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CIVIL LAW SECTION

UNIFORM WILLS ACT

Background Discussion on Statutory Wills

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Introduction

[1] After reaching the age of majority, adults may possess and then lose testamentary capacity either temporarily or permanently. A loss of testamentary capacity may be due to any number of conditions resulting in mental disability or mental incompetence, including mental illness, brain injury from physical trauma, senile dementia, etc. Some people may never have testamentary capacity in their lifetime due to developmental delay or impairment. However, the legal assessment of an adult's testamentary capacity is never just presumed from the presence of a mental condition; it is always assessed on an individual basis. The law is clear that a mentally challenged person whose affairs require management by a substitute decision-maker may still have the testamentary capacity to create a will.[1]

[2] The law in Canada also seems clear that a substitute decision-maker cannot exercise the testamentary power of a person under their care by making, altering or revoking that person's will. A testator's power to make a will cannot be transferred or delegated at common law. Like getting married or serving a prison sentence, will-making is classified as a personal act that can only be performed by the principal, not by an agent. In addition, the fiduciary nature of the relationship between a principal and their agent, attorney or trustee restricts a substitute decision-maker from disposing of the principal's property without clear and specific authority to do so; therefore, this principle similarly restricts substituted will-making.[2] Although many Canadian statutes confer on substitute decision-makers very broadly-stated general powers to deal with the property and affairs of the persons under their care, it is extremely doubtful that the power to make a will would thereby be included.[3] Five provinces leave no doubt about the matter by expressly providing that a substitute decision-maker cannot make, change or revoke a will.[4]

[3] Courts have no greater authority in this area than other substitute decision-makers. In the absence of express statutory authority, a court cannot make, change or revoke the will of a person without testamentary capacity.[5]

[4] In England, Australia and New Zealand, courts are granted such express statutory authority to make "statutory wills" for persons without testamentary capacity. In Canada, however, courts typically do not have such statutory authority. The one exception is New Brunswick, which extended such jurisdiction to its courts about a decade ago.

Circumstances Addressed by Statutory Wills

[5] Before considering the relevant legislation and reform issues in this area, it is useful to canvass the type of fact scenarios which are typically advanced as reasons to make a statutory will.[6] These scenarios are a cause for concern only if they result in an unjust or inappropriate distribution on the incompetent person's death that, for whatever

reason, cannot be adequately addressed by the law of intestacy or dependants relief legislation. If the safety net of intestacy and dependants relief statutes produces an acceptable result for a particular incompetent person and their family, then the justification for a statutory will is reduced. The usual fact scenarios discussed in the context of this issue include the following:

- The person made no will before becoming incompetent and intestacy will produce an undesirable result or a result the person would not have wanted.
- A pre-existing will was revoked by marriage or divorce, the person is now incompetent to make a new one and intestacy will produce an undesirable result or a result the person would not have wanted.
- The person did make a will before becoming incompetent but it has become seriously outdated during the period of incompetence for reasons such as:
  - a major asset in the will has been disposed of by the property trustee;
  - the will does not provide for a child who arrived after the period of incompetence commenced;
  - the executor or chief beneficiary has predeceased the testator;
  - there has been a major change in the relationship between the testator and the beneficiaries under an existing will or on intestacy.
- A statutory will is needed to prevent money inherited from one side of the family from going to the other side on intestacy.
- It is just and desirable to make testamentary provision for a dedicated non-family caretaker (a friend, employee or charitable organization) who of course will have no claim on intestacy or under dependants relief legislation. This scenario is most compelling where the blood relatives are non-existent, remote or neglectful.
- A statutory will can prevent litigation over the estate which would otherwise occur.
- In jurisdictions where inheritance or estate taxes exist (unlike Alberta), a statutory will can result in significant tax savings, for example, by substituting a beneficiary's child for the beneficiary in the will so the estate property passes between the three generations only once, not twice.

[6] A statutory will case in England that had very unusual circumstances is *Re Davey*.[7] A young male nurse in a nursing home secretly married an elderly dying woman with mental deterioration. The marriage revoked her will (made while mentally

competent) which had left her property to her family. On her death she would therefore die intestate and her estate would pass to her secret husband of a few days. In the course of an already ongoing application to appoint a trustee, the Court of Protection learned of the secret marriage and quickly appointed the Official Solicitor as trustee to deal with the matter. Without time to challenge the validity of the marriage in court, the Official Solicitor applied for and obtained a statutory will in the same terms as the revoked will, without notice to the husband or family. The woman died just a few days later. The court observed that the disinherited husband's remedy would be to apply for a share of the estate under the dependants relief legislation.

