The Scope of the Validation Power in the Wills Act 2007

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I Introduction

When the new Wills Act was adopted in 2007 it made a number of changes to the law regulating wills. Probably the most radical change is the power in s 14 to validate wills that do not comply with the formal requirements for making a valid will in s 11. This change follows Australia's lead, where a similar power, referred to as a dispensing power, has existed since 1975.[1] Initial concerns that it would encourage sloppy will-making and result in uncertainty and a flood of applications turned out to be groundless.[2] The constraints imposed by the wording of the Australian provisions together with judicial restraint in the exercise of the power, at least initially, as well as the increased cost, delays and uncertainty about the outcome of applications were strong incentives for complying with the formal requirements. The Australian experience and the benefits of saving wills from invalidity on purely technical grounds persuaded the New Zealand Law Commission to recommend the adoption of a similar, though not identical, power in its Report *Succession Law — A Succession (Wills) Act* in 1997.[3] That recommendation was eventually implemented with the adoption of the Wills Act 2007.

The Wills Act 2007 came into force on 1 November 2007.[4] It applies to all persons dying on or after that date, regardless of the date of the will.[5] It was not until August 2009, however, that the validation power was invoked for the first time.[6] The reason for the delay may have been because the validation power could not then be applied to wills made before 1 November 2007 even though the will-maker died after that date. The transitional provisions prevented retrospective application of the validation power.[7] An amendment in 2012 now enables the power to be used in respect of all non-compliant wills regardless of the date they were made.[8]

Since the first application to validate a non-compliant will in 2009 there has been a steady increase in the number of applications.[9] By October 2012 at least 43 applications had been made, of which 41 were successful. The two applications that were declined failed because there was no

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1 Wills Act 1936 (SA), s 12(2) as amended by Wills Amendment Act (No 2) 1975 (SA). Section 12(2) was amended again in 1994 to replace the criminal standard with the civil standard for establishing the deceased's intention. The dispensing power was subsequently adopted in the rest of Australia: Succession Act 1981 (Qld), s 18(1) as amended in 2006; Succession Act 2006 (NSW), s 8; Wills Act 1970 (WA), s 32(2); Wills Act 1968 (ACT), s 11A(1); Wills Act 1997 (Vic), ss 9(1) and 9(2); Wills Act 2000 (NT), s 10(2). Tasmania is the only state to retain the criminal standard: Wills Act 2008 (Tas), s 10(1).

2 John H Langbein "Substantial Compliance with the Wills Act" (1975) 88 Harv L Rev 489.

3 Law Commission *Succession Law — A Succession (Wills) Act* (NZLC R41, 1997) at 19. The significance of the different wording is explored below.

4 Section 2.

5 Section 4. However, several of the substantive changes do not apply to wills made before 1 November 2007. See the transitional provisions in ss 39 and 40.

6 *Re Hickford* HC Napier CIV-2009-441-369, 13 August 2009.

7 Section 40(2)(k), (l) and (n).

8 Wills Amendment Act 2012, s 5 repealed s 40(2)(k), (l) and (n) of the Wills Act 2007. *Re Heka* [2012] NZHC 2824 appears to be the first case in which the validation power was exercised in respect of a will made before 1 November 2007.

9 Six applications were made in 2009; five in 2010; 14 applications were made in 2011 and by 31 October 2012 a further 18 applications had been made.

jurisdiction at the time to validate wills made before 1 November 2007.[10] In the 41 cases where jurisdiction did exist, the success rate was 100 per cent.

From this body of case law a picture is beginning to emerge of a jurisdiction that has the potential to go well beyond its Australian counterpart in giving effect to testamentary intentions. The aim of this article is to evaluate the use of the validation power in New Zealand to determine its scope and assess the risks associated with a broad jurisdiction.[11] Before embarking upon that task, it is necessary to outline the formal requirements for a valid will and explain their purpose.

II The Formal Requirements

The Wills Act 2007 was not intended to make any radical changes to the formal requirements for a valid will aside from abolishing the requirement that the will-maker's signature be placed at the foot or end of the will. Section 11 was otherwise intended merely to restate in plain and contemporary language the well-established requirements in s 9 of the Wills Act 1837 that a will had to be in writing, signed and witnessed. However, several unintended changes slipped into s 11.[12] Ironically, while the repeal of the position of the signature did not initially apply to wills made before 1 November 2007, the unintended changes did apply to wills made before that date![13]

One of those changes related to the will-maker acknowledging his or her own prior signature. The 1837 Act permitted this type of acknowledgement, but the new Act did not. Will-makers could only acknowledge another person's signature made at their direction and in their presence.[14] In *Stephenson v Rockell,* for example, the will-maker's handwritten will was not validly executed because he signed it before locating two friends to witness the document by signing below his signature.[15] Fortunately the will was made after 1 November 2007 and thus able to be validated by the Court.

A second unintended change related to the attestation requirement. Whereas s 9 of the Wills Act 1837 did not require a particular form of attestation, s 11(4)(b) of the 2007 Act stipulated that each witness state on the document, in the will-maker's presence, that they were present when the will-maker signed the will or acknowledged someone else's signature. The need for a formal attestation clause soon gave rise to significant problems. In the absence of a clause worded as stipulated by s 11(4)(b), the will was invalid. An affidavit of due execution, which would have sufficed under the Wills Act 1837, could not substitute for the absence of such a statement on the will. For wills executed after the Act came into force, the Court was able to use s 14 to validate the document, which it did in eight of the 41 successful applications.[16] That was not an option for wills executed before 1 November 2007 because of the transitional provisions in force at the time.[17] Fortunately, most of those wills were saved by liberal use of the Court's construction powers.[18]

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10 *Re Ioane* HC Auckland CIV-2009-404-5527, 27 October 2009; *Re Laver* HC Auckland CIV-2010-404-6232, 3 June 2011.

11 For a review of the Wills Act more generally, see Nicky Richardson "The Wills Act 2007" (2010) 6 NZFLJ 324.

12 Statute Amendments Bill (No 2) 2011 (271-2) (select committee report) at 2.

13 Wills Act 2007, s 40(2)(i). This transitional provision was repealed by the Wills Amendment Act 2012.

14 Wills Act 2007, s 11(3) prior to its amendment in 2012.

15 *Stephenson v Rockell* (2010) 28 FRNZ 168.

16 *Re Te Brake* HC Hamilton CIV-2009-419-800, 21 August 2009; *Re Clayton* HC Hamilton CIV-2009-419-963, 24 September 2009; *Re Maddox* HC Auckland CIV-2009-404-8025, 22 December 2009; *Stephenson v Rockell*, above n 15; *Re Charlton* HC Napier CIV-2010-441-722, 9 March 2011; *Re Clark* HC Whangarei CIV-2011-488-397, 30 June 2011; *Re Stuart-Menteath* HC Rotorua CIV-2011-463-621, 6 October 2011; *Re Rowell* [2012] NZHC 1823.

17 Wills Act 2007, s 40(2)(k).

18 See for example, *Re Lincoln* HC Auckland CIV-2009-404-3402, 17 July 2009; *Re Stevenson* HC New Plymouth CIV-2009-443-432, 22 October 2009; *Re Fry* HC Nelson CIV-2009-442-298, 21 September 2009; *Re Lewis* HC

Thankfully, the errors in the restatement of the formal requirements have been remedied by the Wills Amendment Act 2012, which came into force on 25 February 2012. A will is no longer invalidated by the absence of a formal attestation clause or the acknowledgement by the will-maker of his or her prior signature.[19] The effect of these changes is to reinstate the more liberal position that applied under the Wills Act 1837, thus obviating the need for applications to validate wills for lack of a formal attestation clause. An affidavit of due execution, which was used in the past to establish compliance with the witnessing requirements, once again suffices as evidence that the formal requirements were met. The changes were effected by substantially amending the formal requirements in s 11 and backdating those changes to 1 November 2007. New transitional provisions in s 40A Wills Act 2007 prevent disturbance of determinations or actions taken in reliance on the law as it was before the Amendment Act came into force on 25 February 2012.

