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WILLS AND ESTATE INTENSIVE

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WHAT IS A WILL, and WHY DOES IT MATTER?

By

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INTRODUCTION

1 This paper explores the surprisingly elusive nature of a "will" and highlights the need to recognise that a "formal" will, an "informal" will and a "statutory" will are very different types of testamentary instrument. Each is governed by specific legislation even though, after their admission to probate, administration of the estate of a deceased person by reference to them may proceed along a common path.

2 In the popular imagination a "will" may commonly mean (and mean only) a document, signed by a will-maker and witnessed by two people, designed to appoint an executor, dispose of property to named beneficiaries and, perhaps, give directions for a funeral. This is broadly what constitutes a "formal" will. In more recent days, since documents not duly executed have routinely been admitted to probate, the popular imagination may now also think that a will can sometimes take any form of recording of testamentary intentions. In this the popular imagination is probably also close to the mark. On the other hand, a statutory will, properly described as a court-authorised will, probably has no presence in the popular imagination at all. It is a mystery to many lawyers.

3 What may be largely unknown across the spectrum of society is that, although the general law informs the concept of a will at a foundational level, each type of will currently recognised in NSW as admissible to probate is governed by legislation and idiosyncratic. Throughout the history of the Australian legal system, a will has been required by legislation to be in writing. If an oral expression of testamentary intentions is to be given effect resort must be had to principles other than those governing the law of wills. So, what is a "will"? That is a question generally answered obliquely rather than by a direct definition.

4 The concept of a "will" is central to the administration of a deceased estate, whether or not the deceased in fact left a will. Before a person's death the existence or otherwise of his or her will may, incidentally, be relevant to decisions made in protective management of his or her estate should he or she become incapable of managing his or her own affairs. On an exercise of probate jurisdiction, even a grant of administration of an intestate estate is predicated upon the absence of a will after due search. A family provision order is predicated upon an assessment of a deceased person's testamentary arrangements, and it takes effect as a will or codicil.

5 A will might also be centre stage in the entry into transactions designed to circumvent formalities attending the making of a will, or legal consequences flowing from the making of a will. "Will substitutes" include trusts settled *inter vivos*; nominations under insurance or superannuation policies; the acquisition of property by co-owners as joint tenants; the maintenance of joint bank accounts, assumed to be co-owned in joint tenancy; the passing of property under a *donatio mortis causa;* or the making of a contract, or a representation intended to be relied upon, to leave property by will, enforceable on death via a constructive trust.

6 The centrality of the concept of a will is most evident upon an exercise of the Court's probate jurisdiction.

7 The governing purpose of an exercise of probate jurisdiction is the due and proper administration of a particular deceased estate, having regard to any duly expressed testamentary intention of the deceased and the respective interests of parties beneficially entitled to the estate: *In the Goods of Loveday* [1900] P 154 at 156; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-191. The task of the Court is to carry out a testator's duly expressed testamentary intentions, and to see that beneficiaries get what is due to them.

8 For an exploration of the probate jurisdiction, see a paper prepared by me (published on the website of the Court), entitled "Probate Law and Practice: An Introduction", presented on 3 March 2022.

"PROBATE" LEGISLATION

9 The probate jurisdiction of the Supreme Court of NSW is governed by legislation, notably the *Probate and Administration Act* 1898 NSW, the *Succession Act* 2006 NSW and "*the Probate Rules*" (Part 78 of the *Supreme Court Rules* 1970 NSW).

10 Despite the centrality of the concept of a will in this legislation, none of it contains a definition of the concept expressed otherwise than in terms "inclusive" of other concepts.

11 Section 3(1) of the *Probate and Administration Act* 1898 provides that, unless the context or subject matter otherwise indicates or requires, in that Act "'Will'" extends to a testament and to a codicil and to any appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child by virtue of the *Imperial Act Twelfth Charles the Second*, chapter twenty-four, and to any other testamentary disposition." There is no accompanying definition of the words "testament", "codicil", "disposition" or "testamentary disposition".

12 Section 3(1) of the *Succession Act* 2006 defines a "will" as including "a codicil and any other testamentary disposition". There is no accompanying definition of "codicil" or "testamentary disposition"; but "disposition" is defined as including

"any gift, devise or bequest of property under a will; the creation by will of a power of appointment affecting property; and the exercise by will of a power of appointment affecting property." Section 4 comes closer to defining the nature of a will, obliquely, by describing what property may be disposed of by will: property to which a testator is entitled at the time of his or her death; and property to which the testator's personal representative becomes entitled, in the capacity of personal representative, after the testator's death; but not property of which the testator is a trustee at the time of his or her death. Section 102 defines an intestate as "a person who dies and either does not leave a will or leaves a will but does not dispose effectively by will of all or part of his or her property."

