Austlaw Wills & Estates Practice Group Meeting

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Informal Wills

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Informal Wills

> "*At our [law school] reunion, we remembered our teachers, one of whom was the late Justice Frank Hutley. He taught the law of succession to generations… Correctly, he realised that these were not topics for imprecise generalities. Accuracy and a thorough understanding of many inter-related areas of the law were essential before a lawyer could really call himself or herself an expert on the law of wills."*
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> The Hon. Michael Kirby AC CMG, former Justice of the High Court of Australia, in *Construction of Wills in Australia* by David Haines QC (2007, LexisNexis Butterworths) at foreword.

1. In Canada's University of Saskatchewan, there is a memorial to an informal will[1]. It commemorates the day of 8 June 1948, when a famer, Cecil George Harris, set out for his day's work. Cecil George Harris would never return home.

2. Cecil George Harris headed out across his land in his tractor on that fateful day, and was welcomed into the embrace of a brewing storm. The storm broke, and resulted in an accident that caused him to be pinned beneath his tractor, for over 10 hours.

3. Fearing he would not survive, Cecil Harris etched into the fender panel of his tractor (under which he was pinned) the following:

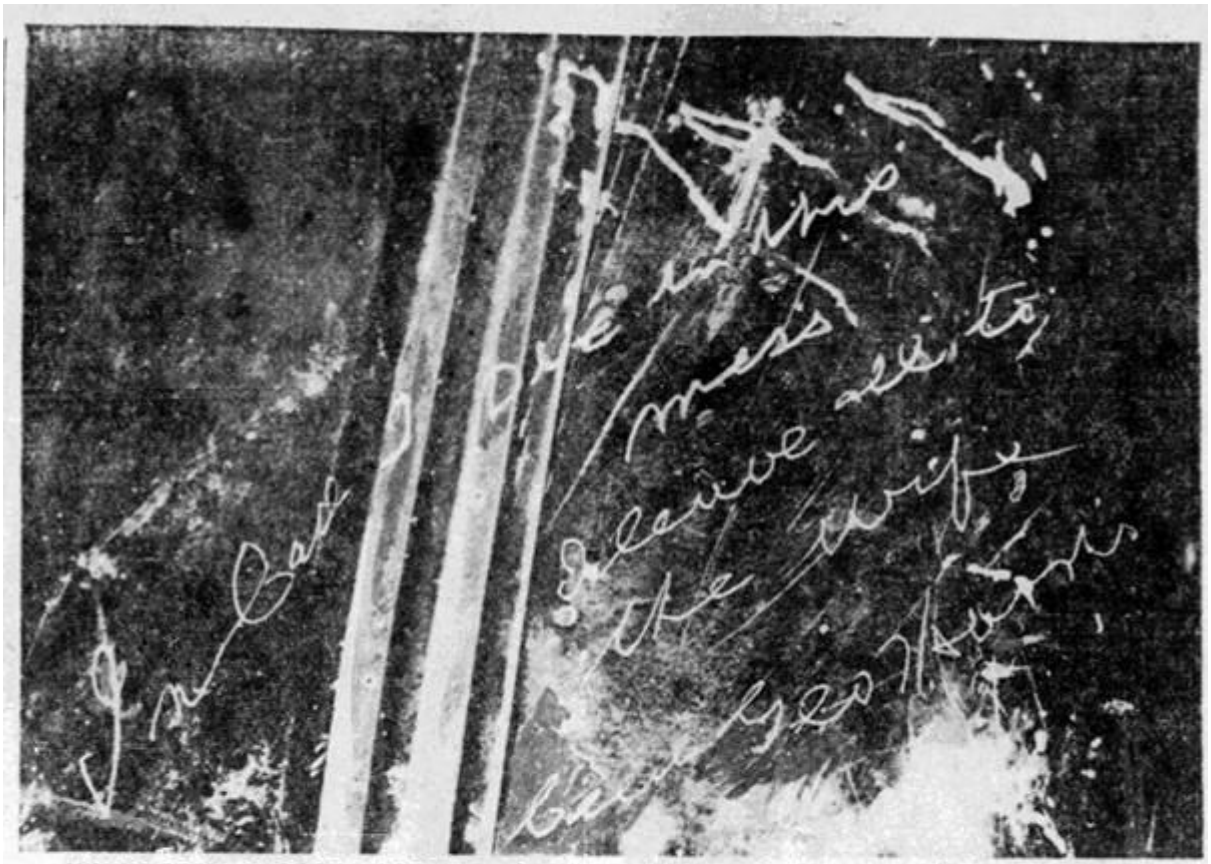
   "In case I die in this mess, I leave all to the wife. Cecil Geo Harris."

