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Succession Law Keeping Pace with Changes in Technology and Community Expectations – Informal Wills

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Abstract

Purpose - *The purpose of this paper is to provide insights into recent developments in the way the law of succession allows people to use new technologies to document their testamentary intentions in an informal way.*

Design/methodology/approach – *This article considers one area in which the law has arguably kept good pace with advances in society's expectations and technological change – the law of succession. This article examines the legislative reforms in Queensland and other jurisdictions permitting the recognition of informal wills and the decided cases in the area. In particular, the article examines the decision in a Queensland Supreme Court case in which the court recognised the validity of a will made on an iPhone.*

Research limitations/implications – *This is a doctrinal analysis, not an empirical study, and accordingly is limited to providing details specific to the legislation and the court cases selected.*

Keywords: *Informal wills; succession; technological change; formal requirements of wills; iPhone.*

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Introduction

The law is often criticised for being too slow to adapt to changing community expectations and changes in technology. There is, however, one area in which the law is arguably keeping pace is the law of succession – the law governing wills and rights to inherit the property of deceased persons.

A will is a revocable document or collection of documents in which a person sets out the manner in which his or her property is to be distributed upon his or her death. As Hallen J at paragraph [242] said *In Estate of Laura Angius; Angius v Angius* [2013] NSWSC 1895:

It is not necessary that the document said to be a Will should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient if it is intended to dispose of property, or of rights of the deceased, in a disposition that is to take effect upon death, but until then is not to take effect but is to be revocable. Although usual, it is not legally essential to find a clear statement identifying the document as a Will.

In legal parlance, these instructions as to how a person wishes their property to be distributed are known as “testamentary intentions”. A person’s will is often referred to as their “last Will and Testament”. A will is described as a “last will” because it is possible for one to have their testamentary intentions expressed in more than one document and it is possible for a person to make more than one will over the course of a lifetime to account for changing circumstances. The reference to a “last will” indicates that the person intends this document to supplant any former will he or she might have made. Such a document will ordinarily commence with the words, “I revoke all form wills and codicils”, whereby a “codicil” is a document which amends, adds to explains or modifies a will or part of one.

The making of a will is ordinarily governed by strict formal requirements. In all Australian states and territories, these formal requirements are that, to be valid, a will must be in writing and signed by the testator in the presence of attesting witnesses who actually see the testator sign. While the formal requirements are an appropriate safeguard of the interests of beneficiaries entitled to take property under the will, there are times when it is necessary and appropriate for the courts to recognise a will made otherwise than in accordance with these formal requirements as being legally valid. Such a will is known as an informal will. The term, “informal will” is not a term which is defined in the legislation. In practise, the term is used to refer to wills which have not been created or executed in accordance with the formal requirements of wills that are imposed by the relevant legislation. An informal will might be in the form of a handwritten note, a statutory declaration, a letter, or perhaps any other means of recording testamentary intentions.

As will be discussed in the balance of this article, the courts in Queensland have shown a willingness to move with the times and recognise the validity of testamentary intentions of deceased persons recorded on electronic devices, including wills made on an iPhone and on a DVD. This article will consider the legislative reforms in Queensland and elsewhere in the Commonwealth that permit courts to disregard the formal requirements and recognise informal wills, and the decided cases in the area. In particular, the article considers the decision in a Queensland Supreme Court case in which the court recognised the validity of an informal will made on an iPhone.

Formal Requirements of Wills

In all Australian states and territories there are three main formal requirements for the making of a will. They are writing, signature, and attestation. In Queensland, these formal requirements are set out in section 10 of the *Succession Act 1981* (Qld). The formal requirements are that the will:

1. must be in writing;
2. must be signed by the testator, or by someone else in the presence and at the direction of the testator, in the presence of at least two witnesses who must be present at the same time; and
3. must be attested by at least two of the witnesses signing the will in the presence of the testator.

The two witnesses must be over the age of 18 years and must be present at the same time to witness the testator signing the will or acknowledging his or her signature on the will. Those who witness the execution of a will are not permitted to take gifts under the will as beneficiaries.