13 Rule 1 of the *Probate Rules* (SCR Pt 2 Rule 1) defines a "will" as including "a codicil and any other testamentary document." The Rules include no definition of "codicil" or "testamentary document".

14 The *Interpretation Act* 1987 (NSW) contains no definition of the word "will"; but it does, in section 21, contain a definition of the word "document" which has profound significance in the context of an "informal will" governed by section 8 of the *Succession Act*. According to that definition:

> "'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."

15 “Writing” is defined, in section 21, as including “printing, photography, photocopying, lithography, typewriting and any other mode of representing or reproducing words in visible form.”

CURRENT USAGE OF TERMINOLOGY

16 In modern usage in NSW, the word “will” is taken to refer to any “testamentary instrument” intended to take effect on the death of a testator whether it disposes of property or not and whether such property as may be disposed of, takes the form of realty or personalty. Historically, the word “will” referred to a disposition of realty and the word “testament” referred to a disposition of personalty. Thus, even today, it is common to read in a will the introductory words, “This is the last will and testament of …”. Modern law is no longer constrained by mediaeval distinctions between succession to land and succession to chattels, or the jurisdictional boundaries between courts of common law and ecclesiastical courts which fostered those distinctions.

17 Historically, a “codicil” referred to a will which did not name an executor. In current usage, a “codicil” generally refers to a form of will that supplements or amends an earlier will.

18 Probate legislation tends to assume that there is within the community a common understanding of foundational concepts such as “will”, “codicil” and “testamentary disposition”. For greater clarity, one must turn to practice texts.

CASEBOOKS, PRACTICE BOOKS AND LEGAL TEXTS

19 The classic casebook of Hutley, Woodman and Wood, *Succession: Commentary and Materials* (Lawbook Co, Sydney, 4th edition, 1990) offers in Chapter 2 (entitled “Definition and Nature of a Will”) the following definition:

> “A will may be defined as a declaration of intention with regard to matters which the declarant desires to take place on or after his death.
>
> From the authorities, the following points in regard to wills should be noted:

(i) a will is not admissible in probate unless it affects property within the jurisdiction, although this rule no longer applies [in some jurisdictions].

(ii) A will cannot be made irrevocable, and a strong illustration of the principle that a will must be revocable is provided by the fact that mutual wills are not irrevocable. Nevertheless, a contract as to the terms of a will, or that a will will not be revoked, may be valid; if the contract concerns an interest in land, a written memorandum is required. In the event of a breach of such a contract, the Courts will give an appropriate remedy, namely damages, but an injunction to restrain the alteration of a will, or a decree of specific performance to compel the making of a will, is not granted. Where the promisor, by his own action in his lifetime, makes it impossible for him to perform the contract, the promisee can bring an action for anticipatory breach.

(iii) The term 'will' is used ambiguously. Strictly the totality of a man's valid testamentary instruments constitutes his will, but the term is generally applied to the principal testamentary instrument, whilst subsidiary instruments are called codicils: see *Douglas-Menzies v Umphelby* [1908] AC 224 and note particularly *Permanent Trustee Co (Canberra) Ltd v Finlayson*, (1968) 122 CLR 338 where there were two wills, one in New South Wales and one in the Australian Capital Territory, probate of each being granted in the respective jurisdictions."

20 Mason and Handler, *Succession Law and Practice, New South Wales* (LexisNexis, Australia, a loose-leaf service), in paragraph [s 3.5.1], offers the following definition:

"A will or testament has been defined as:

- '… the full and complete declaration of a man's mind or last will of that which he would have to be done after his death by way of disposition of his property': *Shep Touch* Ch 23 at 399;

- ‘the will of a man is the aggregate of his testamentary intentions so far as they are manifested in writing, duly executed according to the statute. By his will a testator may not only dispose of his property, but can appoint executors, trustees and guardians of his infant children’: see *Lemage v Goodban* (1865) LR 1 P&D 57 at 62.”