4. Cecil Harris did, subsequently, expire.

[1] For the purposes of this paper, I have treated the term "will" and "testamentary instrument" interchangeably.

5. The conclusion to his life has become one of the most widely reported stories of an informal will on the planet. Curiously, the case was not legally reported.[2]

6. Whilst the lawyer that took the case to the Saskatchewan Surrogate Court for a grant of letters of administration cta (*cum testamento annexio*) thought it might be sufficient to produce a photograph (reproduced **below**), the Court insisted on seeing the, then detached, tractor fender panel – which now resides in a display case at the University of Saskatchewan.



WHEN CECIL GEORGE HARRIS was pinned beneath a tractor on his farm near McGee, Sask., he took out his penknife and on the fender of the tractor scratched 'In case I die in this mess I leave all to the wife. Cecil Geo. Harris." Recently the fender was taken into court at Kerrobert, along with the penknife which bore evidence of scrapings from the tractor, and was admitted to probate as the only will of Harris, who died two days after being released from under the tractor. He was pinned beneath the machine for nine hours, all of which time he was conscious and had his arms free.

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[2] Ellwand, G., "An Analysis of Canada's Most Famous Holograph Will: How a Saskatchewan Farmer Scratched His Way Into Legal History" (2014) *77 Saskatchewan Law Review 1*.
[3] Image from article, 'The Tractor Fender Will of Cecil George Harris',
<http://www.weirduniverse.net/blog/comments/cecil_george_harris> Accessed 23 February 2020.

7. Cases such as 'the Tractor Will case' are more than a curiosity. They show the determination of the Courts to honour testamentary intentions, no matter how poor the form of the testamentary instrument.

With or Without correct form

8. In New South Wales, there exists a statutory framework for the correct execution of a will.

9. That statutory framework is contained within Chapter 2, Part 2.1, Division 2 of the *Succession Act 2006* (NSW) (**"the Act"**) - principally section 6.

10. Section 6 provides that a will must:
    a. be in writing and signed by the testator (or signed at the testator's direction);
    b. the testator's signature is made or acknowledged in the presence of 2 or more witnesses present at the same time; and
    c. at least 2 of those witnesses attest and sign the will in the testator's presence (albeit not necessarily in each other's presence).[4]

11. At s 6(2), it also states that the testator must intend that the document they are executing is to be their will.[5]

12. Of course, other elements vital to the correct execution of a will are that the testator must have testamentary capacity, and that they must have knowledge and approval of the testamentary instrument's contents.

13. Whilst potentially running the risk of oversimplifying the process for successful execution of a testamentary instrument, it is potentially of assistance to new practitioners in the area to think along the lines of the following four critical thresholds:

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[4] *Succession Act 2006* (NSW), s 6.
[5] *Succession Act 2006* (NSW), s 6(2), Janes, S., D. Liebhold & P. Studdert, *Wills, Probate and Administration Law in New South Wales* (2020, Thomson Reuters, 2nd ed.) at 73.

Testamentary Capacity

Technical Requirements

Succession Act 2006 (NSW) Chapter 2, Part 2.1, Division 2
or
Division 3

Knowledge & Approval of contents of the will

Will is free from Fraud and/or Undue Influence

14. Both sections 6 and 8 of the Act contain references implying that the testator must have intended the document to be their will.[6]

15. Section 6 is not the only pathway for the recognition by the Court of a testamentary instrument, as there exists a concern that the strict technical requirements for execution may frustrate the testator's intentions for the distribution of their estate.[7]

16. An 'informal will' is a document purporting to be the repository of the deceased's testamentary intentions, that *fails* to conform with the requirements in section 6.