As in other jurisdictions, in Queensland (as in the other states and territories) the definition of “writing” includes any way of representing or reproducing words in a visible form. The requirement that the will be in writing has been applied by the courts with a degree of flexibility. In the case of *Estate of Slavinskyj* (1988) 53 SASR 221, the South Australian Supreme Court found that the requirement that a will be writing was satisfied in the case of a will written on a wall. A similar result was reached in the English case of *Hodson v Barnes* (1926) 43 TLR 71, where it was held that a will written on an eggshell was sufficient to be regarded as being in writing.

Maintaining these formal requirements is desirable for four reasons. In this regard, Langbein (1975) has identified four main functions of the formal requirements – the evidentiary, channelling, cautionary, and protective functions. The first is that they perform an evidentiary function, which is served by the need for writing, the need for the testator’s signature and the need for witnesses. They are reliable evidence of the testator’s testamentary intentions and of the terms of the will. Some means of ensuring that what is presented as being the testator’s intentions is reliable is essential given that the testator will invariably be dead once a court has the opportunity to consider the will. This is achieved principally by the formalities assuring that the testator signing is witnessed and sworn to by disinterested bystanders. Second, the formalities simplify the will-making process by standardising the manner in which a will is drawn and executed. Langbein called this as a “channelling function”, because the formalities channel testators into standard forms of behaviour, which simplify the will-making process and the interpretive process the courts must go through. Third, the formalities provide a cautionary function that impresses on testators the notion that making a will is a solemn undertaking that has important ramifications for prospective beneficiaries. Finally, the formalities serve to protect the testator and the intended beneficiaries by reducing the risk of fraud, forgery or undue influence. This protective function is particularly important given that many wills are made at a time when a testator is in a position of vulnerability, say due to age, ill health, mental infirmity, or simply due to being desirous of finalising a testamentary document quickly in circumstances where the threat of death may be imminent.

Traditionally, the law has required that a will must be executed in strict compliance with the formal requirements in order to be valid. If the formal requirements were not complied with, the will would not be valid, even if accurately accorded with the deceased’s testamentary intentions. The need to satisfy formal requirements minimises the risks of disputes arising as to whether a document is a valid will, and the need for those disputes to be aired in costly court proceedings that may reduce the value of the deceased’s estate that is available to the beneficiaries.

Easing the Formal Requirements

From 1 January 1982, the law in Queensland was relaxed to allow a document that had been executed in “substantial compliance” with the formal requirements to be recognised as a valid will. This change in the law was made in the recognition that there are times when only acknowledging the validity of documents that have been executed in compliance with the formal requirements might lead to unsatisfactory or unjust outcomes (Langbein, 1987). The practical benefit of the change, however, was limited because the focus of the inquiry remained upon compliance with the formal requirements, as opposed to the deceased’s testamentary intentions. If a court did not deem there to have been substantial compliance with the formal requirements, then the will was not valid, even if it was an accurate statement of how the deceased wanted his or her property distributed.

In 2006, some time after the other Australian jurisdictions, the law in Queensland was again amended to facilitate the recognition of wills made other than in substantial compliance with the formal requirements. This amendment introduced the concept of an informal will into Queensland law. As a consequence of this change, section 18 of the *Succession Act 1981* (Qld) now allows the Supreme Court of Queensland to recognise any document as being a will if the court is satisfied that the deceased person intended the document to form his or her will, irrespective of the extent to which the person has complied with the formalities. In essence, the provision provides the court with a power to dispense with the need for the testator to have complied with the formal requirements.

This provision has fundamentally changed the approach taken when considering documents that purport to contain a person’s testamentary intentions. Prior to the commencement of section 18, the Act made the formal requirements the starting point in any inquiry into a will’s validity, rather than the testator’s intentions. Under section 18 the focus of the inquiry now is on identifying whether the deceased intended the document to constitute his or her will. Langbein has described this so-called “dispensing power” as a “triumph of law reform” (Langbein, 1987).