[7] It is also important to remember when considering fact scenarios for statutory wills that a court need not be asked to make a statutory will to deal with absolutely all of a person's estate. If an existing will or the intestacy laws will distribute a person's estate in an appropriate way except for an aspect which needs intervention, the court can be asked to simply make that one adjustment. For example, the court could make a codicil to an existing will to add a bequest to a caregiver. As stated by the Law Reform Committee of Victoria:

> ... it should be made clear that the Court is not bound to make an entire will for an incapable person. The applicant may be satisfied with a specific bequest or devise, for example a life interest in a house in which the applicant may be living with the incapable person whom he or she is caring for on a gratuitous basis. The rest of the estate can be distributed according to an existing will or the intestacy rules, or be left to a family provision claim. The jurisdiction should be capable of being exercised only to meet the need at hand. If every time the court were to consider that it must authorise an entire will that could be an occasion for expensive enquiries and hearings.[8]

Statutory Wills in England

Introduction

[8] The English Court of Protection has been empowered since 1970 to make statutory wills for mentally incompetent persons.[9] On application, the court may authorize the execution of a will[10] for a person ("P") who "lacks capacity in relation to a matter or matters concerning . . . P's property and affairs."[11] A person lacks capacity "in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain."[12] The court cannot make a statutory will for a minor.[13]

Application Procedure

[9] Under the Court of Protection Rules, an application for a statutory will may be brought without prior permission of the court by a wide assortment of people, including

the Official Solicitor, the Public Guardian, a person who has made application for the appointment of a deputy (trustee or guardian) for P, a beneficiary under an existing will or on intestacy, an attorney under an enduring power of attorney and any person for whom P might be expected to provide if P had capacity to do so. Anyone else must have the prior permission of the court to apply for the making of a statutory will.[14]

[10] According to the legal author Martin Terrell, statutory will applications are relatively rare in England – only around 250 applications per year.[15] Applications are detailed, time-consuming to prepare and therefore costly to bring. The effort and cost must be assessed against the size of the estate and the consequences of not having a statutory will.[16] As Terrell notes:

> An application needs to show the patient's family and interests, character and history of generosity, the patient's testamentary history and the relationship to his proposed beneficiaries, the size of the estate and the likely size of the estate at the date of death. The application must then apply all these factors to the present situation and show why the present dispositions under an existing will or intestacy are inappropriate, and why the patient would wish to change those present dispositions. The burden of proof is on the applicant to justify the change to the current dispositions.[17]

Test for Making a Statutory Will

[11] Until recently, the Court of Protection used a subjective test to determine what P would want done with the estate, rather than just doing what the court perceived as being objectively best. In other words, the court attempted "to make for the patient the will it suppose[d] he would, had he been capable, have made for himself."[18] This substituted judgment approach was mandated under the legislation which formerly governed this area.[19] The leading case of *Re D.(J.)*[20] listed five principles or factors for a court to follow when devising a statutory will:

> (1) the patient should be assumed to have a brief lucid interval at the time the will was made;
>
> (2) during that lucid interval it should be assumed that the patient has full knowledge of the past and realises that as soon as the will is executed he will lapse back into his pre-existing mental state;
>
> (3) the actual patient must be considered, with all his antipathies and affections that he had while in full capacity, and not a hypothetical patient;
>
> (4) the patient must be assumed to be acting reasonably and to have been advised by a competent solicitor; and
>
> (5) in normal cases, he is to be envisaged as taking a broad brush to the claims on his bounty rather than an accountant's pen.[21]

[12] However, using this subjective test meant that the court often had to resort to mental gymnastics and artifice to meet it. As one judicial critic noted:

> In cases in which an incapacitated person had never been able to form even the most rudimentary testamentary intention, the English Courts were resorting to a legal fiction in purporting to ascertain what testamentary disposition that person subjectively would have intended to make. Even where the incapacitated person had previously expressed some valid testamentary intention, the Courts were attributing to him or her a new testamentary intention upon the basis that the person, if temporarily restored to testamentary capacity, would have changed his or her mind. The fiction was employed to disguise, needlessly, that what the courts were really doing in such cases was making decisions, objectively based, in the best interests of the incapacitated person and his or her family.[22]

[13] The subjective approach and its supporting case law have now been swept away in England by the *Mental Capacity Act 2005* which came into force in 2007. It enacted an overarching principle that "[a]n act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests."[23] In determining P's best interests, the decision-maker must consider all relevant circumstances and in particular:[24]

> (6) He must consider, so far as is reasonably ascertainable –
>
> (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
>
> (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
>
> (c) the other factors that he would be likely to consider if he were able to do so.

So the test for making a statutory will is now an objective "best interests" test. While subjective elements must still be considered, they are no longer determinative.[25] Moreover, the weight to be attached to those other factors is entirely dependent on the specific facts and circumstances of each case.[26]

Execution Procedure

[14] Once the court has approved the terms of a statutory will, it will authorize someone (usually the property trustee) to sign the will for the person who lacks capacity. The authorized person must sign the will with their own name and the name of the patient, in the presence of two or more witnesses present at the same time. The witnesses must then sign the will in the presence of the authorized person. Finally, the will must be sealed with the court seal. Apart from these special formalities, the will is governed by the standard wills legislation.[27]

Statutory Wills in Australia

Introduction

[15] In the mid-1990s, some Australian states started to pass legislation to authorize the making of statutory wills. Then, in 1997, the Australian National Committee for Uniform Succession Laws recommended that all Australian jurisdictions adopt standard statutory provisions to authorize the making of statutory wills for mentally incompetent persons.[28] Today, all eight Australian jurisdictions authorize the making of statutory wills although some variations do exist between certain enactments, especially those which predate the uniform report.[29]

Application Procedure

[16] There are several differences between the English model of statutory wills and the typical Australian model. A major difference is that, in England, most people apply to court to make a statutory will in a one-step process. The typical Australian model creates a two-step process whereby every applicant must first seek leave of the court to bring a subsequent application for a statutory will.[30]

[17] The Australian two-step process is designed to screen applications so that only well-founded applications will be heard by the court. It reflects a fear that frivolous or vexatious applications may be brought because in Australia, anyone can apply to have a statutory will made for an incompetent person. By contrast, the English one-step model screens potentially frivolous or vexatious applications by putting restrictions on who may apply for a statutory will in the first place. Any person who does not fit one of the stated categories must have the court's permission to apply for a statutory will.