17. The Act accommodates the determination of an informal will through the provisions of the "dispensing power' in Division 3, Section 8 of the Act, which can dispense with the form requirements contained in section 6.[8]

[6] *Succession Act 2006* (NSW), ss 6(2) & 8(2)(a).
[7] *In the Estate of Williams (deceased)* (1984) 36 SASR 423 at 425, per King CJ; Dal Pont, G.E., & K.F. Mackie, *Law of Succession* (2017, LexisNexis Butterworths, 2nd ed.) at 114.
[8] *Succession Act 2006* (NSW), s 8.

18. Section 8 of the Act provides the following:

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

(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.

19. Section 8 refers to a 'document' or 'part of a document'.[9]

[9] *Succession Act 2006* (NSW), s 8(1).

20. Reference to a ‘document’ in section 8 refers to the Definitions contained within s 3 of the Act – which in turn direct to the *Interpretation Act 1987* (NSW),[10] which defines ‘document’ in the following way:

    *"**document**" means any record of information, and includes:*

    (a) anything on which there is writing, or

    (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or

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

    (d) a map, plan, drawing or photograph.

21. The definition of ‘document’ is not merely a formality.

22. The interpretation of what constitutes a document may end up being quite broad, for example a tractor, an eggshell,[11] an SMS message,[12] a computer file,[13] an iPhone recording,[14] or pencil marks on a wall.[15]

23. When applying s 8 to an informal will, the Court is required to determine, as a matter of fact, whether the document being propounded was intended by the testator to carry the function of their will.

24. The Court will do this by having regard to, amongst other considerations, the manner in which the document was executed, any evidence that supports the belief that the document carries the deceased’s testamentary intentions, and any corroborative statements of the deceased.[16]

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[10] *Interpretation Act 1987* (NSW), s 21.
[11] *Hodson v Barnes* (1926) 43 TLR 71.
[12] *Re Nichol; Nichol v Nichol* [2017] QSC 220.
[13] *Yazbek v Yazbek* [2012] NSWSC 594.
[14] *Re Yu* [2013] QSC 322.
[15] *Estate of Slavinskyji* (1988) 53 SASR 221.
[16] *Succession Act 2006* (NSW), s 8(3)-(4).

25. An illustration of this principle sometimes occurs in cases where the deceased has committed suicide.[17]

26. At issue in such cases is testamentary capacity and the intention to create a will, which are invariably reliant on the note itself; as corroborative statements and other evidence of the deceased's testamentary intentions are usually absent.

Proof of Informal Wills

27. In pursuit of a determination as to whether the deceased intended the document to be a testamentary instrument, the Court *"may receive extrinsic evidence, including of the manner in which the document was executed and statements made by the deceased person, although the Probate Court has always been entitled to do so in ascertaining which documents should be admitted to a grant."*[18]

28. The dispensing power is not *"a licence to alter the core principles of probate law with respect to the mental element…even if an informal will otherwise meets the criteria for admission to probate, it cannot be admitted in the event that it lacks the requisite testamentary intention…"*[19]

29. Be mindful that *"the greater the departure from the formal requirements the more difficult it will be to show that the deceased intended the document to constitute his or her will."*[20]

30. Of course, each case must be examined on its facts within the frame that the intention of the deceased is to be treated as a matter of fact,[21] rather than discretion.

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[17] See for example the case of *NSW Trustee and Guardian v Pittman* [2010] NSWSC 501, where the deceased had attempted suicide on at least 10 occasions, leaving at least 5 suicide notes leaving varying directions as to property disposition.
[18] Certoma, G.L., *The Law of Succession in New South Wales* (2010, Thomson Reuters, 4th ed.) at 97; *Succession Act 2006* (NSW), s 8(3)-(4).
[19] Dal Pont at 117.
[20] Certoma at 97.
[21] *Jaguers v Downing* [2015] VSC 432 at [13], [19]-[20] per McMillan J; *Hatsatouris v Hatsatouris* [2001] NSWCA 408 at [56] per Powell JA.

31. The onus of proof is placed upon the person propounding the informal will; and needs to be proved to the civil standard.[22]

32. In the matter of *Hatsatouris v Hatsatouris*,[23] (a matter where the Plaintiff pressed the validity of a codicil that was incorrectly executed) Powell JA posited a series of questions in order to determine whether there is a factual basis for the application of the dispensing power to an informal will.

    "the particular questions of fact to be answered being:

    (a) was there a document,

    (b) did that document purport to embody the testamentary intentions of the relevant Deceased?

