Technology and Wills (using an iPhone, Word or other modern devices)

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In recent Supreme Court decisions[2] in New South Wales and Queensland Supreme Court it has been made clear that it is not only formal, printed, singed and witnessed documents that can constitute a valid will. The wide variety of circumstances in which a deceased can express himself or herself, exacerbated in these times of apps, personal computers and tablets, an executor or their advisers must be vigilant to ensure they are fully comprised of the testator's or testatrix's wishes and testamentary dispositions.

The Courts will try to give effect to a deceased's testamentary intention if they can. The cases here considered bear out what Mahoney JA said 20 years ago,[3] '*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.'*

As practitioners it is incumbent on us to ensure those testamentary intentions, wherever they be located, are made known to the Courts. This includes the various modern devices on which intentions may recorded. The cases, which will be considered in turn, are a timely reminder to us of that obligation.

Yazbek's Case – Microsoft Word[4]

Justice Slattery summarized the issue in Yazbek's Case at [1]:

> *The late Daniel Yazbek ("Daniel") was a creative and entrepreneurial restaurateur with a flair for Japanese cuisine. Daniel was born on 1 December 1970, the sixth child of a family of eight siblings. He died at the age of 39 on 18 or 19 September 2010. In these proceedings the plaintiff, Acob Yazbek ("Alan"), one of Daniel's brothers, propounds an informal testamentary document as Daniel's will. The defendants, Ghosn Yazbek ("Ghosn"), Daniel's father, and Mouna Yazbek ("Mouna"), Daniel's mother, resist this relief. They say Daniel died intestate.*

The legal issue was whether the "Will.doc" or a printed out paper copy of it satisfied the requirements of s 8 of the *Succession Act* 2006 (NSW) (the "***NSW Act***") sufficient for the Court to declare either to be Daniel's last will.[5] That section provides:

> ***8 When may the Court dispense with the requirements for execution, alteration or revocation of wills?***
>
> *(1) This section applies to a document, or part of a document, that:*
>
> *(a) purports to state the testamentary intentions of a deceased person, and*

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[2] In New South Wales the decisions of *Ian Yazbek V Ghosn Yazbek & Anor* [2012] NSWSC 594 ("***Yazbek's Case***"), *Costa v The Public Trustee of NSW* [2008] NSWCA 223 ("**Costa's Case**"), *Newman v Brinkgreve; The Estate of Floris Verzijden* [2013] NSWSC 371 ("***Newman's Case***") and (by contrast) *Bolger & Anor v McDermott & Anor* [2013] NSWSC 919 ("***Bolger's Case***"), and in Queensland the decision of *Re Yu* [2013] QSC 322 ("***Yu's Case***").

[3] *Re Estate of Masters (dedc); Hill v Plummer* (1994) 33 NSWLR 446 at 462.

[4] As this case also sets out the framework of s 8 of the NSW Act it is longer than the analysis of other NSW decisions in this article.

[5] Other parties alleged Daniel had printed the "Will.doc", signed it and later destroyed it, thereby revoking that document (printed or not) as a testamentary document. This issue

(b) has not been executed in accordance with this Part.

(2) The document, or part of the document, forms:

(a) the deceased person's will—if the Court is satisfied that the person intended it to form his or her will, or

(b) an alteration to the deceased person's will—if the Court is satisfied that the person intended it to form an alteration to his or her will, or

(c) a full or partial revocation of the deceased person's will—if the Court is satisfied that the person intended it to be a full or partial revocation of his or her will.

(3) In making a decision under subsection (2), the Court may, in addition to the document or part, have regard to:

(a) any evidence relating to the manner in which the document or part was executed, and

(b) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person.

(4) Subsection (3) does not limit the matters that the Court may have regard to in making a decision under subsection (2).

(5) This section applies to a document whether it came into existence within or outside the State.

His Honour found that "Daniel" prepared a Microsoft Word document, entitled "Will.doc" on his computer between 11 and 14 July 2009, just before he left for an overseas holiday, and 14 months before his death. The Police found Daniel's death to be suicide and, in doing so, searched various electronic devices including a laptop computer. It contained the "Will.doc". The "Will.doc" contained well wishes to Daniel's family and friends, descriptions of how some (but not all) of Daniel's property should be distributed and his name typed at the conclusion of the document. It was edited over a 3 day period of editing and last accessed on 1 September 2010, 8 or 9 days before Daniel's death.