The transitional provisions also caused problems for wills that were not signed at the foot or end of the document. While the position requirement was abolished for wills executed on or after 1 November 2007, the transitional provisions explicitly retained this requirement for wills predating the new Act, but without the extended meaning given to the words "foot or end" of the will by the Wills Amendment Act 1852.[20] The effect of the 1852 amendment was to save wills from invalidity where the signature was placed elsewhere on the will if it was clear from the evidence that by signing the will the will-maker intended to give effect to the whole document.[21] In *Re Wilkins*, where the will-maker initialed the first two pages but forgot to sign the last page of his will, the Court got around the problem posed by the 2007 Act by relying on ancient precedent and imaginative use of its construction powers to save the will from invalidity.[22] The irony is that in adhering to the general principle against making legislation retrospective, Parliament did exactly the opposite. Wills that would have been valid under the old Act were rendered technically invalid by the new Act.

The Wills Amendment Act 2012 has resolved this problem, by repealing the transitional provision relating to the position of the signature with effect from 1 November 2007.[23] No will is now invalid solely because it was not signed at the foot or end of the document, regardless of the date when the will was executed. Provided the document is signed with the intention of giving effect to the will as a whole, the document will be deemed to have met the signature requirement.[24]

For persons dying on or after 1 November 2007 leaving a will made before or after that date, s 11 now provides:

> Requirements for validity of wills
> (1) A will must be in writing.
> (2) A will must be signed and witnessed as described in subsections (3) and (4).
> (3) The will-maker must—
> (a) sign the document; or
> (b) direct another person to sign the document on his or her behalf in his or her presence.

Auckland CIV-2011-404-2770, 18 October 2011; *Re Leith* [2012] NZHC 1190; *Re Paul* [2012] NZHC 1657. *Re Lauer* HC Auckland CIV-2009-404-6324, 2 December 2009 is the exception. See also, Alan MacKenzie "Immediate Post Death — the Wills Act 2007" (paper presented to the New Zealand Law Society Death and the Law Intensive Conference, May 2012) 101 at 102–103.

19 Wills Amendment Act 2012, s 4 replaced ss 11(3) and 11(4) and inserted subss 5 and 6.

20 Wills Act 2007, s 40(2)(i).

21 Nicola Peart "Testamentary Formalities in Australia and New Zealand" in Kenneth G C Reid, Marius J de Waal, and Reinhard Zimmermann (eds) *Testamentary Formalities* (Oxford University Press, Oxford, 2011) 330 at 334-5.

22 *Re Wilkins* [2010] 1 NZLR 832.

23 Section 5 repealed s 40(2)(i) in the principal Act with effect from 1 November 2007.

24 Nicola Peart "Testamentary Formalities in Australia and New Zealand" in Kenneth G C Reid, Marius J de Waal, and Reinhard Zimmermann (eds) *Testamentary Formalities* (Oxford University Press, Oxford, 2011) 330 at 346.

(4) At least 2 witnesses must—
  (a) be together in the will-maker's presence when the will-maker—
    (i) complies with subsection (3); or
    (ii) acknowledges that—
      (A) he or she signed the document earlier and that the signature on the document is his or her own; or
      (B) another person directed by him or her signed the document earlier on his or her behalf in his or her presence; and
  (b) each sign the document in the will-maker's presence.
(5) As evidence of compliance with subsection (4), at least 2 witnesses may each state on the document, in the will-maker's presence, the following:
  (a) that he or she was present with the other witnesses when the will-maker—
    (i) signed the document; or
    (ii) acknowledged that he or she signed the document earlier and that the signature on the document is his or her own; or
    (iii) directed another person whose signature appears on the document to sign the document on his or her behalf in his or her presence; or
    (iv) acknowledged that another person directed by him or her signed the document earlier on his or her behalf in his or her presence; and
  (b) that he or she signed the document in the will-maker's presence.
(6) No particular form of words is required for the purposes of subsection (5).

III Purposes of the Formal Requirements

In its 1997 Report on the Wills Act, the New Zealand Law Commission recommended that a will should continue to be signed or acknowledged by the will-maker in the presence of two witnesses who then signed in the presence of the will-maker. Those formalities served two important purposes.[25] The first was cautionary: to help the will-maker appreciate that the document he or she was solemnly signing in the presence of witnesses would determine who would receive the will-maker's property. The second purpose was probative: to ensure that the document presented after the will-maker's death was a genuine expression of the will-maker's testamentary intentions.

John Langbein identified two further purposes, or functions as he called them: the protective function and the channeling function.[26] The presence of two independent witnesses is intended to protect against fraud, forgery and undue influence. Compliance with the formalities channels will-makers into largely standard forms of behaviour, organization, language and content, which facilitates the probate process and estate administration.

While the benefits of the channelling function should not be underestimated, there can be little doubt that the main purpose of the formalities is to authenticate a document as an expression of the deceased's genuine testamentary intentions.[27] This purpose, which incorporates the cautionary, probative and protective functions of the formalities, reflects one of the governing principles of the law of wills:[28]

> that great care should be taken in determining whether what is claimed to be an expression of a will-maker's wishes is genuinely so, because when a will operates (on a will-maker's death) he or she is no longer present to speak for himself or herself.

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25 Law Commission, above n 3, at 3.
26 Langbein, above n 2.
27 Law Commission, above n 3, at 19.
28 Law Commission, above n 3, at 1.

On the other hand, the strict compliance insisted upon by the Courts under the 1837 Act meant that even the slightest departure from the formal requirements invalidated wills, thus potentially defeating genuine testamentary intentions.[29] That ran counter to another governing principle of the law of wills identified by the Law Commission: "that a will-maker's ascertainable intentions should be upheld".[30] As Australia had already shown for over 20 years, compliance with the formal requirements was not the only way of establishing that a document expressed the deceased's genuine testamentary intentions. That aim could be achieved by other means. Given the broader aim of the Law Commission's succession project to have legislation that enabled "better effect to be given to the intentions of will-makers", its recommendation that New Zealand follow Australia's lead and adopt a dispensing (or validation) power was unsurprising.[31]

IV Validation Power

The validation power that Parliament adopted provides as follows:[32]

> 14 High Court may declare will valid
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> (1) This section applies to a document that—
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> (a) appears to be a will; and
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> (b) does not comply with section 11; and
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> (c) came into existence in or out of New Zealand.
>
> (2) The High Court may make an order declaring the document valid, if it is satisfied that the document expresses the deceased person's testamentary intentions.
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> (3) The Court may consider—
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> (a) the document; and
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> (b) evidence on the signing and witnessing of the document; and
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> (c) evidence on the deceased person's testamentary intentions; and
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> (d) evidence of statements made by the deceased person.

Following the repeal of the transitional provisions pertaining to s 14 in 2012, the power can now be used to validate non-compliant wills regardless of the date that they were made, provided the will-maker died on or after 1 November 2007.[33] The lack of retrospectivity that previously prevented s 14 from being applied to wills made before that date was thought to accord with legislative best practice, but in this instance it was misconceived. A will does not take effect until the will-maker dies. The concern that retrospectivity would affect existing rights therefore did not apply. That was presumably the reason that the Law Commission did not include any transitional provisions. Nor were any of the Australian legislatures concerned about retrospectivity. Besides, the aim of the provision was to give effect to testamentary intentions. Adherence to the principle of non-retrospectivity would only serve the interests of those whom the deceased did not intend to benefit. The repeal of the relevant transitional provisions must therefore be welcomed.