    (c) 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?"[24]

33. The first question of Powell JA's judgment is usually satisfied once the s 21 interpretation of the term 'document' is applied.[25]

34. The second, whilst more difficult, can be more easily facilitated with the following judicial guidance:
    'Testamentary intentions' have been defined as "an expression of what a person wants to happen to his or her property upon death."[26]

35. Besanko J stated, "*The question whether the documents express the testamentary intentions of the deceased involves a consideration of whether they contain a statement of her intentions as to what was to happen to the property described in the documents upon her death. In other words, is it clear that the documents express her*

[22] *Kantor v Vosahlo* [2004] VCA 235 at [15] per Ormiston JA.
[23] *Hatsatouris v Hatsatouris* [2001] NSWCA 408.
[24] [2001] NSWCA 408 at [56] per Powell JA.
[25] *Interpretation Act 1987* (NSW), s 21.
[26] *Re Trethewey* (2002) 4 VR 406 at [16] per Beach J.

intentions as to the disposition of the property upon her death?" [27]

36. The testamentary instrument is not burdened by the necessity to be identified by *"clear statement"* as a will.[28]

37. The third element is, perhaps, the most difficult of the three – does the evidence satisfy the Court that, at the time the document was made, the deceased demonstrated their intention that it would operate as their will?

38. Of significance is the statement of Murray J in *Dolan v Dolan, "the document will be held to constitute the will of the deceased if the court is satisfied that the deceased intended its terms without more – without any alteration or reservation – to be the manner in which the property of the deceased dealt with in the document was to be disposed of upon his or her death."*[29]

39. Hallen J stated in *Estate of Laura Angius; Angius v Angius* that, *"the use of the words "without more on her, or his, part",* [from the third question in *Hatsatouris*[30]] *does not really add anything. What the words do is direct attention to a consideration of the particular document itself, which must purport to "state the testamentary intentions of the deceased person", and then determine whether the Court is satisfied that the deceased person intended that particular document to form his, or her, Will…the focus of the section is on the actual testamentary intention of the deceased so far as it relates to the particular document in question. Both elements need to be satisfied."*[31]

40. Kirby P (as he then was) in the case of *Re Masters, Hill v Plummer* stated that *a "too rigid insistence that a document should have the formalities or other characteristics* necessary to constitute it the deceased's will would narrow significantly the operation of the [section]."[32]

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[27] *Re Estate of Torr* [2005] SASC 49 at [34] per Besanko J; *Romano v Romano & Anor* [2003] NSWSC 436.
[28] *Estate of Laura Angius; Angius v Angius* [2013] NSWSC 1895 at [242] per Hallen J; *Romano v Romano & Anor* [2003] NSWSC 436.
[29] *Dolan v Dolan* [2007] WASC 249 at [22] per Murray J.
[30] [2001] NSWCA 408 at [56].
[31] [2013] NSWSC 1895 at [260] per Hallen J.
[32] *In the Estate of Masters (deceased); Hill v Plummer* (1994) 33 NSWLR 446 at 451, per Kirby P.

41. Perhaps the concept is well distilled in the words of Lindsay J in the matter of *Estate Moran; Teasel v Hooke* in that *"consideration of whether the particular document was intended to operate as a will: to have present operation as such, not merely as a draft, a diary note or the like."*[33]

42. Consider the role and gravity of supportive evidence (interestingly a key element to buttress the Tractor will case – the lawyer who took possession of the case (and the tractor fender) swore eight affidavits in support of various aspects, including validation of the deceased's handwriting - all on the same day that he received the fender![34]).

43. Also consider the importance of the handwriting itself as a supportive element (albeit not of any assistance in an SMS will), in the absence of attesting witnesses. After all, the supportive element in paragraph [2] of the pro forma Affidavit of Executor in a 'normal' Grant of Probate application is generally filled with the confirmation by the deponent that they recognise and can attest to the authenticity of the signature at the foot of the document purported to be the deceased's formal will.

44. Practitioners should be ultimately mindful, like the lawyer who propounded the Tractor Fender, of the need to ensure that their document and its application to the Court, is backed by as much evidence as possible to assist the Court to navigate the intentions of the deceased.

Additional Procedural items

45. On top of the usual procedural elements, the practitioner should pay particular attention to *Supreme Court Rules 1970* (NSW), Pt 78, rr14, 41-45.

