INFORMAL AND STOP-GAP WILLS

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Introduction

It is approximately 27 years since the New South Wales Parliament passed s.18A of the Wills Probate & Administration Act, a law permitting the admission to probate of a will not executed in accordance with the formal requirements. South Australia, no doubt, in character with its long tradition of legal innovation, was the first State to adopt such a law, in 1975.

It is one thing to legislate such a law reform, it is another for it to seep its way into the consciousness of the legal profession, and for the implications of such a reform to be fully appreciated. In regard to informal wills, some recent cases have further developed the law and demonstrate the increasing importance of this issue to probate practice.

Informal Wills in an Electronic Age

The first decision I wish to consider is that of Justice Slattery in *Yazbek v Yazbek* [2012] NSWSC 594 which I shall refer to for convenience as the "Will.doc" case. The deceased was a 39 year old man who tragically died of his own hand, and who was survived by his parents and seven siblings. There was an initial grant of Letters of Administration to the deceased's parents as on an intestacy. Slattery J ultimately found that the deceased had made an informal will which was admitted to probate, and the initial grant of administration to the parents was revoked.

What made the case somewhat unusual was that the informal will was an electronic document found on the deceased's computer. The document was in the form of a letter to his family, but also sought to dispose of property, and had been saved on the computer under the name "Will.doc". Evidence from a computer expert at the hearing revealed that it had been created through a series of computer sessions a little over a year prior to the deceased's death.

There was evidence of a witness who had spoken with the deceased to the effect that the deceased had said prior to going on a holiday - "There is a will on my computer and also one at home in a drawer". From this evidence Slattery J inferred that the electronic will had probably been printed by the deceased. However, exhaustive searches failed to uncover the printed copy. Further, the evidence did not reveal whether the printed copy had ever been signed by the deceased, or the reasons why it could not be found after his death. In those circumstances the plaintiff, a brother of the deceased, sought to admit to probate the electronic document found on the deceased's computer.

It is no impediment to a document constituting a will for the purposes of s.8 of the *Succession Act* (the successor provision to s.18A of the *Wills Probate & Administration Act*) that the document exists only electronically. Section 8(1) expressly provides that it applies to - "A document, or part of a document" – the term 'document' is in turn given an extended definition by s.21 of the *Interpretation Act*, which provides that a document means any record of information including *inter alia*:

> "(c)Anything from which sounds, images or writings can be reproduced with or without the aid of anything else."

Electronic informal wills had already been accepted in Victoria and Queensland under similar legislative provisions, and Slattery J had little difficulty in finding that the fact that at

the date of the deceased's death the document could only be found in an electronic form was not an impediment to admitting a copy of it to probate as an informal will.

The central issues in the case concerned whether the Court should infer that the document was intended to embody testamentary intentions on the part of the deceased and whether the failure to discover the printed copy, after the deceased's death, gave rise to an inference of revocation in accordance with the rebuttable presumption.

It is of course central to any finding that a document constitutes an informal will, that it be shown to embody testamentary intentions of the deceased. For example, a draft will which the deceased has not yet decided to adopt, is not an informal will for the purposes of s.8 of the *Succession Act*.

It is also important that the document manifests a dispositive intention by the deceased. In other words it reveals a desire on the deceased's part that by the document, he or she seeks to deal with their property in the event of death.

In the "Will.doc" case there was a substantial controversy as to whether or not the document had ever been printed out. If it was found that the document had been printed out, then the defendants argued, one should infer that it was the printed copy that the deceased had intended to be his will, and as that had been lost at the date of his death the presumption of revocation should have applied. On the other hand, if the evidence suggested that it had not been printed out, this was a further reason for concluding that the deceased had not committed himself to the document and that it had never been more than a draft.