Other Differences with English Model

[18] The Australian model also provides explicitly that the court is not bound by the rules of evidence. This makes it much easier to receive and assess information about the incapacitated person's wishes, habits and character.

[19] Before making a statutory will, Australian courts must be satisfied that the person lacks testamentary capacity and is incapable of making a valid will. But unlike the English legislation, Australian statutes do not explicitly tie testamentary incapacity to concepts of impairment or disturbance in the functioning of the mind or brain. In practical terms, the effect of both models is probably the same, but the Australian model appears to be more objective and less stigmatizing as a result. As stated by the Law Reform Committee of Victoria:

> ... it would be better not to attempt to enumerate the possible causes of incapacity in the person on whose behalf a statutory will may be made, by references to disease, senility, injury, mental infirmity, etc. That would involve

> an applicant having to show which kind of incapacity the person on whose behalf a statutory will was being sought was suffering from. Some of these terms relating to mental incapacity are not clear of meaning and are demeaning to the sufferer.[31]

[20] Also in contrast to the English model, most Australian jurisdictions allow a statutory will to be made for a minor who lacks testamentary capacity.[32] This power is distinct from the power which most Australian courts also have to authorize a minor to make a will despite their minority. In that situation, the minor lacks testamentary capacity only by temporary reason of youth, with no other underlying cause of long-term incapacity, and the minor is personally requesting the ability to make a will. By contrast, the statutory will provisions are used where someone other than the minor is applying to have a statutory will made for a minor who is not going to acquire testamentary capacity on reaching majority or during their adult life due to some underlying cause of long-term incapacity.

[21] The typical Australian model provides that a court can make a statutory will only if the person who lacks testamentary capacity is alive at the date on which the order is made.[33] If the incapacitated person dies at any point in the application process before the order is given, the possibility of making a statutory will ends and the person's estate will pass subject to the usual law of wills, intestacy and dependants relief. The Law Reform Committee of Victoria had recommended a more radical proposal – that an application for a statutory will should be able to be brought within six months of the incapacitated person's death (or such further extended period as the court may allow), on the basis that the extent of the estate and the relative claims of potential beneficiaries would be clearest at that point.[34] However, this recommendation was never implemented in Victoria or followed by any other Australian jurisdiction. The National Committee for Uniform Succession Laws stated that:

> [t]he advantage of excluding applications made after the death of a person is that all applications to adjust how the person's estate will otherwise be distributed (whether by will or by the relevant intestacy rules) will be subject to a single legislative regime, namely, family provision legislation. This avoids the possible conflict that might arise if two different types of applications could be made after the death of a person.[35]

Test for Making a Statutory Will

[22] Like the former English model, the typical Australian model requires the court to subjectively consider the actual person who lacks testamentary capacity, not a hypothetical person. In the language of the uniform model statute, the court must be satisfied that "the proposed will, alteration or revocation *is or might be one that would have been made* by the proposed testator if he or she had testamentary capacity."[36] This

formulation of the test allows the court to examine the issue according to a wide range of factors, as in England.

[23] South Australia uses a much narrower formulation: the court must be satisfied that "the proposed will, alteration or revocation *would accurately reflect the likely intentions* of the person if he or she had testamentary capacity".[37] When this wording was previously used in the Victoria Act (now changed), it was interpreted as limiting the court to examining only the proposed will rather than examining the wide range of factors delineated in the English case law.[38] To avoid this limiting effect, the other Australian jurisdictions use the more flexible wording of the uniform model statute or variations of that wording. For example, New South Wales provides that the court must be satisfied that "the proposed will, alteration or revocation *is, or is reasonably likely to be, one that would have been made* by the person if he or she had testamentary capacity."[39]

[24] The typical Australian model also requires the court to consider whether it is "appropriate" or "reasonable" for a statutory will to be made for the person. This provision is usually characterized as one which simply vests discretion in the court. However, as noted by one academic:

> This discretion enables the court to decline an application that otherwise meets other requirements for the grant of an order. If the circumstances of a case give the court reason to doubt that a proposed order is in the best interests of the person over whom it is made, the court would surely be right to refuse the application by exercise of this discretion.[40]

[25] Most Australian cases largely focus on making a subjective assessment and still rely heavily on the old English case law in this area.[41] However, a new trend is emerging where an objective assessment is used more prominently and the limitations of a subjective test are acknowledged.[42] In *Re Fenwick*, Palmer, J. of the New South Wales Supreme Court conducts an exhaustive review of the history of statutory wills in England and Australia. The traditional English subjective test is heavily criticized as artificial and unrealistic. Palmer, J. states that "Australian Courts should resist the temptation to be entangled by"[43] the former English case law and should start instead "from a clean slate"[44] when interpreting its jurisdiction's test for making a statutory will. Greater emphasis should be placed on an objective assessment:

> In my opinion, the law of statutory wills in Australia should be developed in a way which justifies a result by a transparent process of reasoning founded upon reality, not upon contra-factual assumptions.[45]