That s 14 can now be used in respect of all wills regardless of their date has several advantages. First, and most obviously, wills can be validated that do not meet the formal requirements in s 11 of the Wills Act 2007 or s 9 Wills Act 1837either the old law or the new

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29 Recent examples of wills failing to meet the formal requirements in the Wills Act 1837, s 9, are *Re Costelloe* HC Auckland CIV-2007-404-922, 10 August 2007 and *Re Fleming* HC Auckland CIV-2008-404-6379, 8 December 2009. In both instances the deceased died before the new Act came into force.

30 Law Commission, above n 3, at 1.

31 Law Commission, above n 3, at vii.

32 Wills Act 2007, s 14.

33 Section 4.

law.[34] Second, the power can be used to deal with any residual problems resulting from changes to the formal requirements for executing, changing or revoking wills. Third, it avoids the problem of ascertaining the date of the document for purposes of determining jurisdiction.[35]

V Jurisdictional Requirements for Validation

Section 14(1) stipulates four jurisdictional requirements: (1) there must be a document; (2) it must appear to be a will; (3) it must not comply with the requirements for a valid will in s 11; and (4) it must have been made in or outside New Zealand. Only if all four requirements are met does the Court have the power to validate the document as a will. The Court may exercise the power if it is satisfied that the document expresses the deceased's testamentary intentions. Before considering how this power is exercised, the jurisdictional requirements will be analysed in some depth.

A Document

The validation power can be exercised only in respect of a "document", which is defined in the Act as "any material on which there is writing".[36] The Act does not define what is meant by material or writing. Section 29 of the Interpretation Act 1999 defines "writing" as "representing or reproducing words, figures, or symbols in a visible and tangible form and medium (for example, in print)". It does not define "material". That word has traditionally been construed widely in the context of wills to include paper, fabric, stone, wood, metal, plastic, glass, or even an eggshell (if the will were short!). It could also take the form of a photograph, a text message on a mobile phone, an electronically stored document, or writing recorded on a CD, DVD, film or video.

So far, all but two of the 41 cases involved paper documents. The remaining two cases involved electronic documents.[37] In 16 of the 41 cases the documents were professionally drafted wills. In six of those 16 cases the will-maker died before seeing the draft will.[38] In those six cases, the Court was satisfied that the draft accurately reflected the instructions given by the will-maker. Of the 25 cases where the document was not professionally drawn, 24 involved various types of informal document written by the will-maker or by someone else at the will-maker's direction. These included "do-it-yourself" will-forms,[39] letters,[40] handwritten or typed documents,[41] and suicide notes.[42] All of these forms qualified as documents under s 14.

In the remaining case, *Re Feron*, the document was the solicitor's handwritten notes of will instructions given by the will-maker over the phone.[43] Ms Feron followed up her phone call by

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34 In *Re Heka*, above n 8, the Court validated a handwritten will made in 2005 that was signed by the will-maker and two witnesses, but not in each other's presence.

35 *Gladwin v Public Trust* [2011] 3 NZLR 566 (HC) [*Re Cairns*] reveals the problem of dating an unsigned document for purposes of s 14 before it was made retrospective.

36 Wills Act 2007, s 6.

37 *Re Simunovich* HC Auckland CIV-2011-404-5914, 17 October 2011; *Re Feron* [2012] NZHC 44, [2012] 2 NZLR 551.

38 *Re Brown* HC Auckland CIV-2010-404-6328, 13 October 2010; *Re Brundall* [2011] 3 NZLR 528 (HC); *Re Irvine* HC Whangarei CIV-2011-488-677, 26 October 2011; *Re Fraser* HC Napier CIV-2011-441-700, 20 December 2011; *Re Osborne* [2012] NZHC 1846; *Re Rowell*, above n 16.

39 *Smith v Shaw* HC Nelson CIV-2010-442-239, 14 September 2010; *Re Murray* [2012] 2 NZLR 546 (HC); *Re Cottrell* [2012] NZHC 1046; *Re Smith* [2012] NZHC 2061.

40 *Re Keenan* [2012] NZHC 2376; *Re Shallcross* [2012] NZHC 2438.

41 For example, *Re Maddox*, above n 16; *Re Rejouis* [2010] 3 NZLR 422 (HC); *Re Prince* [2012] NZHC 1058; *Re Heka*, above n 8.

42 *Re MacNeil* HC Timaru CIV-2008-476-612, 28 September 2009; *Sim v Broadbent* HC Auckland CIV-2009-404-2032, 3 May 2011 [*Re McArthur*]; *H v P* [2012] NZHC 753; *Re Wells* [2012] NZHC 74.

43 *Re Feron*, above n 37.

sending her solicitor an e-mail. Due to the Christchurch earthquake, her solicitor was unable to prepare the will before Ms Feron's death. As the draft will did not exist when Ms Feron died, Whata J held that it did not qualify as a document for purposes of s 14:[44]

> The linkage to s 11 strongly suggests that the purpose of s 14 is to cure a non-compliance with s 11, rather than a wholesale absence of a will. There must at least be a document purporting to be a will under the hand or direction of the deceased prior to death.

The solicitor's notes together with Ms Feron's follow up e-mail did meet the document requirement. The Court validated them as it was satisfied that together the documents expressed Ms Feron's testamentary intentions.[45]

The need for a document excludes oral wills, even where they are expressed with all due solemnity and in the presence of witnesses, as in the case of an ohaki (oral deathbed declaration by Māori).[46] However, if someone made notes of the ohaki, then, based on the ruling in *Re Feron*, those notes could qualify as a document for purposes of s 14. They would clearly do so if they were made at the direction of the deceased, because in that case the deceased would have intended a written version of the ohaki. Arguably, the notes should also qualify as a document if they were made with the deceased's knowledge or consent. A liberal construction of the document requirement would accord with the legislative intent to give effect to a deceased's ascertainable testamentary intentions. In the absence of some written record of the ohaki, however, the Court has no power to give effect to the deceased's intentions.

A similarly liberal and purposive construction might be applied to an audio or visual recording of an orally expressed will. The audio or visual tape or disc would qualify as "material", and the words are arguably reproduced in a visible or tangible form so as to meet the definition of "writing". The spoken words could also easily and reliably be converted into written form. But this construction may be straining the meaning of "document" beyond its natural boundaries. Uncertainty therefore remains as to whether the validation power can be used in respect of audio or visual recordings of oral wills. Given that a document is essential to the validation jurisdiction, it is unfortunate that Parliament did not follow Australia's lead to clarify and update the meaning of "document" to reflect modern forms of communication. The Australian legislatures have amended their definitions of "document" to include "anything from which sounds, images or writings can be reproduced".[47] New Zealand lags behind in this respect.

B Appears to be a will

The document must appear to be a will. In contrast to the Wills Act 1837 and the current Australian statutes, s 8 of the Wills Act 2007 defines exhaustively what a will is. In short, it is a document made by a natural person that disposes of property or appoints a testamentary guardian. It includes a document that changes, revokes or revives a will or is a codicil to a will.[48] In determining whether a document appears to be a will, the Courts consider both the contents and the form of the document. In all of the 41 documents where the validation power was used, it was readily evident from the format of the document, its entitling as the deceased's last will, or the content of the document that they appeared to be wills. With the exception of one case, they all

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44 At [13].