Slattery J was assisted in his conclusions in the "Will.doc" case by the evidence of the deceased's words to the effect that he had it 'on his computer and a copy at home in a drawer'. From that Slattery J inferred that it had been printed, but that from the deceased's

perspective both the electronic and printed version each equally represented his will. By contrast in *Mahlo v Hehir* [2011] QSC 243, McMurdo J in the Supreme Court of Queensland concluded that the electronic document in that case, which otherwise would have satisfied the requirements for an informal will, was not intended by the deceased to be her will. The evidence revealed that the deceased was aware of the manner in which one would normally make a will, no evidence suggested that the electronic document had ever been printed, and McMurdo J concluded that if the deceased had intended the electronic document to be her will she would have taken further steps to print it out and sign it.

While these are clearly factual issues, one can envisage how in any instance where there is merely an electronic document, and no evidence of the deceased ever having referred to his or her will on their computer, the Courts will have to overcome their doubt as to whether the electronic document was merely intended as a draft. Courts are accustomed to drawing inferences from very scant evidence in matters of this sort, and these cases reveal the importance of unearthing every possible fact that might assist in uncovering the deceased's intentions.

As Slattery J found in the "Will.doc" case that the will had in fact been printed, he had to deal with the further argument of the defendants to the effect that if the paper copy was missing at the date of the deceased's death, the presumption of revocation would apply. This rebuttable presumption really only assists the Court in circumstances where the evidence is insufficient to permit an inference as a fact as to whether or not the deceased destroyed the will with the intention of revocation. If the evidence permits a conclusion, even on the barest of probabilities, that the will was not lost in consequence of destruction by the deceased with the intention of revocation, but through some other accident, the presumption will be rebutted (see *Cahill v Rhodes* [2002] NSWSC 561 per Campbell J and *Barr-Mordecai v Rotman* [2000] NSWCA 123).

In dealing with the argument in regard to revocation, Slattery J was again assisted by the evidence which revealed that the deceased viewed the electronic document on his computer as much his will, as the paper copy. The evidence of the computer expert was to the effect that the deceased's laptop revealed a moderately competent computer user, and if the deceased had intended to revoke the will, then Slattery J inferred that he would have not merely destroyed the printed copy, but would have deleted the electronic copy. Not only had it not been deleted but it had apparently been accessed only a few weeks before he died.

The "Will.doc" case is a reminder that one must now look for testamentary instruments not only amidst the papers and other hard copy records of a deceased person, but on the files of their computer. Every document found will have its status resolved in accordance with the usual legal principles, but the manner in which computers are typically used will often raise in an acute fashion the status of any such document, and the relationship of any such electronic document to any paper copy that may have been made. No doubt the case is not far off when someone will leave a will on a smart phone.

Interim or Stop-Gap Wills

Another argument considered by Slattery J in the "Will.doc" case was whether or not the electronic informal will had only been created by the deceased as an interim measure to take effect in the event that he died while on the overseas trip made shortly before if it was created.

In *Permanent Trustee Co Limited v Milton* (1995) 39 NSWLR 330 Justice Hodgson had found that the terms of s.18A rendered the document an informal will only if it was intended to reflect the deceased's testamentary intentions, and this could have a temporal aspect. Thus, if the evidence disclosed that the testator's intention was that the document operate only as a stop-gap will until the deceased had an opportunity of making a formal will, then

that would be the relevant s.18A intention, and the informal will would take effect if the testator died before he or she had the opportunity of making a formal will. On the other hand, Hodgson J concluded that if after such reasonable opportunity had presented itself, the deceased had, nevertheless, not made a formal will, then there was no continuing intention for the purposes of s.18A in regard to the informal document, and it would no longer represent the deceased's testamentary intentions and would not be an effective will.

The New South Wales Court of Appeal had already decided in the *Estate of Masters* (1994) 33 NSWLR 446 at [469], that there could be a sufficient intention for the purposes of s.18A in regard to an informal document even if it was intended that the document would ultimately be superseded by a properly executed will.