[26] Palmer, J. proposes slightly different tests for making a statutory will depending on the capacity history of the person for whom it is sought to be made. If the person is an adult who had prior testamentary capacity which is now gone ("lost capacity"), the court should first assess any evidence of the person's present actual intention (including any

intention to die intestate in whole or in part). Next, the court must decide whether that present actual intention would be carried into testamentary effect by that person if he or she had testamentary capacity. If actual intention is non-existent or cannot be clearly established, the court should subjectively assess the "reasonably likely" intention of the person, having regard to previous wills, family history and so on.[46]

[27] If the person has never had any testamentary capacity ("nil capacity"), the court must first objectively assess whether it is reasonably likely that the person would have made a will if capacity had existed. Since most people with assets and family make wills, the court can be guided by a lower evidentiary threshold of such common experience in judging that factor. When deciding the terms of the statutory will, the court should use a completely objective approach since any subjective assessment in a "nil capacity" case is impossible and fictitious.[47]

[28] Finally, if the person is a minor who would someday have had testamentary capacity except for the intervening circumstance which now renders that impossible ("pre-empted capacity"), the court should first assess if it is reasonably likely that the person would have made a will at some point in adulthood. If yes, then the court should take a pragmatic approach combining both subjective and objective tests. The court should take into consideration all subjective evidence, including the minor's history, relationships and current intentions, but ultimately should apply an objective test to decide the terms of the statutory will.[48]

[29] The greater use of an objective test in making a statutory will is not without its critics, however. One Australian academic notes that wills legislation is predicated on the concept of testamentary freedom and an individual will-maker's right to leave their property as they see fit. When legislation allows this testamentary freedom to be exercised by a substituted decision-maker, a subjective test is the only appropriate basis on which to exercise that individual's right to autonomy. An objective test in this context is paternalistic. The objective "best interests" test which predominates in the mental health field should not displace the traditional focus of wills legislation on an individual's testamentary freedom:

> While decision-making about one's body and one's property can be articulated similarly in terms of autonomy, the introduction of a concept of "best interests" into the wills arena does not sit comfortably with its conceptual history and theoretical underpinnings. The UK framework for statutory wills has always been one located in the mental health arena and it is perhaps understandable therefore that the standard of "best interests" is now the guiding standard. In the Australian context statutory wills have always been the creature of wills legislation; in that context a "best interests" standard would be distinctly out of kilter.[49]

Execution Procedure

[30] A final departure from the English model concerns the method of executing a statutory will. In the typical Australian model, the court does not authorize a person (such as the property trustee) to sign the will on behalf of the incompetent person with their name and the incompetent person's name. The statutory will is instead signed by the Registrar of the court, sealed with the court seal and deposited in the court's will registry. It is a much more direct recognition that a statutory will is essentially a court order.

[31] What if P dies after the court order is given but before the Registrar signs the statutory will? New South Wales and Northern Territory require the Registrar to have proof that P is alive before signing.[50] But where legislation is silent, a South Australian court has held that the statutory will is nevertheless effective since it is the court's authorization of its terms that makes the will valid, not the Registrar's signature. The court rejected English precedent that such a situation is analogous to a testator dying after giving instructions but before signing the will. Australia's different execution procedure justifies treating the statutory will like any other court order and therefore effective on the date it was ordered by the court.[51]

Statutory Wills in New Zealand

[32] The Family Court of New Zealand is empowered to make a statutory will for a person who is subject to a property order. Although the person has already been found incompetent to manage their own affairs and a manager has been appointed to administer their property, the statute provides that the person is not, by reason only of that order, incapable of making a will. The court will assess testamentary capacity before it acts.[52]

[33] The court has a few mechanisms at its disposal. It can direct that a person subject to a property order may make a will only with the leave of the court.[53] If there is an existing will, the court can ascertain the testator's "present desire and intention"[54] to see if the existing will still expresses it. If the will does not, the court can make a statutory will "in accordance with that present desire and intention."[55]

[34] If the court has directed that a will can be made only with the court's leave or if there is no existing will, the court can make a statutory will by first settling "the proposed terms of the testamentary disposition provisionally"[56] and then authorizing the manager to execute a will in those terms for and on behalf of the person. There is no real test stated in the legislation to indicate whether the terms of such a statutory will should be determined objectively or subjectively. However, case law has determined that English precedent should be followed, despite its

> … somewhat different statutory framework … , but in the absence of any guidelines the test suggested by Sir Robert Megarry VC [in Re D.(J.)] seems

> eminently practical, particularly as the Vice Chancellor did not suggest that the factors or principles enumerated by him were intended to be exhaustive.[57]

Therefore, a subjective assessment of the incapacitated person will occur, to the greatest extent possible.