45 At [21].

46 Jacinta Ruru "Implications for Maori: Historical Overview" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Thomson Brookers, Wellington, 2004) 445 at 450.

47 See for example Interpretation Act 1987 (NSW), s 21(1), definition of "document", para (c) adopted for use in Succession Act 2006 (NSW), s 3.

48 Section 8(3).

dealt with the deceased's property.[49] Many appointed executors as well, and some included instructions about the funeral and disposal of the body.

In *Re Rejouis*, for example, the document in question was labeled a "schedule of intentions".[50] It was intended to be read in conjunction with a 2003 will. Neither document was witnessed. When the application was made in 2010, the Court had no jurisdiction to validate the 2003 will, but the Schedule of Intentions, written in 2008, met the definition of a will on its own because it disposed of the deceased's estate.

Similarly, in *Re Feron*, the solicitor's notes of the will-maker's instructions together with the deceased's follow up e-mail provided a sufficient skeleton for a will to meet this requirement.[51] The notes required the reader to fill in numerous gaps, but they were headed "New Will" and the terms were tolerably clear. The follow-up e-mail was more complete and when read together with the notes, the two documents appointed an executor, made a number of specific gifts, disposed of the residue and addressed funeral arrangements.

The definition of a will does not refer to the appointment of an executor or trustee. It would appear, therefore, that a document that merely appoints an executor is not a will. The definition in the 1837 Act did not refer to such appointments either, but its definition was inclusive rather than exhaustive, thus enabling documents that merely appointed executors to be admitted as wills.[52] In an attempt to modernise the definition and express it in plain English, it seems that Parliament has changed the law, most probably unintentionally. The issue was not raised in *Re Clayton* where the Court was called upon to validate a codicil that only appointed additional executors.[53] While codicils are to be read in conjunction with an existing will, for purposes of s 14 the codicil is the document that must appear to be a will. Where a change is made on the will itself, rather than by codicil, and the change is not properly signed and witnessed, the non-compliant change can be validated under s 14.[54] In that case it is the changed document that must appear to be a will.[55]

A document that merely promises to make a will in certain terms does not qualify as appearing to be a will. For example, an agreement between separating spouses under the Property (Relationships) Act 1976 in which the spouses promise to make wills on agreed terms would not "appear to be a will" for purposes of s 14.

C Document does not meet the requirements of s 11 Wills Act

This requirement limits the validation power to defects in meeting the formal requirements for a valid will in s 11.

The validation power can be used where either the signature or the witnessing requirements have not been met. Even though this power is new to New Zealand, the courts have adopted a robust approach to the remedial power, showing none of the restraint that marked the early Australian precedents.[56] The very first document to be validated involved a professionally drawn

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49 *Re Clayton*, above n 16, discussed below.

50 *Re Rejouis*, above n 41.

51 *Re Feron*, above n 37.

52 Wills Act 1837, s 1 defined "will" to "extend to a testament, and to a codicil", and other instruments as well as dispositions and devises of custody and tuition of a child. See also Greg Kelly "Who can be Appointed Executor?" in John Earles, WLB Douglas, Chris Kelly and Greg Kelly (eds) *Dobbie's Probate and Administration Practice* (5th ed, LexisNexis, Wellington, 2008) at 17.15.

53 *Re Clayton*, above n 16.

54 Wills Act 2007, s 15(d).

55 Although s 15(d) appears to refer to all changes made to wills, the Court held in *Re Prince*, above n 41, at [11] that s 15(d) applies only to changes made on the will itself. If the changes are made in a separate document, that document must meet the requirements of s 14.

56 John H Langbein "Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law" (1987) 87(1) Colum L Rev 1.

will that was not signed or witnessed.[57] There was therefore no formal evidence of the will-maker's authentication. But other evidence satisfied the Court that the document expressed the deceased's testamentary intentions. Of the 41 documents that were validated, eight had only one witness,[58] seven had no witnesses,[59] 14 were neither signed nor witnessed,[60] one was unsigned but witnessed,[61] and one was not signed in the presence of the witnesses.[62] In two cases the documents were validated to remove any uncertainty about compliance with the witnessing requirements.[63] In a further eight cases the attestation clause was either incomplete or missing altogether.[64] Cases involving defective attestation clauses are unlikely to arise in the future, following the amendments in 2012 to the attestation requirements in s 11 of the Act.

D Document made in or outside New Zealand

This final jurisdictional requirement clarifies that the power can be exercised in respect of domestic wills as well as foreign wills for which probate is sought in New Zealand. In *Re Rejouis*, for example, the power was exercised in respect of a document made in Haiti by a Haitian national who was killed in the devastating earthquake in Haiti in 2010.[65] He was survived by his New Zealand wife and their youngest child and had property in New Zealand. Similarly, in *Re Prince*, the deceased made his will in South Africa prior to immigrating to New Zealand where he died.[66]

VI Declaring the Document Valid

If the jurisdictional requirements in s 14(1) are met, the Court may make "an order declaring the document valid, if it is satisfied that the document expresses the deceased person's testamentary intentions".[67] The starting point is the deceased's testamentary intentions, not the extent to which the formal requirements have been met. Section 14 is not a substantial compliance jurisdiction. Its purpose is to give effect to the will-maker's ascertainable intentions in whatever written form they may be found.

A New Zealand and Australia compared

The wording of the Australian dispensing provisions differs materially from the validation power in s 14 of the Wills Act 2007. As in New Zealand, the Australian statutes require that the document expresses the will-maker's testamentary intentions. In contrast to New Zealand,

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57 *Re Hickford*, above n 6.

58 *Smith v Shaw*, above n 39; *Re Cottrell*, above n 39; *Re Prince*, above n 41; *Re Campbell* [2012] NZHC 1608; *Re Smith*, above n 39; *Re Agnew* [2012] NZHC 2134; *Re Keenan*, above n 40; *Re Shallcross*, above n 40.

59 *Re MacNeil*, above n 42; *Re Rejouis*, above n 41; *Re Zhu* HC New Plymouth CIV-2010-443-21, 17 May 2010; *Sim v Broadbent*, above n 42; *Re Simunovich*, above n 37; *H v P*, above n 42; *Re Wells*, above n 42.

60 *Re Hickford*, above n 6; *Re Brown*, above n 38; *Re Tutaki* HC Hamilton CIV-2010-419-1208, 13 May 2011; *Re Brundall*, above n 38; *Re Cairns*, above n 35; *Re Irvine*, above n 38; *Re Fraser*, above n 38; *Re Feron*, above n 37; *Re Cornelius* [2012] NZHC 563; *Re Wilton* [2012] NZHC 1607; *Re Rowell*, above n 16; *Re Osborne*, above n 38; *Re Lauder* [2012] NZHC 3155; *Re Capper* [2012] NZHC 2864.

61 *Re Murray*, above n 39.

62 *Re Heka*, above n 8.

63 *Re McIntosh* HC Napier CIV-2011-441-187, 1 September 2011; *Browne v Public Trust* [2012] NZHC 1647.

64 See above n 16.

65 *Re Rejouis*, above n 41.

66 *Re Prince*, above n 41. See also, *Re MacNeil*, above n 42, where the deceased's suicide note disposing of property was made in Adelaide.

67 Section 14(2).

Australian courts must also be satisfied that the deceased intended the document in question to be his or her will.[68] This wording places the focus on the particular document, rather than solely on the will-maker's testamentary intentions. The New South Wales Court of Appeal held in *Hatsatouris v Hatsatouris* that the question was:[69]

> did the evidence satisfy the Court that, either, at the time of the subject document being brought into being, or, at some later time, the relevant Deceased, by some act or words, demonstrated that it was her, or his, *then* intention that the subject document should, *without more on her, or his, part* operate as her, or his Will?

