

Article Information

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Service: Estate & Succession Planning

Sector: Private Clients

Wills Watch Alert - Statutory Wills - Incapacity

On 17 December 2014 the Supreme Court of Queensland delivered a further decision pursuant to the Succession Act 1981 (Qld) making a statutory will for a 12 year old minor, "SKC" upon the application of her mother "RKC" (RKC v JNS [2014] QSC).

SKC was delivered by caesarean section due to foetal distress. She suffered primarily from severe spastic quadriplegic cerebral palsy resulting from a difficult birth. She had also been diagnosed with encephalomalacia and microcephaly, severe mental retardation and other debilitating conditions.

A personal injuries action for medical negligence was brought on SKC's behalf in relation to the circumstances of her birth. Settlement of SKC's claim was sanctioned by the Court, resulting in an award of damages of approximately \$1.375 million. Perpetual Trustee Company Limited was appointed administrator of the settlement fund.

SKC lived with and was cared for her mother, with whom she had a close relationship supported by her maternal grandmother who assisted significantly with SKC's care. The relationship with her respondent father, JNS, was poor and he did not appear at the hearing.

As a minor, SKC had no existing will but was possessed of a large estate the result of the settlement of her court proceedings. In all of the circumstances, the Court was satisfied on medical reports that SKC lacked testamentary capacity and there was no likelihood of her acquiring such capacity. As SKC suffered her injuries at birth there was no direct evidence available of her testamentary wishes when she had little or no ability to understand or communicate her wishes.

However, without a statutory will and then dying intestate SKC's estate would be divided equally between her mother and father even though the father did not care for her or did not contribute financially to her maintenance. In the circumstances, a draft of a proposed will, which appointed Perpetual as her executor, and her mother and other close family members as substitute executors and beneficiaries was approved.

Statutory will applications are becoming more common, and this trend is expected to continue given Australia's aging population and should be of particular interest to trustees of protected estates and the potential benefits they can provide as a remedy for those persons subject of a protective trust who lack testamentary capacity and are unlikely to regain that capacity.

While statutory will schemes exist in each of the states and territories of Australia authorising the Supreme Court to authorise the making of a will, codicil or instrument of revocation on behalf of a person who lacks testamentary capacity it should be noted that there are various differences between the schemes.

Should you require any further information on this case, statutory wills or any other estate planning issue, please contact [Rod Jones](#) or [Donna Benge](#).