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Précis Paper

Informal Wills and the Witness Beneficiary Rule

A thorough overview of the rules relating to informal testamentary documents and the witness beneficiary rule.

Discussion Includes

- Informal testamentary documents
- Requirements under the Succession Act 2006
- The 'without more' test
- Testamentary capacity and burden of proof in probate matters
- The Duty of Care to prepare informal wills
- The witness beneficiary rule

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Informal Wills and the Witness Beneficiary Rule

1. In this edition of BenchTV, Dr Stephen Janes (Deputy Dean Of Law, Western Sydney University) and Craig Birtles (Barrister, Sydney) discuss the law relating to informal testamentary documents and the witness beneficiary rule.

Informal Testamentary Documents

2. An informal testamentary document is a document that does not comply with the formal requirements set out in the Succession Act 2006. If the court is satisfied that an informal document should be admitted to probate, it will serve as the deceased's will.

Requirements under the Succession Act 2006

3. A formal will is one that complies with the requirements under s6. It must be in writing. It must be signed by the testator with intention to give effect to the document whilst in the presence of 2 or more witnesses. It must also be signed by at least 2 witnesses, in the presence of the testator.

4. Document, with respect to s8, has the same definition as in s21 of the Interpretation Act 1987. It is anything from which sounds, images or writings can be reproduced with or without the aid of something else. Cases have held this to include a range of items including videotapes, computer disks and even things written on an iPhone.

The 'without more' test

5. *Hatsatouris v Hatsatouris* [2001] NSWCA 408, (decided under the former s.18A the Wills, Probate and Administration Act 1898) Powell J said that in order for an informal testamentary document to be admitted to probate, it was necessary for the Court to find that the deceased intended that the document, 'without more', form the deceased's will. White J in *Bell v Crewes* [2011] NSWSC 1159 affirmed the 'without more' test in NSW. This is in contrast to the position in other states. In *Mitchell v Mitchell* [2010] WASC 174 the court in WA held that is was sufficient that the document reflected the final testamentary wishes of the deceased.

6. There has been suggestion that the law may move away from the 'without more' test. White J in *NSW Trustee and Guardian v Halsey; Estate of Von Skala* [2012] NSWSC 872 stated that the requirement might be "whether the deceased intended the document to be his or her testamentary act, that is, to have present operation as a will". However, when the NSW Court of Appeal had the

opportunity to reconsider the matter in *Burge v Burge* [2015] NSWCA 289, it was not necessary to revisit the "without more" test and it continues to apply.

7. The legislation across the states is generally consistent. Particularly, in WA and NSW it is practically identical. In the event that the issue reaches the High Court, it is unclear whether the without more test would prevail.

8. The burden of proof is higher in Tasmania, where it must be proved beyond a reasonable doubt that the testator intended for the document to operate as a will.

The test for testamentary capacity and burden of proof in probate matters

9. Mr Birtles questions how testamentary capacity and the burden of proof in probate matters would interact with the Powell J test. Dr Janes believes this area has not been fully explored. However, in terms of a formal will the issue is straightforward. If the will does not comply with the formalities, it is not a will and therefore there is no need to consider issues of capacity. In regards to informal wills, the question to be posed is, where does the test for capacity, such as soundness of mind, knowledge and approval fit with the test in s8? Dr Janes believes that the requirement in s8 that the deceased intends the document to form their will, inherently includes the test from *Banks v Goodfellow* (1870) LR 5 QB 549 as they must have the capacity to form that intention. The deceased must also know and approve of the contents of the document.

Presumptions

10. Ordinarily, upon the evidence of due execution there is a presumption of testamentary capacity and knowledge and approval. However, for informal wills, the onus is on the person who propounds the document to establish that the deceased intends the document to form their will and has the requisite capacity to form this intention. Therefore the presumptions cannot be relied upon for informal wills in the same way it is for formal wills. A proponent of an informal testamentary document should file evidence of the taking of instructions for or preparation of the document, and of the reading of the document by, or to, the testator.

11. Lindsay J in *Boyce v Bunce* [2015] NSWSC 1924 and *Re Estate of Wai Fun CHAN, Deceased* [2015] NSWSC 1107 said that the practical application of the presumptions is to aid in the investigations of questions of fact. The extent that the document appears to be regular on its face, and the circumstances of preparation are otherwise regular, will be relevant to the evidence required to prove testamentary capacity and knowledge and approval. His Honour said that the ultimate question remains, is this the will of a free and capable testator?

Original wills

12. For both formal and informal wills, if the original will is not available then a copy can be admitted to probate. In *Whiteley v Clune & anor: Estate of Brett Whiteley (*unrep SC(NSW) Powell J 13 May 1993) a lost informal will was admitted to probate due to the strength of the evidence.

Duty of Care to prepare informal wills

[2013] NSWSC 462; (2013) 85 NSWLR 67

13. Solicitors should discuss informal wills with their client. If the client wishes to make an immediate will, a simple, formal will could be made if two witnesses are available. If the requisite number of witnesses are not available, the testator could make an informal will but the client's intention for the document to serve as their will should be clear, i.e. acknowledged in the document and signed. If the client is not given advice as to their ability to make an informal will, a disappointed beneficiary under the terms of the proposed will might have an action for negligence against the solicitor. Delay may also give rise to a professional negligence claim, as was the case in *Maestrale v Aspite* [2012] NSWSC 1420. It is important for the solicitor to consider the circumstances of the case and wishes of the client. This includes time constraints, requirements for due diligence and the client's choice. The solicitor must ensure the client is well informed about the relevant risks for each course of action.