Justice Slattery held the "Will.doc" was Daniel's will. A [77] and [78][6] his Honour noted there is no substantive difference between s 8 of the NSW Act and its predecessor (s 18A of the *Probate and Administration Act* 1898 (NSW)), and that the requirements of execution under that predecessor provision are clear:

1. there must be a document – by s 3 of the NSW Act and s 21 of the *Interpretation Act* 1987 (NSW) a word document in soft copy is a "document";[7]

2. which purports to state the deceased's testamentary intentions – his Honour held the "Will.doc" did so because it dealt with a large part of the estate, was saved under the name "Will.doc", referred to Daniel's life in the past tense and because of the structure of the "poignant messages" to his family in the document; and

3. which the deceased intended to form his will – his Honour held Daniel so intended as he named the document "Will", told people he had a will & had said it was at least on his computer, it immediately preceded overseas travel, Daniel typed his name after the salutation and he opened it

[6] Quoted with approval by Hallen J in *Bolger & Anor v McDermott & Anor* [2013] NSWSC 919 at [103] (considered below).
[7] Justice Slattery also noted *Re Trethewey* [2002] VSC 83 per Beach J and *Mahlo v Hehir* [2011] QSC 243 per McMurdo J to the same effect under the Victorian and Queensland equivalent legislation.

> without amending shortly before his death. These considerations outweighed countervailing considerations.

Another important aspect of *Yazbek's Case* was the approach approved in rejecting the defendants' argument for revocation. At [127] Slattery J held you do not look in detail to the law of revocation, but instead you look to the test asked by s 8 of the NSW Act. That is, you merely apply s 8 at the relevant time rather than applying it earlier and looking for evidence of revocation. This may be obiter, however, as even if that law was applied his Honour would still have found no revocation occurred.

What is clear – especially when *Yazbek's Case* is contrasted with decisions such as *NSW Trustee and Guardian v Pittman – Estate of Koltai* [2010] NSWSC 501 and *Bell v Crewes* [2011] NSWSC 1159 – is that the Court will discern whether the deceased intended the informal document to operate as a will. For instance in *Bell v Crewes* the fact that the document provided for a signature, and it was not signed, weighed heavily in finding the printed document was not a will. In assessing an informal will, therefore, indications that the deceased intended it to be a will should be the focus of your attention.

Costa's Case – Suicide Note

Before committing suicide Robert Costa left a hand-written document that was found in his bedroom. It was written in the form of a poem and was addressed to his parents. Included in the poem were the words, '*I think I'm dying*' and '*I want you to have my house*'. The deceased's house was his only valuable asset. The deceased's parents sought the grant of probate. The issue was whether the deceased had the intention for the document to constitute a will. At first instance Windeyer J dismissed the claim, holding that there was no such intention. His Honour held[8] at [19]:

> After careful consideration I consider that the document propounded is in the nature of a suicide note expressing wishes and requests and not a document intended to operate as a testamentary instrument. Its form and wording lead to that conclusion. It follows that I am not satisfied the requirements of s 18A are made out.

The parents successfully appealed that decision. The Court of Appeal[9] held that inferences may be drawn in applying the test of s 18A of the *Probate and Administration Act* 1898 (NSW) (now s 8 of the NSW Act) and in this case the correct inference was that the deceased intended the poem to constitute his will. The facts underlying that inference were to be applied as follows:[10]

> I would give less weight than the primary judge apparently did to the precatory wording of the document, the deceased's knowledge of the requirements of a valid will, the lack of a signature and the form of the document.
>
> I would give more weight to the consideration that the document was written on a solemn unique occasion, as a last message to his parents, the persons apparently closest to him. I would give more weight to the consideration that, if the document was no more than an emotional expression of wishes, the house would to the deceased's knowledge be disposed of under his will to an ex-acquaintance with whom the deceased's relationship had broken down and with whom the deceased had lost contact. I do not think it likely that the deceased was, by this document, intending to do no more than to indicate an ineffectual emotional wish for something that would not happen.

Costa's Case shows not only the nature of the inquiry – establishing facts from which an inference of the

[8] At first instance see *Costa v The Public Trustee in the Estate of Robert Costa aka Way Geary Coaster* [2007] NSWSC 1271.
[9] Hodgson, Ipp and Basten JJA.
[10] See Hodgson JA at [27] to [29] on which point Ipp JA (at [52]) and Basten JA (at [114]) agreed.

deceased's intention, which is largely undiscoverable, can be determined – but also the various ways in which the testamentary intention can be found. Here being a suicide note delivered in poem.

Newman's Case – Surrounding Circumstances will assist

In Newman's Case the deceased was a patient in hospital in 2011 when he wrote, on the back of some clinical notes, a purported alteration to his 2004 will. It was held to be a valid amendment to his will. Newman's Case makes clear that the circumstances surrounding the document will be important in assessing the document under s 8 of the NSW Act. In upholding the 2011 document Hallen J relied on the fact that the deceased was in hospital, initiated the 2011 document himself, crafted it carefully to avoid errors, made earlier comments on relationships consistent with the outcome of the 2011 document, had experience in executing wills and referred to the document as a will, sought witnesses, dated and signed the document, said his 'mind is strong and I know what I'm doing' and that the deceased requested the document be placed with his medical records.