[35] The signing requirements also follow the English model. The manager signs before two witnesses present at the same time and the witnesses then subscribe in the presence of the manager. Finally, the will is sealed with the court seal.[58]

Statutory Wills in Canada

New Brunswick's Legislation

[36] As already mentioned, the only Canadian jurisdiction which allows a court to make a statutory will for a person without testamentary capacity is New Brunswick. In 1994, New Brunswick amended the *Infirm Persons Act* so that the Court of Queen's Bench would have "the power to make, amend or revoke a will in the name of and on behalf of a mentally incompetent person."[59] A mentally incompetent person is one who requires care, supervision and control due to "a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury" or "who is suffering from such a disorder of the mind."[60] In addition to persons declared to be mentally incompetent by a court, these provisions also apply to anyone found by a court to be incapable of handling their affairs "through mental or physical infirmity arising from disease, age or other cause, or by reason of habitual drunkenness or the use of drugs."[61]

[37] While the court must find the person to be mentally incompetent or incapable of managing their affairs, there is no explicit statutory requirement that the person must be found to lack testamentary capacity. Such a requirement is present in the English, Australian and New Zealand models. A New Brunswick court has commented that, if the person still has testamentary capacity, they should sign the will along with the committee (property trustee), but if the person does not have testamentary capacity, then there is no need for the person to sign it.[62] Even if this is a correct interpretation of the statute, it seems inappropriate for a court to be acting when a person has testamentary capacity and can legally make their own will.

[38] The Act states a subjective test for the exercise of the court's discretion and provides that a court may make, amend or revoke a will:

> ... where the court believes that, if it does not exercise that power, a result will occur on the death of the mentally incompetent person that the mentally incompetent person, if competent and making a will at the time the court exercises its power, would not have wanted.[63]

Only New Brunswick states the test as a negative proposition – the avoidance of a result which the mentally incompetent person would *not* want. One critic has inquired, "Would comments like 'I want A to get something' contrasted with 'I would not want A to get anything' furnish different results?"[64] Stating the test as a negative also caused some to question whether the English case law could be used when interpreting the law.[65] Despite this concern, New Brunswick courts have since adopted the English case law concerning the factors and principles which should guide a court in subjectively making a statutory will.[66]

[39] If the court believes a statutory will is warranted, it may authorize or direct the committee of the estate to do any action in relation to the incompetent person's estate that the person could do if competent.[67] Only a committee can be authorized to so act by the court. An attorney under an enduring power of attorney cannot apply for authorization to make, amend or revoke a will.[68]

[40] The making of any will, amendment or revocation by the committee must be approved by the court in order to be valid.[69] This seems to create an odd procedure. The court approves the terms of the will after the committee has executed the will rather than authorizing them in advance.[70]

The Rest of Canada and the Case for Law Reform

[41] No other Canadian jurisdiction has followed New Brunswick's lead to authorize the making of statutory wills. Nor does there appear to be any great reform movement to advocate this development in Canada. However, one academic – Professor Gerald B. Robertson of the University of Alberta – has called for this reform to be made:

> If the present position is indeed that Canadian courts cannot authorize a property guardian to make or revoke a will, this is an unfortunate omission in our law. Although such a power is one which should rarely be exercised, there are situations in which its absence can cause grave injustice, injustice which cannot necessarily be cured by the law of intestate succession or by dependants' relief legislation. Those responsible for reforming the law in this area should give [this matter] serious consideration . . . .[71]

[42] Arguments in favour of court jurisdiction to make statutory wills usually focus on the perceived practical need, in some individual cases, to avoid an unjust or inappropriate distribution of an incapacitated person's estate on death. Sometimes the problematic distribution is not resolvable by reliance on intestacy or dependants relief laws and sometimes the problematic distribution may be the result of those laws.

[43] However, there are some major philosophical hurdles militating against allowing a court to simply come in and rearrange a person's testamentary affairs when the subject is personally incapable of doing it. Canadian legislation largely respects the view that

will-making is a sacrosanct personal act that should not ever be delegated to another.[72] To allow even a court to engage in substitute will-making for the most vulnerable of testators can attract condemnation. As two legal commentators in New Brunswick stated:

> Is this not another example of the "Big Brother" syndrome where the state can interfere with the discretion of an individual without the individual's knowledge. To what extent should the state continue to interfere with the individual? What next? In the writers' opinion, this is a bureaucratic enactment of control without justification and, as such, subject to dangerous development by the courts.[73]

[44] There is also the view that the statutory laws of intestacy and dependants relief already represent society's considered legal response to situations where a person does not have a will (for whatever reason) or where the will or intestacy laws do not adequately provide for a dependent relative. This view argues that the integrity of these statutory safety nets should be preserved without special treatment for a certain class of persons (those without testamentary capacity) whose estates are then handled by alternative means. As stated by the Scottish Law Commission when it refused to recommend any system of statutory wills, "[w]hat such a power would really be would be a power to change the ordinary rules of succession, testate or intestate, which would otherwise apply on the death of the *incapax*."[74]

[45] However, if a person who has testamentary capacity does not want their estate to be distributed according to intestacy or dependants relief laws, the person can avoid that result by exercising their testamentary capacity in an appropriate manner. Persons who lack testamentary capacity simply do not have that choice. It is arguable that the availability of a statutory will restores that choice to them (albeit via a substitute decision-maker) and provides equal opportunity to avoid an unwanted or undesirable result. Even though the choice would have to be exercised by substitute decision-making, it would at least occur in the context of an objective process with the most safeguards possible.

Alberta's Public Consultation re Law Reform

[46] In a 2007 Report for Discussion, the Alberta Law Reform Institute explored whether an Alberta court should have the power to make a statutory will for an adult who lacks testamentary capacity.[75]

[47] Right from the start, the ALRI Board expressed serious reservations about allowing statutory wills to be made in Alberta. A major concern was whether it is appropriate or advisable to allow such substitute decision-making for persons lacking testamentary capacity. From the perspective of potential beneficiaries, it may be arguable that a need for this reform exists, but the issue must be assessed from the point of view of

the incompetent testator. Society has already provided a default safety net of intestacy and dependants relief legislation to cover situations where a will is absent or inadequate for whatever reason.