14. In *Fischer v Howe* [2013] NSWSC 462 the court recognised circumstances that gave rise to the solicitor's duty to raise informal wills with the client and execute them. This includes, if the solicitor is aware of a risk of imminent death or loss of testator capacity. Although the solicitor's duty was affirmed in the NSW Court of Appeal, his retainer prevented his liability.

Evidence of intention for informal wills

15. It would be unusual for an unsigned will to be admitted under s8. A draft of a formal document without this element will usually lack proof that the deceased intended it, 'without more' to form their will. However the surrounding circumstances may point to the requisite intention. The following list may provide evidence of intention,

- the form of the document or alteration
- the circumstances of preparation
- the location and storage (see. *Burge v Burge* [2015] NSWCA 289)
- the testator informs the beneficiary of what's in the will or where it is stored
- conversations by the testator about changing the will and the testator's changing circumstances i.e. changing partners or family relationships
- the testator's imminent death e.g. an accompanying suicide note.

16. The more a document looks like a will; the more likely it is to be admitted to probate. In *Re Application of Brown; Estate of Springfield* (1991) 23 NSWLR 535, Powell J affirmed the opposite is also true, the less a document looks like a will, the harder it becomes to prove the deceased intended the document to form his will. Furthermore, the mere fact that the document was signed is not conclusive that the testator intended the document to constitute their will. Surrounding circumstances must always be considered to ascertain intention. This includes the testator's knowledge about the requirements for a formal will and previous action and habits regarding their will.

17. A range of documents have previously been admitted to probate including a Microsoft document (*Yazbek v Yazbek* [2012] NSWSC 594; *The Estate of Roger Christopher Currie, late of Balmain* [2015] NSWSC 1098) and video wills (*Re Estate of Wai Fun CHAN, Deceased* [2015] NSWSC 1107).

Re Estate of Wai Fun CHAN, Deceased [2015] NSWSC 1107

Facts

18. The deceased had made a formal will but wished to make further provision for two of her children. Due to the circumstances of her illness she was unable to make a codicil to the will and decided to record her testamentary wishes on a DVD. It was filmed by one of the beneficiaries of the alteration of the will. The court was satisfied that the DVD was a document that was intended to constitute testamentary dispositions and be an amendment to the will. Lindsay J admitted the document to probate.

19. The issue was then, whether the beneficiary of the amendment, who was filming the DVD, could be regarded as a witness for the purposes of the witness beneficiary rule. The case also considered whether a proper transcript should accompany a DVD admitted to probate.

Witness beneficiary rule

20. The witness beneficiary rule deems, that if you are beneficiary under a will and the witness to the will, your beneficial gift is rendered void. Since 1989, the once absolute rule has been subject to judicial discretion to exempt a witness beneficiary from the operation of the rule. The discretion can be used in situations where the beneficiary is the third witness, or the person who would have received the gift on an application of the rule consents to have the beneficiary receive the gift. Importantly, the witness beneficiary applies to the court for relief from the rule, where they can demonstrate that the gift was freely and voluntarily given and that the deceased knew and approved of the gift.

Contesting a will

21. Applications for probate of an informal document can be decided by a registrar if appropriate notices are served on the affected persons and there is no contest. Opposition to a case raises the question of the need for judicial determination. Judicial determination can also be required by other factual circumstances such as a novel form of the document.

Advice for practitioners

22. If a practitioner is presented with an informal document, firstly, they should inquire whether there is any formal will, Secondly they must question if the document meets the requirements of s8. This requires a thorough investigation of all the circumstances surrounding how the document came into existence.

23. The process that is necessary to admit an informal document to probate subsumes the requirements of the witness beneficiary rule.

BIOGRAPHY

Dr Stephen Janes

Deputy Dean of Law, Western Sydney University, Sydney

Dr Stephen Janes was admitted as a Barrister in 1991 and practised in commercial, equity and succession law, having previously practised as a solicitor. In 2005 Dr Janes was awarded a PhD by the University of Sydney for a thesis on an aspect of succession law. He is currently a senior lecturer in law at Western University Sydney, lecturing in wills and succession and commercial law. Dr Janes is also a member of the Law Society of NSW Specialist Accreditation Committee for Wills and Estates.

Craig Birtles

Barrister, Sydney, 13 Wentworth Selborne Chambers

Before being called to the bar, Craig was admitted as a solicitor in 2008 and practiced with Teece Hodgson & Ward for 9 years. From 2015 – 2017 Craig was an Accredited Specialist in Wills & Estates Law. He was named as a Rising Star in the 2017 edition of Doyle's Guide in the area of Wills & Estates Litigation.
Craig is an adjunct lecturer for College of Law (Masters of Applied Law), Family Provision subject and is also a casual lecturer in the Law Extension Committee Diploma of Law, Succession Law subject

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Yazbek v Yazbek [2012] NSWSC 594

Legislation

Interpretation Act 1987
Succession Act 2006
Wills, Probate and Administration Act 1989