21 Dal Pont and Mackie, *Law of Succession* (LexisNexis Butterworths, Australia, 2nd edition, 2017), in paragraph [1.1], offers the following definition of a “will” (omitting footnotes):

> “A will represents a declaration of intention, in prescribed form, of the declarant (the testator) as to the distribution of the testator’s property upon his or her death. It ordinarily appoints a person to act as an executor to effect that intention and identifies the person’s (beneficiaries) to whom the testator’s property is to be disposed. As a will represents no more than a declaration of a testator’s intention, it does not preclude a testator disposing of or otherwise dealing *inter vivos* with the property to which the will refers (subject to constraints imposed by contract law and the doctrine of mutual wills) …”

22 With this broad definition, the text proceeds to discuss core characteristics of a will: a will is ambulatory in nature; as a testamentary instrument, a will is intended to have legal effect only on the testator’s death; although the usual function of a will is to dispose of property, a will may, in addition, or exclusively, serve other functions (such as simply the appointment of an executor or guardian or instructions for a funeral); a will may dispose of some only of a testator’s property, leaving other property to be disposed of by a separate will or on intestacy; and a will must generally comply with statutory requirements as to form.

23 Much the same treatment of the “Definition and Nature of a Will” can be found in Chapter 4 of Certoma’s, *The Law of Succession in New South Wales* (Lawbook Co, Sydney, 4th edition, 2010).

THE MORAL OF THE STORY

24 The point sought to be made by this survey of attempts to define the concept of a “will” is that, although there may be a common understanding of the concept, it can be elusive and, in a particular case, care may need to be taken to ensure that our understanding of what is meant by a “will” is correct. This is

particularly so in the context of a “document” in the nature of an “informal will” or a statutory will.

NSW’s THREE TYPES OF “WILL”

25 Under current NSW legislation, there are three types of “will”, each with distinctive characteristics:

(a) A “formal” will, compliant with statutory formalities as to its execution (principally, the *Succession Act*, section 6).

(b) An “informal” will, governed by the *Succession Act*, section 8.

(c) A “statutory” will, governed by the *Succession Act*, sections 18-26.”

26 In practice, one commonly hears reference to “mutual wills” or a “contract to make a will”. Those expressions generally refer to the making, or not, of a “formal” will and the operation of the law of trusts referable to facts (essentially one or more promises) extrinsic to the concept of a will. They do not add a further dimension to each of the three types of will currently recognised under NSW law.

THE THREE TYPES OF WILL IN OVERVIEW

A Formal Will

27 Discussion of the requirements of a formal will generally operates as the paradigm for discussion of the very different concepts of an “informal will” and a “statutory will”.

28 Discussion of the requirements of a formal will focuses attention on two types of inquiry.

29 The first is whether an instrument complies with statutory formalities for execution of a will: the question of “due execution”. Leaving aside constraints

on the power of a minor to make a will (*Succession Act*, sections 5 and 16), the focus here is on sections 6, 7, 9 and 10 of the Succession Act, which are in the following terms:

> **"Division 2 Executing a will**
>
> **6 How should a will be executed?(cf WPA 7 and 9)**
>
> (1) A will is not valid unless—
>
> (a) it is in writing and signed by the testator or by some other person in the presence of and at the direction of the testator, and
>
> (b) the signature is made or acknowledged by the testator 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 presence of the testator (but not necessarily in the presence of each other).
>
> (2) The signature of the testator or of the other person signing in the presence and at the direction of the testator must be made with the intention of executing the will, but it is not essential that the signature be at the foot of the will.
>
> (3) It is not essential for a will to have an attestation clause.
>
> (4) If a testator purports to make an appointment by his or her will in the exercise of a power of appointment by will, the appointment is not valid unless the will is executed in accordance with this section.
>
> (5) If a power is conferred on a person to make an appointment by a will that is to be executed in some particular way or with some particular solemnity, the person may exercise the power by a will that is executed in accordance with this section, but is not executed in the particular way or with the particular solemnity.
>
> (6) This section does not apply to a will made by an order under section 18 (Court may authorise a will to be made, altered or revoked for a person without testamentary capacity).
>
> **7 Must witnesses know that they are signing a will?**
>
> A will that is executed in accordance with this Act is validly executed even if one or more witnesses to the will did not know that the document he or she attested and signed was a will.
>
> …

Division 4 Witnessing a will

9 Persons who cannot act as witnesses to wills(cf WPA 12)

A person who is unable to see and attest that a testator has signed a document may not act as a witness to a will.