Section 18 of Queensland’s *Succession Act*, which is consistent with the similar provisions in the other Australian jurisdictions,¹ contains three conditions which must be satisfied for an informal will to be recognised by a court as being valid.

The first condition is that there must be a document. It is worthy of note that s 18 uses the word “document” and not “written document”. “Document” is broadly defined in section 36 of the *Acts Interpretation Act 1954* (Qld) to include any disc, tape or other article, or any material from which writings are capable of being produced or reproduced, with or without the aid of another article or device. It is clear from this definition that a “document” includes not only a paper document but also a document in electronic form. This broad definition of “document” is not limited to the law of wills and estates, but is of general applicability to other areas of law.

Second, the document must purport to state the testamentary intentions of the deceased. However, it is not sufficient that the document merely state what the deceased’s testamentary wishes are. The third requirement is that the deceased must have intended that the document to form his or her will – it must have been the deceased’s intention that the document be legally effective so as to dispose of the person’s property upon his or her

¹ See for example *Succession Act 2006* (NSW), s 8; *Wills Act 1936* (SA), s 12(2).

death.² This third requirement does not allow a court to take into account a draft or preliminary ideas for a will (Atherton, 1994; Peart, 2007).

As was observed by Justice Mahoney in *Estate of Masters, Hill v Plummer* (1994) 33 NSWLR 446 at 455:

There is, in principle, a distinction between a document which merely sets out what a person wishes or intends as to the way his property shall pass on his death and a document which, setting out those things, is intended to cause that to come about, that is, to operate as his will. A will, like, for example, a contract, a deed, and a sale, is, as it has been said, “an act in the law”. It is something to which the law attaches the legal consequences of that kind of transaction: ... Ordinarily, a transaction will or will not be an act in the law of the particular kind according to whether it was of the relevant form or nature and was intended to operate as such. Thus, a document which is in form a will will not operate as such if it is, for example, a draft or “a trial run”, not intended to have a present operation. A person may set down in writing what are his testamentary intentions but not intend that the document be operative as a will.

In determining whether a person intended a document to form his or her will, Justice Hallen in *Estate of Laura Angius; Angius v Angius* [2013] NSWSC 1895, at paragraph [268] noted that a court may consider the form and content of the document, have regard to evidence relating to the manner in which the document was executed, and consider any evidence of the testamentary intentions of the person, including evidence of statements made by the deceased person. In *Pahlow-Silady v Siladi* [1999] NSWSC 890 it was held that the use of the words, “in the event of my death” or words of similar effect which involve a gift made to another person is a good sign that the document is to be regarded as an expression of testamentary intention. Similarly, in the New Zealand case of *Re Power* [1919] NZLR 761, Justice Stinger at 762 held that a document made by a person who is seriously ill or whose death is imminent that provides for the disposal of the person’s assets is to be regarded as an expression of testamentary intention.

There is no need to prove that the deceased attempted to comply with the formalities, provided the requisite testamentary intention was present at the time the document was made. If, however, the deceased believed that he or she needed to execute the will to make it valid, then the provision will not make the will valid. Cases relevant in this regard are the Queensland decision of *Mahlo v Hehir* [2011] QSC 243 (discussed below) and the New South Wales decision of *Estate of Gonda* [2012] NSWSC 357. In these cases, the deceased’s familiarity with the formal will-making requirements was the determining factor in these courts finding that the deceased did not have the requisite intention that the document be their will.

In applying section 18, the court will consider the facts and circumstances of each case. The court will take heed of the terms of the document itself, the circumstances in which the document was created, where the document was located, the evidence of persons who had discussions with the deceased person about his or her intentions, and evidence of any searches have been made to locate other wills made by the deceased person. Other relevant factors a court will consider at the closeness in time between the making of the will and the testator’s death, any evidence of the testator’s state of mind leading up to the preparation of the document, and the availability of witnesses.³ The courts have also

² *Beech's case (In the Estate of Beech, deceased)* [1923] P 46, 57 (Salter J) *Estate of Masters, Hill v Plummer* (1994) 33 NSWLR 446; *Proctor v Klauke* [2011] QSC 425, [37]; see also *Oreski v Ikac* [2008] WASCA 220, [55] cited in *Proctor v Klauke* [2011] QSC 425, [42].