[48] The Board was also concerned that allowing statutory wills would encourage estate-sponsored litigation and act as a drain on estates. It was concerned about the existence and nature of evidence in contested cases.

[49] The lack of any significant local or national reform movement in Canada advocating this major legal change was also a consideration. Presumably this indicates that there is no pressing need for such a reform.

[50] For similar reasons, a Project Advisory Committee made up of leading Alberta lawyers in succession law advised the ALRI Board that it did not support this reform. The Committee was also concerned that the legal availability of a statutory will could place a positive duty on a dependent adult's trustee or guardian to inquire into the propriety or adequacy of the dependent adult's will (or lack of same) and to assess whether a statutory will should be sought.

[51] While ALRI questioned whether there is a need to allow statutory wills to be made for persons without testamentary capacity, it wanted to assess public views and opinions on this issue by consulting as widely as possible. For that purpose, therefore, ALRI made a formal Request for Comment in its Report for Discussion and decided to see what kind of response would emerge on this issue.

[52] Two responses were received in support of statutory wills from organizations advocating on behalf of seniors. These organizations argued that an aging parent's loss of testamentary capacity in the final stages of life can pose real issues for their families if intestacy or dependants relief laws do not adequately address the situation. Such issues will likely increase once today's large population of "baby boomers" reach their senior years, when dementia and Alzheimer's disease are more common.

[53] The rest of the consultation feedback on the issue of statutory wills was largely negative. All the responses received from lawyers or organizations representing the mentally disabled were opposed to the making of statutory wills.

[54] The lawyers were mainly concerned about the subjective nature of creating a will for another person. They were also more likely to say that the existing legal safety net was sufficient to handle problems arising from loss of testamentary capacity.

[55] The opposition of organizations representing the mentally disabled was based on a profound distrust of lawyers, the courts and the legal system. While a statutory will might occasionally be beneficial to avoid unintended or unfair results on probate, they said that any possible benefit would be far outweighed by the perceived detriments of

dealing with the legal system. The advocates for the mentally disabled said that both they and their clients distrust the motives of lawyers. They do not believe that the courts are capable of objectively assessing either a person's capacity or that person's testamentary wishes. They believe the judge will simply impose the judge's own views. Participating in the court system is time consuming, expensive and it always alienates the disabled individual.

[56] In ALRI's opinion, implementation of any proposal concerning statutory wills must be able to allay this kind of fear and distrust in a major population group affected by that law. Reform in a sensitive area like statutory wills cannot be accomplished without public support. Addressing this kind of fear and distrust would require a long-term government commitment to communication and reassurance. Extensive public education would also be required to show people how statutory wills work to people's benefit in other jurisdictions. The acceptance and use of statutory wills in other countries are facts which are completely unknown to people here.

[57] In addition to the other arguments against statutory wills, the negative consultation input received on the issue of statutory wills confirmed ALRI's own initial reluctance to recommend legislation. Accordingly, ALRI did not recommend such law reform in its Final Report.[76]

Summary of Pertinent Questions

[58] From the foregoing research into the current state of the law regarding statutory wills, a list of pertinent questions can be summarized to assist the ULCC Working Committee in its consideration of this area.

Fundamental issues:

- Is there a need for law reform in this area?
- How best to handle any potential controversies and sensitivities that may arise in response to statutory wills legislation?
- In addition to outdated wills, can intestacy laws and dependants relief legislation also be sources of unjust or inappropriate distribution of the estate of a person who cannot alter their application due to lack of testamentary capacity?

If legislation is created:

- Should the legislation tie testamentary incapacity to the presence of mental impairment, incompetence or disturbance? Or should the court's jurisdiction be based simply on a finding of testamentary incapacity?

- If mental incompetence is a prerequisite, note that there should be a separate requirement to assess testamentary incapacity.
- Should a court be able to make a statutory will for a minor who will never acquire testamentary capacity?
- Who should be able to apply to make a statutory will for a person lacking testamentary capacity?
- To bring an application, should leave of the court:
    - always be required? (two-step process)
    - never be required? (pure one-step process)
    - only be required in cases where the applicant has no pre-existing legal or familial relationship with the person? (mainly one-step process)
- In determining the terms of a statutory will, should the court use:
    - a subjective test?
    - an objective test?
    - an objective test combined with a consideration of subjective factors?
- Should the test vary depending on whether the person's situation involves (as stated in *Re Fenwick*) lost capacity, nil capacity or pre-empted capacity?
- Should the test be legislatively stated in positive or negative terms?
- In making a statutory will, should the court be bound by the rules of evidence?
- How should a statutory will be executed?
    - the court should authorize a person to sign the will with their own name and the name of the person who lacks testamentary capacity. All standard execution rules will apply, or
    - it should be signed by the Registrar of the court like any other court order.
- What happens if the person dies after the court order is given but before the Registrar signs the order? Must the Registrar require proof that the person is alive before signing?

[1] J. MacKenzie, ed., *Feeney's Canadian Law of Wills*, 4th ed., looseleaf (Markham, Ont.: Butterworths Canada Ltd., 2000) at § 2.7.