In *Permanent Trustee Co Limited v Milton* Hodgson J was tempted into speculating whether in regard to an informal will, if the testator ceased to any longer have the intention that it represent his or her testamentary wishes that it would, therefore, cease to be an informal will. This obiter comment was disapproved of by Powell J in *Hatsatouris & Ors v Hatsatouris* [2001] NSWCA 408 at [59] who concluded (also obiter) that once the relevant intention had been manifest so as to render the document a testamentary instrument, the will could only be subsequently revoked by actions that complied with the provisions for revocation. Of course, part of the means by which a testator may revoke a will is by the making of an informal will under s.8.

The consequence of all these cases is that, firstly, if someone makes an informal will which is intended only to operate for a limited period, then, from the expiry of that period, it will no longer be supported by the requisite testamentary intention, and if no further will is made the deceased will have died intestate. On the other hand, if an informal will was made not merely with the intention of being an interim or stop-gap measure, then it will continue unless

and until revoked even if there has been a change of intention by the testator in regard to that instrument, if the testator has failed to take appropriate action to implement that intention.

The interim and stop-gap will findings plainly acknowledge that provisions such as s.8 of the *Succession Act* are not merely corrective provisions, enabling a Court to dispense with formal requirements where there has been a failure to execute a formal will through oversight or ignorance of the law, but may also have a facultative operation. The interim and stop-gap will cases clearly acknowledge that the informal will provisions may be used by a testator where, for whatever practical reason, it is not convenient to execute a formal will, or where there is insufficient time to execute a formal will, and a testator deliberately creates a will not compliant with the formal requirements, but intending it to be an informal will. This might commonly be done on the eve of an overseas trip or by a person about to undertake a major medical procedure where time and convenience prevents a formal will being created.

The commonest issue disputed in informal will cases is whether or not there was the requisite intention in regard to the document that it constitute a will. Where the informal will provisions have been deliberately used this issue can, and should, be easily avoided, by simply inserting into the document a statement to the effect that it is intended to be an informal will.

Informal Wills and the *Hill v Van Erp* Principle

In addition to the developing law on informal wills, another body of law has been developing in the preceding two decades in regard to the duty of solicitors when carrying out the instructions of clients in drafting and procuring a properly executed will. In *White v Jones* [1995] 2AC 207 the House of Lords held that unreasonable delay by a solicitor in carrying out the instructions of a testator, to procure a properly executed will, so that the testator died before the instructions had been acted upon, gave rise to an action in negligence by

beneficiaries who missed out on gifts they would otherwise have received. Two years later the High Court approved the principle in *Hill v Van Erp* (1997) 188 CLR 159, where the solicitor had negligently permitted the spouse of a beneficiary to witness the will which, thereby rendered null and void the gift in favour of that beneficiary.

The steady stream of cases that have followed these two landmark decisions suggest that wherever a solicitor fails to act in accordance with the standard of a reasonably competent practitioner, and thereby defeats the intentions of the solicitor's client, the consequent loss to beneficiaries will be recoverable. Thus, in *Carr-Glynn v Frearsons* [1999] Ch 326 solicitors were found liable in circumstances where they had failed to advise and arrange severance of a joint tenancy, and where the failure to procure the severance prevented gifts under a will being effectual. In *Summerville v Walsh* (1998) NSWCA 222 the New South Wales Court of Appeal approved a finding that a solicitor was negligent where he had failed to advise a severely disabled testator, that he the solicitor could execute the will on the testator's behalf, and to take that action so as to ensure a valid will.

All the decisions applying the *Hill v Van Erp* principle acknowledge that the solicitor's primary duty is to the solicitor's client who has given instructions for the will. The tortious duty owed by the solicitor to prospective beneficiaries is always subject to the terms of the solicitor's retainer from the testator. However, usually the intentions and interests of the testator will coincide with those of the intended beneficiaries, although if for whatever reason they do not, then the terms of the retainer clearly govern the solicitor's duties.