10 Can an interested witness benefit from a disposition under a will?(cf WPA 13)

(1) This section applies if a beneficial disposition is given or made by will to a person (the interested witness) who attests the execution of the will.

(2) The beneficial disposition is void to the extent that it concerns the interested witness or a person claiming under the interested witness.

(3) A beneficial disposition is not void under subsection (2) if—

(a) at least 2 of the people who attested the execution of the will are not interested witnesses, or

(b) all the persons who would benefit directly from the avoidance of the disposition consent in writing to the distribution of the disposition under the will and have the capacity to give that consent, or

(c) the Court is satisfied that the testator knew and approved of the disposition and it was given or made freely and voluntarily by the testator.

Note—

Consent under section 10 (3) (b) is not liable to duty. See section 65 (12A) of the Duties Act 1997.

(4) In this section—

beneficial disposition does not include a charge or direction for the payment of—

(a) a debt, or

(b) reasonable remuneration to an executor, administrator, legal practitioner or other person acting in relation to the administration of the testator's estate."

30 The second is whether an instrument evidences a testator's true testamentary intentions. At its highest level of abstraction, this invites the question whether a particular instrument was the last will of a free and capable testator. That question can be broken down, logically, into questions about testamentary capacity, knowledge and approval, undue influence and fraud. The clarity of

that logical framework is, however, often obscured by an intermingling of discussion about adjectival (procedural) law and discussion of the logical framework of substantive law principles. A finding that a will was duly executed has traditionally carried with it presumptions of testamentary capacity and knowledge and approval. In a classic exposition of probate law, discussion of substantive law principles can appear to be subordinated to discussion of presumptions, onus of proof and shifting evidentiary burdens.

An Informal Will

31 By definition, an "informal will" necessarily lacks the element of "due execution" and, so, the presumptions consequent upon due execution of a formal will have no scope, as such, for operation. If they have any role to play it is, by way of analogy, as inferences drawn from common experience; it might easily be inferred, for example, that a will prepared in the form of a formal will but witnessed by only one witness (not the requisite two witnesses) might have been intended to operate as a will, with an inference of knowledge and approval following upon that first inference. Section 8 of the *Succession Act*, which governs the "validity" of an "informal will", speaks of a testator's intention without, in terms, embracing the formal logic of inquiry as to the existence or otherwise of testamentary intention.

32 Section 8 is in the following terms:

> **Division 3 Dispensing with requirements for execution, alteration or revocation of a will**
>
> **8 When may the Court dispense with the requirements for execution, alteration or revocation of wills?(cf WPA 18A)**
>
> (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.

33 Section 8's heading, and its placement between sections governing due execution of a formal will, illustrate an early assumption that it (and its predecessor, section 18A of the *Wills, Probate and Administration Act* 1998 NSW) would operate only in exceptional circumstances. The reality is different. Informal wills have become commonplace. Why this is so may be a question for sociologists. As lay people have been encouraged to be their own lawyers and society has taken to recording all types of thought by electronic means, the scope for the creation of "documents" recording testamentary intentions has broadened.

34 The principles that inform a finding of testamentary intention in connection with a formal will probably inform also any inquiry about "intention" in the context of section 8; but not explicitly so.

35 Whereas, by its nature, a formal will, from the time of its execution, advertises to all who read it the character of the instrument, any document ultimately found to be an informal will might not recognisably be so until discovered and analysed after the death of its author. It might be found, almost by accident, in a private diary, on a personal computer or on a mobile telephone. It might form

part of a suicide note. The focus for inquiry in relation to an informal will is thus fundamentally different from the focus of inquiry in relation to a formal will, the execution of which must be witnessed and may be superintended by a solicitor and lodged with the solicitor, a bank or the NSW Trustee for safekeeping. An informal will differs from both a formal will and a statutory will in that, until its publication in the course of an application for probate, it might be an entirely private document.

A Statutory Will

36 A "statutory will" is fundamentally different from both a formal and an informal will. That is because orders of a court authorising the making of a will of this nature are predicated upon an absence of "testamentary capacity" on the part of a living, putative testator. The concept of "testamentary capacity" is generally understood as importing that concept from the paradigm applied in assessing the will-making capacity of a testator who makes, or purportedly makes, a formal will. However, although the criteria for the making of a statutory will pay regard to the incapable person's wishes ("intention"), any intention attributed to the incapable person is imputed rather than found as a fact. Whereas both a formal will and an informal will are routinely tested for validity (by reference to the date of their creation) only after the death of a testator, the validity of a statutory will depends upon the Court's compliance with statutory criteria at the time the order is made, and in circumstances in which the testator is both alive and subject to the protective jurisdiction of the Court. Whether the validity of such a will can also be tested at the time an application is made for it to be admitted to probate remains to be determined.