The Supreme Court of Victoria made a similar observation about the scope of the Victorian dispensing jurisdiction in *Estate of Peter Brock*:[70]

> It is necessary, but not sufficient, that the document sets out the deceased's true testamentary intentions. The deceased must *also* have intended that the document in question operate as a will. In enacting s 9, the legislature did not intend that *any* document expressing or reflecting testamentary intentions could be probated under s 9; the testator must have intended the *particular* document to constitute a will, and for the document to immediately operate as his or her will at the time it was created or completed.

By requiring an intention that the document in question be the will, the Australian provision appears to preclude the dispensing power being used in relation to will instructions, because the will-maker would not have intended the document recording those instructions to be their will. The will-maker would have expected a formal will to be prepared for approval and execution.

In New Zealand, by contrast, the court would merely have to be satisfied that the document recording the deceased's will instructions expressed the deceased's testamentary intentions. It was so satisfied in *Re Feron*, where the will-maker had instructed her solicitor over the phone to prepare a new will, but died before the will was drafted.[71] The will-maker clearly did not intend her solicitor's scribbled notes to be the document that she would sign. But that did not prevent the High Court from validating the solicitor's notes as the expression of Ms Feron's testamentary intentions.[72] As long as the Court is satisfied that there was finality about the testamentary intentions, the document in which those intentions are expressed need not be in final form. New Zealand's validation power thus has a significantly wider scope than the dispensing power has in Australia.

B Discretion to validate

The power to validate is discretionary. That said, although s 14(2) is expressed in permissive terms,it is difficult to envisage a situation where a court would decline to validate a document despite being satisfied that it meets the jurisdictional requirements and expresses the deceased's genuine testamentary intentions.

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68 Succession Act 1981 (Qld), s 18(1), as amended in 2006; Wills Act 1968 (ACT), s 11A; Wills Act 1970 (WA), s 32; Succession Act 2006 (NSW), s 8; Wills Act 1997 (Vic), s 9; Wills Act 2000 (NT), s 10; Wills Act 1936 (SA), s 12(2); Wills Act 2008 (Tas), s 10(1).

69 *Hatsatouris v Hatsatouris* [2001] NSWCA 408 at [56] (emphasis in original).

70 *Re Brock* [2007] VSC 415 at [29] (emphasis in original). See also *Re Gholam (dec)* [2011] SASC 125.

71 *Re Feron*, above n 37.

72 See also *Re Brown*, above n 38, where the will-maker gave instructions to a Public Trust officer. He saw his instructions being entered onto the computer and approved them, but he died before seeing the draft will. In *Re Rowell*, above n 16, the deceased gave instructions to her solicitor over the phone. She had no opportunity to check the instructions and died before seeing the draft will.

Section 14 cannot be used to decline to validate a will because its terms are unfair or a breach of moral duty. In *Re Lauder*, for example, the Court was asked to validate a professionally drawn will that the deceased was unable to execute due to his sudden illness and death.[73] It left his estate to his surviving partner. If the will had not been validated, the couple's 2-year old son would have inherited about $50,000 under the intestacy rules. But the child's interests were not relevant to the application. As Gendall J pointed out:[74]

> the test in this application is not what is in the best interests of the child, or for that matter his mother, but whether the required grounds have been made out under s 14.

If the deceased is alleged to be in breach of a legal or moral duty, then such breaches should be addressed through the appropriate statutory or common law avenues, such as the Family Protection Act or a constructive trust claim, not by refusing to validate a document that expresses the will-maker's testamentary intentions.

C Evidence

To be satisfied on the balance of probabilities that the document expresses the deceased's testamentary intentions, the Courts insist on cogent evidence.[75] As Lang J observed in *Re Brown*, "[t]his reflects the obvious importance of the declaration that the Court is being asked to make".[76] Section 14(3) permits the Court to consider the document itself, any evidence about the signing and witnessing of the document, any evidence of the deceased's testamentary intentions, and any evidence of statements made by the deceased.

Evidence relied on in the 41 cases where the validation power was exercised suggests that the form and the content of the document are the starting point. The fact that the deceased entitled their document their "Will" and made specific dispositions of their property was seen as a strong indicator that the document expressed the deceased's testamentary intentions.[77] That intention was all the more likely to be found to exist if the deceased went some way to complying with the formalities, for example by finding someone to witness their signature.[78] Arranging to have a witness suggests that the deceased approached their will-making with appropriate solemnity and deliberation, which is one of the main purposes of the formalities in s 11.

An explanation for the deceased's failure to comply with the formal requirements is also a relevant factor. In *Re Hickford*, for example, where the will was not signed or witnessed, the Court concluded that the deceased thought he had done all he had to do.[79] In *Re Rejouis*, neither the deceased, who was a Haitian national, nor his New Zealand widow knew that wills had to be witnessed.[80] In *Re Tutaki* the deceased knew she had to make arrangements for executing her will, but she became too unwell and died before she could do so.[81]

The circumstances in which the will was prepared often explains both the reason for not complying with the formal requirements and the reason for making the will. In *Smith v Shaw*, for example, the deceased was unmarried and had no children.[82] She had been diagnosed with cancer

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73 *Re Lauder*, above n 60.

74 At [9].

75 *Re Hickford*, above n 6, at [11]; *Re Cairns*, above n 35, at [21].

76 *Re Brown*, above n 38, at [18].

77 *Re Keenan*, above n 40; *Smith v Shaw*, above n 39; *Re Shallcross*, above n 40; *Re Simunovich*, above n 37; *Stephenson v Rockell*, above n 15.

78 *Re Agnew*, above n 58 (one witness); *Re Cottrell*, above n 39 (one witness); *Re Murray*, above n 39 (two witnesses but unsigned); *Re Heka*, above n 8 (not signed in presence of witnesses).

79 *Re Hickford*, above n 6.

80 *Re Rejouis*, above n 41.

81 *Re Tutaki*, above n 60.

82 *Smith v Shaw*, above n 39.

and before going into surgery she downloaded a will document, leaving her estate to her nephew and niece. Her father, who would have inherited her estate under the intestacy rules, was the sole witness to her signature. The nature of the document, the circumstances in which it was prepared, and the formality of having her father witness her signature contributed to the Court finding that the document expressed her testamentary intentions.

Another relevant factor in *Smith v Shaw* was the subsequent discussion the deceased had with family members about her will. Statements by the deceased were also material to the Court's validation of the unsigned and unwitnessed will in *Re Hickford.*[83] Mr Hickford had shown the will to his partner to check that she was happy with it. He also told his daughter that he had made a will. In the absence of evidence that the deceased subsequently changed his mind, such discussions provide strong evidence that the document expresses the deceased's testamentary intentions. Other supporting evidence can play a similar role, such as the e-mail in *Re Feron* as a follow-up to the deceased's telephonic instructions to her solicitor, a handwritten note in *Re Rowell* reflecting Ms Rowell's telephonic instructions, and the phone calls by the deceased's nephew to the deceased's law firm in *Re Cairns* asking the firm to attend to the execution of the deceased's incomplete will.[84] In *Re Capper* the deceased contemplated changing his draft will, but an e-mail indicated that he understood that if he died without making the change, the provisions made in his draft will would stand.[85] Besides, if his intention to change the draft will meant that it did not express his testamentary intentions, the consequence would be that his earlier executed will would be valid, which was clearly not his understanding.

