been and seemed to be pinning her hopes on Tony having discussions with Shaun and figuring some of this out."[70]

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68 AB 2 745-746.
69 AB 2 754.
70 AB 2 808-809.

[58] The respondent referred to three medical examinations that MAG had undergone prior to May 2014 which were referred to by Dr Siddle in her 2017 report but which had been conducted by other medical practitioners. It appears that by March 2014, MAG was suffering from considerable psychological issues and a high degree of stress and anxiety, and exhibited some cognitive decline. There was, however, no elaboration in the evidence as to what degree, if any, those matters might have affected her capacity to reason soundly.

[59] There is no reason not to accept Mr Rowe's assessment of MAG's capacity to give coherent instructions to him in 2014. In light of that assessment, MAG's instructions and her conduct in not indicating after receipt of the letter dated 5 May 2014 or in the meeting on 16 May 2014 that she wished the provision for Michelle in clause 7.1.1(a) of the will to be dealt with in a different way, together provide a reliable basis for drawing an inference that that provision expressed her firmly held testamentary intention at the time.

[60] In my view, Mr Rowe's evidence clearly supports an inference that when she made a will in 2014, MAG was minded to limit the gift to Michelle to $1,000,000. That was so notwithstanding legal advice at the time that Michelle might well receive more were she to make a family provision application.

[61] MAG's soundness of mind has, of course, deteriorated since then. However, there is nothing in the evidence of conduct on her part which would indicate a change of attitude towards the amount of the gift to Michelle. Indeed, there is good reason to conclude that MAG would not increase the amount to accommodate a prospective family provision claim by Michelle. Firstly, MAG and Tony had made wills which had reciprocal provisions as to the gift to Michelle in that amount. Secondly, MAG might well regard the likelihood of a family provision claim actually being made by Michelle as modest given that she had not made such a claim in respect of her own father's estate. Thirdly, there is the evidence of Mr Spink to which I have referred as to MAG's statements to him concerning the gift to Michelle in the will that he and Ms Cornford-Scott had drafted.

[62] For these reasons, I consider that it was not open on the evidence to conclude that a will which contained a gift to Michelle of $4,000,000, some $3,000,000 more than $1,000,000 for which both the will executed on 16 May 2014 and the draft will provided, was a will that MAG would probably have made. This ground of appeal must therefore succeed.

[63] A consequence of the success of this ground is that the discretion under s 21(1) of the Act was exercised on the footing of a factual error. Hence, the discretion miscarried. The correct factual finding was that the will proposed by Mr Spink was the will that MAG would probably have made. When that fact is taken into account, the discretion is, in my view, appropriately exercised by ordering the authorisation of the proposed will.

**Ground 3**

[64] In view of the success of Ground 2 and the consequence it has, it is unnecessary to decide Ground 3. I would, however, make some observations with respect to it.

[65] The ground is correct in asserting that the interests of the person who lacks testamentary capacity guides the exercise of the discretion. However, in so far as the ground may imply that to have regard for the potentiality of a claim for further

provision is contrary to, or inconsistent with, the interests of the person, it is incorrect for the following reasons.

[66] As I have noted, s 23(h) of the Act requires that for an application for leave under s 22(1), the court be given any evidence available of the likelihood of a family provision application. That information can be taken into account in determining whether the court is satisfied that the proposed will is, or may be, one the person would make and whether it is, or may be, appropriate to make an order under s 21(1) in relation to the person.

[67] Thus, the evidence required by s 23(h) can assist the court in identifying the range of individuals whom the person would likely benefit under a will and possibly the nature and approximate value of benefits that such individuals might receive by way of family provision. That such information is to be given to the court does not, however, signal a legislative intention that in determining an application under s 21(1), the court must evaluate potential family provision claims for the purpose of ensuring that the will which it authorises satisfies such claims.

[68] There may be instances, as the decision in *Fenwick* recognises, where having regard to the value of the estate and the costs of potential family provision proceedings and where the evidence otherwise permits, it will be open to the court to find that the will that the person who lacks testamentary capacity would probably make, is a will which satisfies potential family provision claims. But where, as here, the evidence precludes a finding that the person probably would make provision for a particular individual on that basis, it is difficult to see how it is in that person's interests for the court to authorise a will which so provides.

[69] In addition, it is doubtful that the provision for a gift of $4,000,000 to Michelle in the will authorised by the court would achieve a practical outcome of ensuring that family provision proceedings will not impact upon the administration of MAG's estate. As I have noted, such proceedings on behalf of two other potential claimants have been intimated.

[70] Finally, it is significant that there was an insufficiency of evidence before the learned primary judge on which an informed assessment of the amount that might be awarded to Michelle by way of family provision, could have been made. Although her Honour referred to "a very comfortable house" in the United Kingdom and to "a very comfortable income" that a gift of $4,000,000 would provide for her, there was, in fact, no evidence of the likely cost of acquiring such a house, of the likely return on the investment of the balance or of the likely rental return from her current residence.

**Disposition**

[71] For the reasons given, the appeal should be allowed. I consider that the appropriate course to take is to set aside the authorisation order made at first instance (Order 2) and to substitute in its place an order authorising the making of a will for MAG in the form proposed by Mr Spink. The orders made at first instance ought otherwise be confirmed.

[72] Further, it is appropriate, in this case, for the costs of all parties to the appeal to be assessed on the indemnity basis and to be paid from MAG's assets.

[73] **MORRISON JA:** I have had the benefit of reading the reasons of Gotterson JA. I agree with those reasons, as they reflect my own for joining in the orders made on 11 April 2019.

[74] **BOWSKILL J:** I also agree with Gotterson JA.