[33] *Estate Moran; Teasel v Hooke* [2014] NSWSC 1839 at [28] per Lindsay J.
[34] Ellwand at 13.

Final thoughts regarding informal wills

46. Practitioners are also urged to be mindful that s 8 does not only apply to the dispensing of requirements for execution of a will, it applies to the dispensing of requirements for alteration and revocation of wills.[35]

47. Remember to apply careful contemplation of the definition of 'document'. This might prove an even more significant element of the pathway that Succession Law takes into the future for a couple of reasons.

48. Firstly, there has been a growing number of ecommerce-type solutions that are the latest evolution of the 'Post Office Will-kit'. These will increasingly need to be scrutinised as such wills are routinely susceptible to wandering into informality.

49. Haines has stated, *"Home-made wills have been the subject of considerable interpretation by courts of construction. Indeed, their number, and perhaps the incidence of inconsistency in decisions and the number of appeals arising from them, may have led to that cliché which is the toast of the chancery bar: 'Here's to the man who makes his own will'. Some authorities acknowledge that the authors of such documents lacked legal advice in drafting the document or, as the older authorities state, were inops consili, and many contain the usual difficulties and inelegancies which appear endemic to wills drawn without professional assistance…Greater latitude is permissible and given by courts in construing the language employed by the testator in these circumstances."*[36]

50. Secondly, we are headed to an interesting development with the latest twists and turns of our slavish devotion to technology. The author is unaware of any cases yet that press informal documents found only on the 'Cloud', but the presence of the 'Cloud' as a documentary repository – along with the challenges of password security - brings with it a whole new set of challenges it is respectfully suggested.

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[35] *Succession Act 2006* (NSW), s 8.
[36] Haines, D.M., *Construction of Wills in Australia* (2007, LexisNexis Butterworths) at 25.

51. As the world grows less formal and less concerned about protocols[37] and etiquette, should we not expect that wills might become even more difficult to decipher? It is submitted that protocols and etiquette are often shorthand for key social considerations, just as more formal elements of Wills practice are shorthand for underlying complex and fundamental concepts.

52. Two last items of significance:

    (1) In practice, when contemplating informal wills, having protocols in place to defend against accusations of testamentary undue influence is critical.

    (2) The Tractor will case shows one remaining thing, not obvious on first reading. Of course, the case is intriguing, and it is redolent with sadness amidst Cecil Harris' love for his wife – minded as he was to ensure that she was protected when he was confronted with little hope for rescue. Yet there is one more item that reveals itself to those lawyers that are alert to it.

    When the events of 8 June 1948 transpired, it took the **forensic** legal mind of an astute country lawyer as he stared at a tractor fender, in that most extraordinary confluence of events, to realise that he "was dealing with something very special".[38] Something that he had a duty, at law, to honour.

Thank you.

The author is grateful to the Austlaw Wills & Estate Conference for the invitation to present this paper, and for the kind assistance provided by François F. F. Salama of Counsel and Ms Cassandra Goldman of University of Wollongong Law School in reviewing the final draft of the document.

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[37] Truss, L., *Eats, Shoots & Leaves: The Zero Tolerance Approach to Punctuation*, (2003, Griffin Press) at 1.
[38] Ellwand at 2.

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Profile

As a Barrister, I am privileged to work in an area for which I hold a great degree of passion and empathy – Succession Law. I pride myself on an ability to connect with clients involved in these types of disputes, and the legal professionals that face multiple challenges in this ancient, yet still complex, area of law.

Prior to being called to the Bar, as a Solicitor I was the head of a Wills & Estates division within a regional law firm.

I combine my love for this area of the law with a unique practice management approach and I am often called upon to provide analysis and performance consultancy to management processes within a legal framework. I have completed a Master's Degree in Business (Management) and a Master of Applied Law (Wills & Estates). I am currently a Doctoral student with the University of Wollongong for the award of PhD (Law). I have also previously taught at the University level in the subjects of Remedies, Procedure, Equity & Trusts. I have previously served as a committee member of the Traditional Freedoms committee of Australian Lawyers for Human Rights and have made submissions to the Law Reform Commission.

I have appeared on local radio in series of episodes to highlight awareness of the importance of knowledge of Succession Law, to local communities. I was previously an Expert Content Tutor in Charles Sturt University's Indigenous Academic Success Program.