Bolger's Case – Stop gap wills

Bolger's Case is an example of informal documents being rejected as the deceased's will. It does not set out new grounds in relation to informal wills but reference is made to Bolger's Case, however, for 2 reasons: it contrasts with the outcome of the other 3 cases here considered and it reaffirms (at [111] and [112]) the ability of a 'stop gap' will to operate. A 'stop gap' will intended to be interim in operation but taking effect on the testator's death before the further contemplated will can be completed.

The case was a bitter dispute between family members.[11] The deceased had executed a professionally drawn will and codicil to it (both on 18 September 2008), but had also, subsequently, prepared a typed document and a handwritten document (both on 30 June 2009). The typed document was a typed version of the handwritten documents. The 30 June 2009 documents were not executed. Although his Honour had concerns about the manner in which the 30 June 2009 documents came to be (see at [113]), he ultimately held those documents were not the deceased's and he did not intend them to revoke his earlier will.

Re Yu's Case – iPhone 'Notes'

Though *Re Yu's Case* was an *ex tempore* decision of some 10 paragraphs only it remains instructive. Shortly before his suicide the deceased created a series of records on his iPhone, in the "Notes" program. Some of the notes were messages the deceased intended to be read after his death, including a purported will. It was titled 'This is the last Will and Testament ...' in which the deceased named an executor and provided for his property to be gifted away. The named executor applied to the court seeking that the iPhone record be proved as a will.

<u>*Requirements of a will*</u>

The iPhone record did not meet the formal requirements of a will required by section 10 *Succession Act 1981* (Qld) (the **"*Qld Act*"**), namely that it::

- be in writing
- be signed by the will-maker (or someone else in the presence of an at the direction of the will-maker), and

[11] Justice Hallen's comments at [1] to [4] show how bitter.

- have two independent persons who are present at the same time to witness the will-maker's signature.

A will which does not meet the formal requirements (sometimes referred to as an informal will) may be proved as a valid will provided that certain conditions are met (see s 18 of the Qld Act).

First condition: there must be a document in existence.

The definition of document is found in section 36 *Acts Interpretation Act* 1954 (Qld) and is in broad terms. Basically, it includes any paper of material on which there is writing or marks, and '*any disk, tape or other article or material from which sounds, images, writing or marks are capable of being produced or reproduced (with or without the aid of another article or device).*'

Justice Peter Lyons considered *Yazbek's Case* (see above). With reference to that case, and the cases cited in it, the judge was satisfied the record on the iPhone was of a similar nature to the Word document and therefore, it met the definition of document.

Second condition: whether the document purports to state the testamentary intentions of the deceased. That is, the document must deal with the distribution of the deceased's property on their death.

Justice Lyons considered it relevant that the document:

- dealt with the whole of the deceased's property;
- was created by the deceased when was contemplating his imminent death (which was evidenced by the fact that the deceased had also created numerous final messages in the Notes app around the same time);
- appointed an executor as well as nominated a substitute executor; and
- the document authorised the executor to deal with the deceased's affairs in the event of his death.

Consequentially his Honour gained the general impression that the document set out the testamentary intentions of the deceased.

Third condition: the deceased must have intended the document to form his will.

The document must be more than a mere letter or memorandum of wishes. The deceased must intend it to be a legally binding document by which their property is disposed on their death. Justice Lyons was satisfied that the deceased held the requisite intention based on the terms of the document alone. It does not appear from his Honour's judgment that he considered any external evidence as to the deceased's intention. For instance, evidence that the deceased told someone he had created a will and it could be located on his electronic device (as occurred in *Yazbek's Case*). Indeed, the decision does not make plain how the executor became aware of the notes on the deceased iPhone.

His Honour considered the relevant matters to be:

- the document commenced with the words '*This is the last will and testament ...*';
- the deceased formally identified himself and his address;
- the document clearly appointed an executor;

- the deceased typed his name at the end of the document in a place where a signature would appear on a paper document and then typed the date followed by his address again; and
- the document was created shortly after a number of final messages were created.

As the three conditions were satisfied, the application was successful and the court issued a grant of probate of the iPhone document to the executor named in it.

Conclusion

While the circumstances of some of these cases makes for very interesting reading, a will should always, where possible, meet the formal requirements set out above. The types of application referred to above involves cost, delay and uncertainty as to the outcome. A will that meets the formal requirements is far more likely to result in the will being administered in an efficient way.

However, the cases make clear that practitioners must confirm the deceased's testamentary intentions, which may not be limited to formal will executed in accordance with the legislation. Thinking outside the square may be required of us.