In most of the 41 cases there was a range of circumstances on which the Court was able to draw in deciding to declare the document a valid will. Suicide notes were the exception. Unsurprisingly, the notes were generally the only evidence of the deceased's testamentary intentions.[86] In *Re MacNeil*, for example, a ten page handwritten note was found beside Ms MacNeil's body.[87] The first page was headed "this is my will and testament" and the date showed that she wrote it shortly before she committed suicide. The document contained some song lyrics, but it also disposed of her property. She had signed it, but there were no witnesses. The nature and content of the document nonetheless satisfied the Court that it expressed her testamentary intentions and, having committed suicide shortly after writing it, she could not have changed her mind.

Re Wells is the only case where the Court expressed some doubt whether the deceased's handwritten notes left on the kitchen table before he committed suicide clearly evinced his testamentary intentions.[88] While the notes disposed of his property, identified the person responsible for managing the estate and addressed funeral arrangements, there was some confusion about their content. The Court nonetheless validated the notes as changes to the deceased's will, principally because all the persons affected by the changes consented to the application being granted.

In *Re Hickford*, MacKenzie J identified as an overriding procedural principle the importance of giving all persons who might potentially be affected by the granting of the declaration proper notice and a proper opportunity to be heard.[89] In 39 of the 41 cases in which the non-compliant will was validated, all the affected parties either consented to the granting of the application or did not oppose it. Many of the affected parties lost some or all of the inheritance they would

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83 *Re Hickford*, above n 6.

84 *Re Feron*, above n 37; *Re Rowell*, above n 16; *Re Cairns*, above n 35. See also, *Re Simunovich*, above n 37, where the deceased e-mailed her personal assistant asking her to try and fulfill her will.

85 *Re Capper*, above n 60.

86 *Sim v Broadbent*, above n 42; *Re MacNeil*, above n 42; *Re Wells*, above n 42. In *H v P*, above n 42 the deceased e-mailed the unwitnessed document to a number of people shortly before committing suicide.

87 *Re MacNeil*, above n 42.

88 *Re Wells*, above n 42.

89 *Re Hickford*, above n 6, at [4].

otherwise have received.[90] In some cases support for the application followed only after the affected parties had reached a settlement about the distribution of the estate.[91] Even if there is unanimous support for the declaration, the Court cannot simply make a consent order. As MacKenzie J observed in *Re Capper*, the Court must still be satisfied that the requirements of s 14 are met.[92] Consent of the effected parties in *Re Wells* was therefore not enough to validate the document, but in addition to other evidence, it could be decisive.

From a pragmatic standpoint, informal support for a validation order from the affected parties allows the Court to deal with the application on a without notice basis, thus avoiding undue expense and formality. Dealing with applications promptly, inexpensively and efficiently reflects the remedial purpose of the validation power, which MacKenzie J identified as a second procedural principle.[93]

Re Tutaki and *Re Cairns* are the only cases where the Court validated unsigned and unwitnessed documents in the face of opposition from adversely affected beneficiaries.[94] Both applications proceeded by way of statement of claim and went to a full hearing. In *Re Tutaki* the deceased's nephew, who lost a half share in the deceased's house as a result of the validation, argued that the deceased was not thinking clearly when she instructed her solicitor to exclude him from her will. She had a fall that day and had been mistaken about a friend's death whose legacy she also instructed her solicitor to remove. Based on the solicitor's evidence the Court was satisfied that Ms Tutaki was not confused or mistaken in excluding her nephew. The solicitor knew Ms Tutaki, having prepared two previous wills for her, and had no doubt about Ms Tutaki's capacity when they spoke on the phone. While she was mistaken about her friend being dead, her instruction to exclude her friend was clear. Besides, that mistake did not raise an issue about her intention to exclude her nephew, which she did because of lack of recent contact.

In *Re Cairns* the solicitors prepared a new will on the deceased's instructions more than two years before she died. Instead of her estate going to just one of her nephews, she wanted all five of her nephews and nieces to benefit equally. Her solicitors reminded her on several occasions to contact them to finalise her will, but she failed to do so. When she was admitted to hospital shortly before her death, she told several of her nephews and nieces that she wanted them all to share equally in her estate and asked one of her nephews to contact her solicitors to arrange for the completion of her will. He rang the law firm several times, but they did not attend or send him the draft will for completion. Ms Cairns died without executing the draft will. The nephew who did not inherit the entire estate argued that his aunt's unwillingness to complete the will for over two years indicated that she had changed her mind or was at best equivocal about benefiting the other nephews and nieces. He submitted that the evidence was not sufficiently cogent to satisfy the requirements for a declaration validating the draft will. The Court disagreed. The reason for Ms Cairns changing her will was because the nephew to whom she had originally left her estate had planned to return from England to live with her. But he decided to stay in England. She also confirmed her testamentary intentions while in hospital prior to her death and knew that her will still had to be executed. This evidence indicated not only that the draft will represented her testamentary intentions, but also that she had not changed her mind.

In view of the opposition in *Re Tutaki* and *Re Cairns*, the Courts took considerable care to weigh the evidence presented by both sides before ruling in favour of the applicants. The terms of the draft wills and the will-makers' reasons for wanting to change their existing wills, the circumstances in which the draft wills were made, the reasons for not executing the drafts, the

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90 In *Re Rejouis*, above n 41 and *Re Lauder*, above n 60 even the litigation guardians of the minor children consented to the validation of documents that left the deceased fathers' estates entirely to their surviving mothers, thus depriving the children of any intestate entitlement they might otherwise have received on reaching adulthood.

91 For example, *Sim v Broadbent*, above n 42; *Re Capper*, above n 60.

92 *Re Capper*, above n 60, at [4].

93 *Re Zhu*, above n 59, at [3]. In regard to procedural matters see MacKenzie, above n 18, at 107.

94 *Re Tutaki*, above n 60; *Re Cairns*, above n 35.

statements made to others as well as the will-makers' clear understanding that they needed to formally execute their draft wills provided convincing evidence that the draft wills expressed the will-makers' testamentary intentions. Even though none of the formal requirements were met, there was ample evidence in both cases from which the deceased's testamentary intentions could be reliably ascertained and opposing evidence dismissed.

D Lack of testamentary capacity and the rule in Parker v Felgate[95]

If the deceased lacked testamentary capacity or was unduly influenced, the Court would have to decline to validate a non-compliant will because it could not be satisfied that the document expressed the deceased's genuine testamentary intentions. In *Re Agnew*, for example, the deceased's written instructions to her solicitor were not actioned by the solicitor or validated by the Court because she lacked testamentary capacity at the time.[96] But if the will-maker has sufficient testamentary capacity and is acting voluntarily at the time of giving instructions for the will, the cases show that any subsequent loss of capacity preventing the will-maker from signing the will does not prevent the Court from exercising its validation power in respect of the document.

In *Re Osborne*, for example, the deceased was terminally ill with cancer when he asked to see his solicitor to put his affairs in order.[97] He gave instructions for a new will, and asked the solicitor to draw up a deed of gift and an enduring power of attorney. When the solicitor returned the following day, Mr Osborne had deteriorated considerably. He was able to execute the deed of gift and the enduring power of attorney, but he was unable to concentrate for long enough to discuss the terms of the will. The solicitor left intending to return a day or so later to discuss and execute the will, but Mr Osborne's condition continued to deteriorate. He died without signing the will. The will could be validated by the Court, because it did not comply with s 11 and the Court was satisfied that it expressed Mr Osborne's testamentary intentions, even though he was unable to discuss and approve the draft.