³ *Re Nicholls* [1996] 1 Qd R 179, 181-182.

insisted that a purposive interpretation should be given of the provision with a view to giving effect to the testator's real intentions.⁴

In regard to the standard of proof that must be satisfied before a court will admit the validity of an informal will, there is benefit to considering the observations of Justice Mahoney made at page 462 in the case of *In the Estate of Masters (Deceased); Hill v Plummer; Plummer v Hill* (1994) 33 NSWLR 446 concerning the relevant section of the New South Wales Act then in effect (s 18A of the *Wills, Probate and Administration Act 1898* (NSW)).

Secondly, s 18A should, as I have indicated, be given a beneficial application. There are, in the history of this branch of the law, many cases in which the intention of the deceased has not been able to be given effect. That is an evil which should be remedied as far as may be. It may be understood why the legislature decided not to give testamentary effect merely to any statement of testamentary wishes, however casually stated and even if it was not contemplated that legal results would follow. The consequences of that, as far as concerns proof and otherwise, can well be imagined. But the benefits of the change should not be withheld by requiring too rigid a manner of proof that what was put in a document should have legal effect. If a document is on its face such as contemplates legal effect, ordinarily it should be given effect unless — as in this case — there are contexts or circumstances that lead to the contrary conclusion.

An example of a written document held to be a valid will pursuant to section 18 is to be found in the decision of her Honour Justice Philippides in *Re Garris* [2007] QSC 181. The will in that case was a will signed by the testator, but not witnessed, and made shortly before the deceased committed suicide. In *In the Estate of Kelly* (1983) 32 SASR 413 the will was not signed in presence of witnesses but its validity was confirmed by the court.

The iPhone Will Case: *Re Yu* [2013] QSC 322

The willingness of the courts in Queensland to allow the terms of section 18 of the Queensland Succession Act to have a meaningful practical effect when applied to new technologies can be seen in the recent case of *Re Yu* [2013] QSC 322. There Justice Peter Lyons applied section 18 and found that an unsigned and unwitnessed electronic document typed on an iPhone by a man just before he took his own life was a valid will.

Shortly before taking his own life, the deceased created a series of final messages on his iPhone. The will was typed using the iPhone's "Notes" app — a smartphone application somewhat akin to Microsoft's Notepad. In this document, the deceased named an executor and provided for the distribution of his property. The executor named in this document brought an application before the Supreme Court of Queensland seeking to have the iPhone document recognised as the deceased's last will.

The factors the judge hearing the case identified as justifying this conclusion were as follows. First, his Honour took the view that the electronic document saved on the deceased's iPhone was a "document". Such a finding is uncontroversial given that, as noted above, s 18 uses the word "document" and not "written document", and the definition of that term in the *Acts Interpretation Act 1954* (Qld) is broad and inclusive. Further, such a finding is not without precedent, albeit from the use of slightly different technology. As the judge noted in his reasons, in the earlier decision of the New South Wales Supreme Court in the case of *Alan Yazbek v Ghosn Yazbek & Anor* [2012] NSWSC 594, Justice Slattery ruled that a Microsoft Word document created on a laptop computer was a document for the purposes of New South Wales law.

⁴ *Treacey v Edwards* (2000) 49 NSWLR 739, 746 (Justice Austin) citing *Estate of Graham* (1978) 20 SASR 198.