[2] Dawn D. Oosterhoff, "Alice's Wonderland: Authority of an Attorney for Property to Amend a Beneficiary Designation" (2002), 22 E.T.P.J. 16 at 18-19.

[3] Gerald B. Robertson, *Mental Disability and the Law in Canada*, 2d ed. (Toronto: Carswell, 1994) at 97-98 [Robertson].

[4] Northwest Territories, Nunavut, Ontario, Saskatchewan and Quebec: *Guardianship and Trusteeship Act*, S.N.W.T. 1994, c. 29, s. 36(3); *Substitute Decisions Act*, S.O. 1992, c. 30, s. 31(1); *Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, s. 43; Quebec Civil Code, art. 711.

[5] Robertson, note 3, at 98.

[6] See, for example, Martin Terrell, "Wills for persons without capacity" (2004), 154 New L.J. 968 at 970 [Terrell].

[7] *Re Davey*, [1981] 1 W.L.R. 164 (Ct. of Protection).

[8] Law Reform Committee (Victoria), *Reforming the Law of Wills*, Final Report (1994) at para. S.5A.23 [Victoria Report].

[9] Roger Kerridge, *Parry & Clark: The Law of Succession*, 11th ed. (London: Sweet & Maxwell, 2002) at 66 [Parry & Clark]. This authority is currently found in the *Mental Capacity Act 2005* (U.K.), 2005, c. 9, s. 18(i) and Schedule 2, ss. 1-4 [Mental Capacity Act].The Mental Capacity Act was enacted following a review of substitute decision-making by The Law Commission (England) in its report *Mental Incapacity*, Report No. 231 (1995). This report contains virtually no discussion of the law and practice of statutory wills, apparently treating it as self-evident that statutory wills are a useful and valid mechanism that should continue.

[10] Mental Capacity Act, note 9, ss. 16(2)(a) and 18(1)(i). The power to make a statutory will can only be exercised by the court, not by P's deputy: Mental Capacity Act, s. 20(3)(b).

[11] Mental Capacity Act, note 9, s. 16(1)(b).

[12] Mental Capacity Act, note 9, s. 2(1).

[13] Mental Capacity Act, note 9, s. 18(2).

[14] *The Court of Protection Rules 2007*, S.I. 2007/1744, rr. 50, 51(1), 51(2)(a) and 52(4)(a)-(e).

[15] Terrell, note 6, at 968. This estimate would date from around 2004 when the article was published.

[16] Terrell, note 6, at 970.

[17] Terrell, note 6, at 968, 970.

[18] Parry & Clark, note 9, at 67.

[19] See, for example, *Mental Health Act 1983* (U.K.), 1959, c. 20, s. 95.

[20] *Re D.(J.)*, [1982] 1 Ch. 237.

[21] Lord Mackay of Clashfern, ed., *Halsbury's Laws of England*, 4th ed. reissue, vol. 30(2) (London: LexisNexis Butterworths, 2005) at para. 695, summarizing *Re D.(J)*, [1982] 1 Ch. 237 at 243-244.

[22] *Re Fenwick; Application of J.R. Fenwick & Re Charles*, [2009] NSWSC 530 at para. 7 [*Re Fenwick*].

[23] Mental Capacity Act, note 9, s. 1(5).

[24] Mental Capacity Act, note 9, s. 4(6).

[25] *In re P (Statutory Will) (Court of Protection)*, [2009] EWHC 163, paras. 37-40 (Ch.).

[26] *In re M* (Statutory Will) (Court of Protection), [2009] EWHC 2525, para. 32. See also *Re D (Statutory Will) (Court of Protection)*, [2010] EWHC 2159 (Ch.).

[27] Mental Capacity Act, note 9, Schedule 2, s. 3; Parry & Clark, note 9, at 66.

[28] National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills*, Queensland Law Reform Commission Miscellaneous Paper 29 (1997) at 44-58 [Australia Uniform Report].

[29] *Wills Act 1968* (A.C.T.), ss. 16A-16I; *Succession Act 2006* (N.S.W.), ss. 18-26 [New South Wales Act]; *Wills Act* (N.T.), ss. 19-26 [Northern Territory Act]; *Succession Act 1981* (Qld.), ss. 21-28 [Queensland Act]; *Wills Act 1936* (S.A.), s. 7 [South Australia Act]; *Wills Act 2008* (Tas.), ss. 21-41; *Wills Act 1997* (Vic.), ss. 21-30 [Victoria Act]; *Wills Act 1970* (W.A.), ss. 39-48 [Western Australia Act].

[30] The two-step process of requiring leave to be sought before the application hearing is found in Australian Capital Territory, Victoria, South Australia, Queensland, New South Wales, Northern Territory and Tasmania. It is also recommended by the uniform model statute. Western Australia uses a single application procedure. Tasmania allows statutory wills to be made by the Guardianship and Administration Board as well as by a court. The Board is a special tribunal established under the *Guardianship and Administration Act 1995*. It handles all guardianship appointments and other issues concerning mentally incompetent persons. Whether a statutory will is sought from a court or the Board, the procedure is essentially the same.

[31] Victoria Report, note 8, at para. S.5A.26.

[32] In Western Australia, statutory wills may be made only for adults without testamentary capacity: Western Australia Act, note 29, s. 40(2).