If Mr Osborne had signed the will while lacking capacity the Court could not have used s 14, because the reason for the will's potential invalidity would not have been non-compliance with s 11, but the will-maker's lack of capacity. The will might have been saved by the rule in *Parker v Felgate.*[98] But marshaling the evidence for the application of this rule would have taken longer and cost more than using the validation power under s 14, particularly if all affected parties consent to the validation, as they did in *Re Osborne*. When there is doubt about the will-maker's capacity at the time of execution, it may be better not to proceed with execution and rely instead on the validation power.

VII The Limits of the Validation Power

While the validation power in s 14 has a wide scope, it is available only if the formal requirements in s 11 are not met. For example, it cannot be used to validate a will revoked by a subsequent marriage or civil union, even if the will-maker expected the will to take effect. Such a will can be saved only if it was made in contemplation of the marriage or civil union.[99] However,

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95 *Parker v Felgate* (1883) 8 PD 171. This rule is an exception to the general rule that will-makers must have testamentary capacity at the time of execution. If the will-maker had capacity when giving instructions, as Mr Osborne did, his lack of capacity at the time of execution is not fatal if he understood that he was executing a will for which he had given instructions.

96 *Re Agnew*, above n 58.

97 *Re Osborne*, above n 38.

98 *Parker v Felgate*, above n 95.

99 Wills Act 2007, s 18; *Public Trust v Stirling* [2009] 3 NZLR 693 (HC).

if the will was made in contemplation of marriage or a civil union, any defects in the formal requirements could be validated. The power would then be exercised in respect of a document that was invalid only on the grounds of lack of compliance with s 11.

Section 14 can also not be used to validate a will made by a minor without the authorization required by s 9 of the Act. The reason for invalidity in that case is non-compliance with s 9, not with s 11. The same argument applies to a court authorised will that does not comply with the formal requirements in s 55 Protection of Personal and Property Rights Act 1988. Section 14(1)(b) refers explicitly to non-compliance with s 11, thus confining the scope of the validation power to defects in the formal requirements listed in s 11.

A Material included from another will

In *Public Trust v Flowers*, the Court held that s 14 was not the appropriate procedure for obtaining probate of a will that was properly executed, but included a page from another will.[100] The Public Trust had accidentally attached the second page of Mr Flowers' will to his wife's mirror will. The mistake was discovered when Mrs Flowers died. The Court held that there was no jurisdiction to use s 14, because Mrs Flowers had executed the will in accordance with the requirements of s 11. The correct procedure was to use the rectification power in s 31 to correct the will that Mrs Flowers had executed. That makes sense when the will includes only part of someone else's will. The first page was still Mrs Flowers' will and there was no other document that fully represented her testamentary intentions. It was not a case of switched wills.

B Switched wills

It is not uncommon for couples accidentally to sign each other's will, particularly when they are mirror wills. Whether this mistake should be treated as an issue of validation or rectification is a matter on which there are conflicting views in Australia. In South Australia switched wills are treated as an execution issue and the problem is addressed by using the dispensing power to admit the will that the deceased did not sign to probate.[101] In *Re Hennekam*, the Supreme Court of South Australia held that the issue was not that the deceased made mistakes in the terms of the will, but that he or she did not comply with the execution requirements.[102] In reaching that conclusion, the Court rejected the decision of the New South Wales Supreme Court in *Re Gillespie*, which held that the will executed by the deceased should be corrected to reflect the deceased's intentions.[103] Subsequently, in *Re Daly*, the Supreme Court of New South Wales declined to follow its earlier ruling in *Gillespie*, preferring instead the reasoning in *Hennekam*.[104] Correcting portions of the will that the deceased signed was more artificial than using the dispensing power to admit to probate the actual will of the deceased, despite the fact that it was executed by the deceased's spouse.[105]

Whether switched wills should be treated as a rectification issue or a validation issue is a matter of some significance. The jurisdictional requirements are different, necessitating different types of evidence. The question has yet to be considered in New Zealand. In cases predating the Wills Act 2007 the Courts had no choice other than to use their limited common law powers of correction. For example, in *Guardian, Trust, and Executors Company of New Zealand Ltd v*

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100 *Public Trust v Flowers* HC Auckland CIV-2010-404-7145, 3 March 2011.

101 *Re Blakely* (1983) 32 SASR 473 (SC), affirmed in *Re Hennekam* [2009] SASC 188, (2009) 104 SASR 289 and rejecting the New South Wales approach adopted in *Re Gillespie* SC NSW, 25 October 1991.

102 See also, *Marley v Rawlings* [2011] EWHC 161 (Ch), [2011] 1 WLR 2146, where the Court declined to rectify the husband's will, which his late wife had accidentally executed. The mistake was not a clerical error. As there is no power to validate non-compliant wills, the decision is particularly worthy of note.

103 *Re Gillespie* SC NSW, 25 October 1991.

104 *Re Daly* [2012] NSWSC 555, [2012] WL 1943627.

105 *Re Hennekam*, above n 101, at [37].

Inwood, two sisters signed each other's identical wills by mistake.[106] The Court of Appeal held that the opening words and attestation clauses were not essential parts of the will and that aside from a reference to "Jane" the operative parts of the will expressed the testamentary wishes and intentions of the signatory.[107] By contrast, in *Re Foster* the Court was unable to use its common law rectification powers to strike out the offending disposition without rendering the provision completely nugatory.[108] Having no power then to substitute words, the Court declined to admit the document to probate.

Now that the Wills Act 2007 is in force, the Court is able to use its more liberal statutory correction powers to correct wills. It did so in *Re Ioane.*[109] Mr and Mrs Ioane had accidentally signed each other's wills in 2006. Because the wills predated the new Act and proceedings were brought in 2009 before the Wills Amendment Act 2012 was adopted, the Court had no jurisdiction to use the validation power. The question whether the issue of switched wills should be addressed through the correction power in s 31 or the validation power in s 14 has not yet come before a New Zealand court. When it does, there are several arguments in favour of validation rather than correction.

First, there is the artificiality of correcting a document that the deceased did not intend to be their will, as mentioned in the more recent Australian cases. Second, where the switched wills are markedly different from each other, the correction would require a complete re-write of the contents to comply with the intentions of the deceased. It is questionable whether Parliament intended the correction power in s 31 to apply to such a radical change in the terms of the will. Third, the purpose of signing a will is to authenticate the document as the deceased's will. When a will-maker signs the wrong will, their signature does not serve that purpose. In the case of switched wills, that argument applies to both will-makers. Fourth, and perhaps most importantly, the New Zealand validation power aims to give effect to the document that expresses the deceased's testamentary intentions. As explained above, it differs from the Australian provisions where the Courts have to be satisfied that the document in question was intended to be the deceased's will. Yet, even in that more confined statutory context, the approach that is now preferred by the Australian courts is to admit the document to probate that the deceased intended to be their will, rather than a corrected version of the document that the deceased signed. To correct the will that the deceased signed is to revert back to the old law where form trumped substance. The purpose of s 14 is to give effect to the deceased's ascertainable intentions. Those intentions are recorded in the document that the deceased did not sign. Switched wills should therefore be treated as a error in execution, not as an error in the contents of the will.

C Lost wills

In the wake of the Canterbury earthquakes in 2010 and 2011, there is an increased risk of wills being lost. If a copy of the original will can be located, s 14 cannot be used to validate the document if the original was properly executed. The principal issue with lost wills is not that the document before the court fails to comply with the formal requirements for executing a will, but whether the document presented to the court accurately restates the terms of the will that the deceased executed.[110]

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106 *Guardian, Trust, and Executors Company of New Zealand Ltd v Inwood* [1946] NZLR 614 (CA).