As to whether the iPhone document purported to state the testamentary intentions of the deceased, the judge emphatically found that it did. The judge found that the deceased's iPhone document provided for the distribution of the whole of the deceased's property at a time when the deceased was plainly contemplating his imminent death. In this regard, Justice Peter Lyons at paragraph [7] noted that:

Ordinarily, a person does not attempt to dispose of the whole of the person's property except upon the person's death. That, and the fact that the document demonstrated an intention to appoint Mr Jason Yu as the executor under the document, as well as nominating an alternative; and the fact that the document authorised the executor to deal with the deceased's affairs in the event of his death, confirm the general impression which I obtained from the document as to its stating the testamentary intentions of the deceased.

Finally, the judge took the view that the third condition, that the deceased needed to have intended that the document form his Will, was plainly satisfied. The judge's reasons on this point were as follows. The document commenced with the words "This is the last Will and Testament ...", and formally identified the deceased man and his address. By the document, the deceased appointed a person to be the executor of his will and authorised the executor to deal with his property in the event of his death. The deceased typed his name at the end of the document where a signature would normally appear on a paper document, followed by the date and his address. Finally, there was the circumstance that the document was created in contemplation of the deceased's imminent death and shortly after a number of final farewell notes were created on the phone.

A second Queensland Supreme Court case of relevance is *Mellino v Wnuk & Ors* [2013] QSC 336. That case involved an application to the court made pursuant to section 18 of the *Succession Act 1891* (Qld) to have audio and visual recordings made by the deceased on a DVD declared to be his will.

In that case, Justice Dalton found that the DVD video recording was a document intended to embody the testamentary intentions of the deceased. Her Honour found that the recording had been clearly made in contemplation of death, as the deceased had discussed his intention to commit suicide. The deceased had apparently written the words "My Will" on the DVD disc itself. Her Honour concluded that he was also at some pains to define what property he owned, and although very informal, what the document purported to do was to dispose of that property after death.

An analogous case is the decision of Justice Austin of the New South Wales Supreme Court in *Treacey v Edwards* (2000) 49 NSWLR 739. His Honour in that case held that an audio tape an audio tape referred to in a will could be incorporated by reference into a formally executed will or alternatively treated as a testamentary document in accordance with the relevant provision then in force in New South Wales, namely, s 18A of the *Wills, Probate and Administration Act 1898* (NSW). His Honour took the view that an audio recording falls literally within the definition of "document" in the *Interpretation Act 1987* (NSW), which is the legislative equivalent of Queensland's *Acts Interpretation Act 1954* (Qld).

Like other judges faced with similar facts, Justice Austin was not a stickler for form or presentation. His Honour at page 742 stated that: "[a]lthough it is a rambling presentation, the contents of the tape are, in my view, sufficiently certain to dispose of the deceased's assets."

In concluding as he did, Justice Austin noted concerns about the reliability of audio recordings, but also noted that for some testators, recording their testamentary intentions in an audio recording might be easier than writing them down.

Informal Documents Not Recognised as Wills

While the provisions permitting the recognition of informal wills are arguably a progressive and sensible amendment to the law, it will always be preferable for a person to execute a will in accordance with the formal requirements to avoid uncertainty and to avoid the need for beneficiaries to encounter expensive court proceedings. The risks associated with informal wills are with reference to the following cases. The following cases not only provide examples of the uncertainty that surrounds informal wills, but are instances in which the courts have refused to recognise informal documents as being valid wills.

The first case is one that demonstrates the necessary intention that the testator must hold at the time the purported informal will is created if it is to have a chance of being recognised by a court as being valid. That is, the testator must regard the informal document as a valid will, not a draft or a document that needs to be executed before it becomes valid and enforceable.

In *Mahlo v Hehir* [2011] QSC 243, Justice McMurdo found that an electronic document saved on a deceased woman's home computer two weeks prior to her death was not a valid will. The deceased's brother brought an application to the court seeking to prove that the will was valid. The application was opposed by a man who was named as the executor and beneficiary under an earlier will made by the deceased when she and he were in a de facto relationship.