[33] See, for example, Northern Territory Act, note 29, s. 19(3).

[34] Victoria Report, note 8, at paras. S.5A.7, S.5A.17(3).

[35] Australia Uniform Report, note 28, at 50-51.

[36] Australia Uniform Report, note 28, at 57, s. 21(b) of the uniform model statute [emphasis added].

[37] South Australia Act, note 29, s. 7(3)(b) [emphasis added].

[38] *Boulton v. Sanders* (2004) 9 V.R. 495 (C.A.) discussed in John Hockley, "Statutory wills in Australia: Wills for persons lacking capacity" (2006), 80 Austl. L.J. 68 at 71-72.

[39] New South Wales Act, note 29, s. 22(b) [emphasis added].

[40] Matthew Groves, "As the Court Wills," [2009] U Monash LRS 7.

[41] See, for example, *State Trustees Limited v. Do & Nguyen*, [2011] VSC 45; *Re Keane; Mace v. Malone*, [2011] QSC 49; *McKay v. McKay & Ors*, [2011] QSC 230.

[42] *Re Fenwick*, note 22, the case which started this trend, has been applied in subsequent cases including *AB v. CB & Ors*, [2009] NSWSC 680; *In the Matter of Grace Geraldine Brown*, [2009] SASC 345; *Re Estate of Crawley*, [2010] NSWSC 618; and *Re Will of Jane*, [2011] NSWSC 624.

[43] *Re Fenwick*, note 22, at para. 33.

[44] *Re Fenwick*, note 22, at para. 148.

[45] *Re Fenwick*, note 22, at para. 175.

[46] *Re Fenwick*, note 22, at paras. 154-170.

[47] *Re Fenwick*, note 22, at paras. 171-176.

[48] *Re Fenwick*, note 22, at paras. 177-188.

[49] Rosalind F. Croucher, "'An Interventionist, Paternalistic Jurisdiction?' The Place of Statutory Wills in Australian Succession Law" (2009), 32 UNSW Law Journal 674 at 695.

[50] New South Wales Act, note 29, s. 23(2); Northern Territory Act, note 29, s. 19.

[51] *In the Estate of Grace Geraldine Brown (Deceased)*, [2010] SASC 90 at paras. 14-17.

[52] *Protection of Personal and Property Rights Act 1988* (N.Z.), 1988 No. 4, ss. 2, 54, 55 [Rights Protection Act].

[53] Rights Protection Act, note 52, s. 54(2).

[54] Rights Protection Act, note 52, s. 54(6).

[55] Rights Protection Act, note 52, s. 54(6).

[56] Rights Protection Act, note 52, s. 55(2).

[57] *Re Manzoni (A Protected Person): Kirwan v. Public Trustee*, [1995] 2 N.Z.L.R. 498 at 505 (H.C.).

[58] Rights Protection Act, note 52, s. 55(4).

[59] *Infirm Persons Act*, R.S.N.B. 1973, c. I-8, s. 3(4) [Infirm Persons Act].

[60] Infirm Persons Act, note 59, s. 1.

[61] Infirm Persons Act, note 59, s. 39(1).

[62] *Re M. (Committee of)* (1998), 27 E.T.R. (2d) 68 at 79 (N.B. Q.B.).

[63] Infirm Persons Act, note 59, s. 11.1(1).

[64] Eric L. Teed, Q.C. and Nicole Cohoon, "New Wills for Incompetents" (1996), 16 E.T.J. 1 at 2.

[65] Franklin O. Leger, Q.C., "Court-approved Wills" (1998), 14:3 So. J. 7 at 8.

[66] Re M. (Committee of) (1998), 27 E.T.R. (2d) 68 at 77 (N.B. Q.B.).

[67] Infirm Persons Act, note 59, s. 15.

[68] *Re MacDavid* (2003), 4 E.T.R. (3d) 50 at 53 (N.B. Q.B.).

[69] Infirm Persons Act, note 59, s. 15.1.

[70] Infirm Persons Act, note 59, ss.11.1, 15.1; Franklin O. Leger, Q.C., "Court-approved Wills" (1998), 14:3 So. J. 7 at 9.

[71] Robertson, note 3, at 98.

[72] However, even where testators are competent, wills legislation sometimes intervenes to automatically deal by operation of law with changed circumstances that would otherwise render a will unfair or obsolete. Common examples of such intervention include revocation of a will on marriage, partial revocation on divorce and anti-lapse provisions. Of course, operation of these provisions is always subject to the expressed contrary intention of the testator. But in default of such contrary intention, the statute will try to achieve a result which presumably the testator would have wanted for their estate, if they had turned their mind to it.

[73] Eric L. Teed, Q.C. and Nicole Cohoon, "New Wills for Incompetents" (1996), 16 E.T.J. 1 at 3.

[74] Scottish Law Commission, *Report on Succession*, Report No. 124 (1990) at 61 [Scotland Report]. The Commission's public consultation on the issue of statutory wills found that "the results of consultation were overwhelmingly against the introduction of any such power": Scotland Report at 62.

[75] Alberta Law Reform Institute, *The Creation of Wills* (Report for Discussion No. 20, 2007) at 23-40.

[76] Alberta Law Reform Institute, *The Creation of Wills* (Final Report No. 96, 2009) at 21-40.