107 See also, *McConagle v Starkey* [1997] 3 NZLR 635 (HC); *Re Keast* HC Christchurch CIV-2006-409-1623, 26 July 2006.

108 *Re Foster* [1956] NZLR 44 (SC).

109 *Re Ioane*, above n 10.

110 For the procedure see Bruce Douglas "Will Lost, Mislaid or Accidentally Destroyed" in John Earles, WLB Douglas, Chris Kelly and Greg Kelly (eds) *Dobbie's Probate and Administration Practice* (5th ed, LexisNexis, Wellington, 2008) at 10.6.6.

There is longstanding authority in the United Kingdom and in New Zealand for obtaining a grant of a reconstruction or "epitome" of a lost will. In *Sugden v Lord St Leonards* the will of Lord St Leonards could not be found at his death.[111] It had been kept in a box in an "escritoire" but, although eight codicils were found, the will itself was missing. The deceased's daughter was well acquainted with the contents of the missing will since she had acted as secretary for her father for many years and she was also a beneficiary. She was therefore able to depose along with other witnesses as to the declarations made by the deceased both before and after execution of the will and by such declarations establish what in substance had been the contents of the will.

Two issues arose from these facts. The first was a presumption that a lost will, which was last traced into a will-maker's possession and is not forthcoming after reasonable search and inquiry, was destroyed by the will-maker "animo revocandi". Cockburn CJ accepted that this presumption was rebutted in Lord St Leonards' case:[112]

> Now, besides that, we have the fact that, from the time of making his will in 1870 down to the time of his death, he was in the constant habit of talking to every one with whom he came into contact, most certainly to all the inmates of the house with whom he was brought into daily contact, of the testamentary provisions he had made, expressing his satisfaction at what he had been able to do for the different members of his family, more especially for Miss Sugden, and at his having acquired, by his own professional powers and exertions, so large an amount of property. The possession of that property, the disposition of that property, and the satisfaction he felt in having made provision for the peerage which he had founded, and for the various members of his family who were dependent upon his bounty, seem to have been constant subjects of his thoughts, upon which his mind delighted to dwell, and also constant topics of his daily discourse with almost all the persons with whom he was brought into contact. It seems to me utterly impossible to suppose that, under these circumstances, such a man as Lord St. Leonards would voluntarily have destroyed this will, whether for the purpose of revoking it, or making another, or for any other purpose that could be conceived. My mind revolts from arriving at any such conclusion, and I feel bound to reject it.

The second issue was that there was a longstanding rule of evidence that declarations or statements of the deceased will-maker could not be received as evidence of the *contents* of the will. Cockburn CJ declined to apply that rule, deciding that written or oral statements or declarations made by the will-maker prior to execution of the will were admissible as to its contents.[113] Similarly statements or declarations made after execution of the will were admissible evidence of its contents.

In this case, the contents of the will were proved by the direct evidence of Miss Sugden herself and, as there was no attack on her credibility, her evidence was sufficient to prove the contents. The declarations of the deceased both before and after making the will in relation to its contents amounted to corroboration of his daughter's direct evidence and the Court accepted that the declarations of the deceased as to the contents should be admitted as an exception to the rule against hearsay. The Court also decided that it was sufficient if evidence established the substantial parts of the will; it was not essential that all of the contents be proven. In that case the will was proven and its contents established.[114]

The Privy Council subsequently followed the ruling in *Sugden* in *Allan v Morrison*, on appeal from the Court of Appeal of New Zealand, in which the presumption of revocation was not rebutted, and more recently in *Acosta v Longsworth*, on appeal from the Supreme Court of British Honduras.[115]

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111 *Sugden v Lord St Leonards* (1876) 1 PD 154 (CA).

112 At 219.

113 At 220.

114 At 222.

115 *Allan v Morrison* [1900] AC 604 (PC); *Acosta v Longsworth* [1965] 1 WLR 107 (PC).

Sugden and *Acosta*, but interestingly not *Allan v Morrison*, were reviewed in New Zealand in *Palmer v Smedley*, a case where the deceased's widow sought letters of administration with an "epitome" or reconstruction of an alleged lost will.[116] The deceased had on several occasions stated that prior to going overseas he had made a soldier's will leaving everything to his wife, but after his death no trace of the will could be found. Justice Mahon dismissed the application. However, his Honour did accept that *Sugden v Lord St Leonards* and *Acosta v Longsworth* were correctly decided and set out guidelines when making an application for letters of administration in respect of a reconstructed will. Applicants would have to establish:[117]

(1) That the deceased had executed a will.
(2) That it was duly subscribed and attested by witnesses, [although in respect of military or seagoing person's will some of those requirements may be relaxed].
(3) That the contents of the last will was in accordance with the epitome presented.
(4) That if the loss of the will raised the presumption that it had been destroyed by the deceased animo revocandi then that presumption was rebutted by the evidence … . Such a presumption will of course only apply if the missing will is shown to have been in the custody of the testator [when it was lost.]

Mahon J distinguished between post-testamentary declarations by a will-maker as to the *fact* of execution of a will and similar declarations as to the *contents* of the lost will. The will-maker's post-testamentary declarations were admissible only to prove the contents of a will, not to prove the fact of execution. This distinction was critical in *Palmer v Smedley*. As there was no admissible evidence that a will was ever made, the action was dismissed.[118]

The justification for this distinction is unclear and, following the adoption of the Wills Act 2007, there appears to be no reason to retain such a distinction. The validation power with its wide range of admissible evidence would now be available if there was doubt about whether the will-maker had properly executed the will prior to it being lost. An application under s 14 could be made in conjunction with the jurisdiction governing lost wills. In that case the evidence would have to establish that:

a) the deceased had made a will;
b) the document met the jurisdictional requirements of s 14(1);
c) the reconstructed document presented to Court accurately restates the contents of the lost will;
d) the lost will expresses the will-maker's testamentary intentions, as required by s 14(2); and
e) if the will was in the deceased's possession, the presumption of revocation is rebutted by the evidence.

Provided these requirements for unexecuted lost wills can be satisfied or those set out in *Palmer v Smedley* in respect of executed lost wills, it should be possible to obtain a grant of probate in respect of a reconstructed or "epitome" of a lost will.

VIII Conclusion

The Courts have embraced the radical change to wills brought about by the introduction of the validation power in s 14 of the Wills Act 2007. The jurisprudence to date reveals a robust

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116 *Palmer v Smedley* [1974] 1 NZLR 751 (SC).

117 At 753.

118 Recent New Zealand cases in which *Sugden v Lord St Leonards* and *Palmer v Smedley* have been applied are *Re Hauraki* HC Auckland CIV-2005-404-3591, 27 July 2005 and *Rameka v Wikatene* (2008) 27 FRNZ 149 (HC).

approach to this power in an attempt to give "full vent" to its remedial purpose.[119] Skeptics might argue that New Zealand has gone too far; that by abandoning all the safeguards that the formal requirements are intended to provide, there is a real risk that documents will be admitted to probate that do not express the will-maker's true intentions. The decision in *Re Wells* suggests that this risk is not imagined.[120] Nonetheless, the Court's insistence on cogent evidence of the deceased's testamentary intentions, and a procedure that ensures that all affected parties have a proper opportunity to be heard, are adequate safeguards against any misuse of this power and provide assurance that only documents expressing genuine testamentary intentions are validated.

[119] *Re Feron*, above n 37, at [11].
[120] *Re Wells,* above n 41, discussed above in VI C.