The purported will in this instance was a Microsoft Word document entitled, "This is the last will and testament of Karen Lee Mahlo.docx" that had been saved on the deceased's computer. The judge accepted evidence put before the court that the deceased knew she needed to print and sign the document in order to comply with the formal requirements. His Honour accepted that the deceased knew of the formal will-making process because she had been through it with a solicitor only months earlier. There was also evidence from the deceased woman's father that she had in fact printed and signed the document, however no print out of the document had been located.

In what may appear to be to a legal nicety, his Honour was satisfied that the deceased intended to make a will in the terms of the electronic document. However, he found that she had not intended the electronic document to be her will. Instead, in an outcome he described as being "far from satisfactory", Justice McMurdo found that the deceased had signed a hard copy of the electronic document which was never located, and it was this hard copy that she intended to be her will. The decision in *Mahlo v Hehir* is to be contrasted with that in *Re Trethewey* [2002] VSC 83, where a document saved to a deceased person's computer was held to be his will in circumstances where he had on several occasions told people that he had left his will on his computer, which was clear evidence that the deceased intended the electronic copy to form his will and not any other version of the document that may or may not have been printed onto paper.

Conclusion

The decision in the iPhone Will case, *Re Yu* [2013] QSC 322, and other cases, demonstrates that the courts and Parliaments are willing to adapt and move with changing community expectations and changes in technology insofar as they relate to the law governing testamentary dispositions made by wills.

Although cases as *Re Yu* appear to be novel, and in view of the technology it is arguable that they are, however, for a long time, courts have been able to find that an electronically recorded document is a will, notwithstanding the fact that it is not in hardcopy or signed. What *Re Yu* represents is an indication of the extent to which the courts in Queensland (and as a matter of precedent the courts in other Australian jurisdictions) are

willing to dispense with an insistence upon the formalities of wills being adhered to when people seek to make informal records of their testamentary intentions in contemplation of death on the devices that are now a part of everyday life.

However, this does not mean that home-made wills and wills made on smartphones should become the norm, because they involve significant risk that a home-made document will not necessarily be accepted as being an informal will if the formal requirements are dispensed with.

Further, even where an informal document is accepted as an informal will, the need to make an application to court adds substantial cost and delay to the distribution of a deceased person's estate. That extra cost is borne by the beneficiaries. One aspect of the expense of legal proceedings to obtain probate of the will (or in other words, to have the court endorse the will as being valid and permit gifts to be made in accordance with its provisions) is that the legal costs of all parties will ordinarily be paid out of the deceased's estate on an indemnity basis. An order of this kind was made in the case of *Proctor v Klauke & Ors* [2011] QSC 425 at paragraph [56].

Accordingly, the more reliable way of ensuring that property is distributed as intended is to instruct an experienced solicitor to draft the will and manage its execution in accordance with the formal requirements. In particular, the temptation to reduce costs by using will kits or constructing home-made wills should be avoided – a point pressed by Master Sanderson at the beginning of his judgment in *Gray v Gray* [2013] WASC 387.

Home made wills are a curse. Occasionally where the assets of a testator are limited and where the beneficiaries are not in dispute no difficulties may arise in the administration of an estate. Flaws in the will can be glossed over and the interests of all parties can be reconciled. But where, as here, the estate of the deceased is substantial, the will is opaque and there is no agreement among the beneficiaries, the inevitable result is an expensive legal battle which is unlikely to satisfy everyone. All of this could have been avoided if the testator had consulted a lawyer and signed off on a will which reflected his wishes. There is no question but that engaging the services of a properly qualified and experienced lawyer to draft a will is money well spent.

As such, the clear message these cases send is that, although the courts are willing to move with the times insofar as new technologies and people's expectations that they do not always need to comply with legal formalities is concerned, the rules surrounding the use of informal wills are still technical in nature and are not guaranteed to come to rescue every case. This means that people should not create home-made iPhone wills or wills stored on other electronic devices in the expectation that they will suffice, or that they will even be found by others after their death. Where the circumstances permit, there is no substitute for people seeking professional advice and complying with the legal formalities that are designed to protect the interests of those they leave behind after death.

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