Two recent decisions in the New South Wales Supreme Court show the *Hill v Van Erp* principle now also encompassing the law in regard to interim and stop-gap wills. These decisions have significant practical implications for practitioners taking instructions in regard to a will.

The first decision *Maestrale v Aspite* (2012) NSWSC 1420 is a decision of Justice Fullerton given in the latter part of 2012. The testator was 62 years old and had a serious health condition for which he had been hospitalised. A son of the testator was concerned to have his father make a will, fulfilling various promises that had been made to the son. The son liaised with a solicitor who met the testator at a café during a temporary release from hospital. At the café the solicitor took instructions. The solicitor was not aware at the time of taking instructions that there was a serious risk of the client dying before a formal will was prepared and executed. After the meeting at the café the client's health deteriorated and the son contacted the solicitor's office over several days seeking to hurry up the preparation and execution of the will. The solicitor was found to be dilatory in responding to those calls and arrived at the hospital to procure execution of the will 10 minutes after the client had died.

Fullarton J found that the delay by the solicitor in responding to the son's telephone messages was unreasonable delay and that the solicitor should by that stage have appreciated that there was special urgency. Her Honour found the solicitor liable in negligence for the delay, and noted that if there had been an obstacle to the execution of a formal will, then the solicitor ought to have attended the hospital with his file notes so that they might be signed and an informal will created.

The second matter to deal with this issue is the decision of Adamson J in *Fischer v Howe* (2013) NSWSC 462. In *Fischer v Howe* the solicitor attended upon the testator at her home and took instructions for a will. The testator was 94 years of age, frail and with mobility problems, sharing her home with a housekeeper and carer. In the conference the testator gave instructions in regard to all issues concerning her estate except for the identity of an executor in regard to which she was undecided. The testator intended substantial changes to her existing will, and had lost faith in the capacity of the person she had nominated in her current will to be her executor.

The solicitor indicated that he was about to go on leave and would return in approximately 12 days with the formal will for execution. The client agreed to that. The solicitor gave no advice as to the possibility of a stop-gap or interim informal will being executed in the event that anything should happen to the testator during the 12 day interregnum.

Shortly after the conference with the solicitor the testator's health deteriorated and she died during the 12 day period before a formal will was executed. Justice Adamson concluded that in the circumstances that were evident to the solicitor, the client was clearly at a greater risk than a younger individual, not only of sudden mortality, but of possible loss of capacity. The solicitor was found negligent in not having advised the testator as to the facility of making an informal will, and procuring one. Her Honour concluded that such advice would most probably have elicited the testator's agreement to make an informal will. The evidence revealed that an informal will could have been easily written out by the solicitor on his pad in a matter of minutes at the conclusion of the conference.

The parties in *Fischer v Howe* called expert evidence from well recognised solicitors from the field of wills and probate practice in New South Wales. Both solicitors accepted that there would be situations in which clients ought to be advised of the possibility of making an informal will. While the expert evidence differed on some details, both experts recognised that, firstly, this was a situational duty which depended upon there being some factors which produced an elevated risk that a testator's instructions might be frustrated by delay. Secondly, it depended upon the testator having reached the requisite dispositive state of mind. In other words, the testator knew what they wished to do with their estate, and the task was, therefore, for the solicitor to ensure that those intentions were given legal effect.

Both *Maestrale* and *Fischer* are likely to be considered by the New South Wales Court of Appeal and we have, thus, most probably not yet heard the final word on these matters.

Whatever be the outcome of any appeals in *Maestrale* and *Fischer,* it is unlikely that the appellate decisions will reject entirely the importance of practitioners giving consideration to stop-gap or interim wills in circumstances where there may be delay in procuring a formal will. As solicitors become more and more conscious of these issues one can envisage the evolution of professional practice to a point where competent practitioners might invariably consider an interim or stop-gap will for any client in circumstances where there would be delay in executing a formal will. The law, however, could not be said to impose such a duty at the present time.

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