37 Section 18 of the *Succession Act* empowers the Court "on application by any person", to "make an order authorising a will to be made or altered, in specific terms approved by the Court, on behalf of a person who lacks testamentary capacity …".

38 Sections 19-23 are in the following terms:

“Division 2 Court authorised wills for persons who do not have testamentary capacity

…

19 Information required in support of application for leave

(1) A person must obtain the leave of the Court to make an application to the Court for an order under section 18.

(2) In applying for leave, the person must (unless the Court otherwise directs) give the Court the following information—

(a) a written statement of the general nature of the application and the reasons for making it,

(b) satisfactory evidence of the lack of testamentary capacity of the person in relation to whom an order under section 18 is sought,

(c) a reasonable estimate, formed from the evidence available to the applicant, of the size and character of the estate of the person in relation to whom an order under section 18 is sought,

(d) a draft of the proposed will, alteration or revocation for which the applicant is seeking the Court’s approval,

(e) any evidence available to the applicant of the person’s wishes,

(f) any evidence available to the applicant of the likelihood of the person acquiring or regaining testamentary capacity,

(g) any evidence available to the applicant of the terms of any will previously made by the person,

(h) any evidence available to the applicant, or that can be discovered with reasonable diligence, of any persons who might be entitled to claim on the intestacy of the person,

(i) any evidence available to the applicant of the likelihood of an application being made under Chapter 3 of this Act in respect of the property of the person,

(j) any evidence available to the applicant, or that can be discovered with reasonable diligence, of the circumstances of any person for whom provision might reasonably be expected to be made by will by the person,

(k) any evidence available to the applicant of a gift for a charitable or other purpose that the person might reasonably be expected to make by will,

(l) any other facts of which the applicant is aware that are relevant to the application.

20 Hearing of application for leave

(1) On hearing an application for leave the Court may—

(a) give leave and allow the application for leave to proceed as an application for an order under section 18, and

(b) if satisfied of the matters set out in section 22, make the order.

(2) Without limiting the action the Court may take in hearing an application for leave, the Court may revise the terms of any draft of the proposed will, alteration or revocation for which the Court's approval is sought.

21 Hearing an application for an order

In considering an application for an order under section 18, the Court—

(a) may have regard to any information given to the Court in support of the application under section 19, and

(b) may inform itself of any other matter in any manner it sees fit, and

(c) is not bound by the rules of evidence.

22 Court must be satisfied about certain matters

The Court must refuse leave to make an application for an order under section18 unless the Court is satisfied that—

(a) there is reason to believe that the person in relation to whom the order is sought is, or is reasonably likely to be, incapable of making a will, and

(b) the proposed will, alteration or revocation is, or is reasonably likely to be, one that would have been made by the person if he or she had testamentary capacity, and

(c) it is or may be appropriate for the order to be made, and

(d) the applicant for leave is an appropriate person to make the application, and

(e) adequate steps have been taken to allow representation, as the Court considers appropriate, of persons with a legitimate interest in the application, including persons who have reason to expect a gift or benefit from the estate of the person in relation to whom the order is sought.

23 Execution of will made under order

(1) A will that is made or altered by an order under section 18 is properly executed if—

(a) it is in writing, and

(b) it is signed by the Registrar and sealed with the seal of the Court.

(2) A will may be signed by the Registrar for the purposes of subsection (1) (b) even after the death of the person in relation to whom the order was made."

39 A decision by the Court to authorise the making of a will on behalf of an incapacitated person is essentially evaluative. However, in presentation, sections 19 and 22 provide checklists that an applicant for a statutory will would do well to address specifically, either in an affidavit or (at least) written submissions.

40 A guide to the Court's statutory will jurisdiction can be found in a paper by me (published on the Court's website), entitled "A Platypus in NSW Succession Law: Statutory Wills in a Managed Society", presented on 17 November 2021.

CONCEPTUAL COMMON GROUND

41 There is, perhaps, an implicit, common logical framework of substantive law principles for determining the existence, or otherwise, of a "testamentary intention".

42 That framework is most visible on an analysis of the validity of a formal will. It is barely visible on an analysis of the validity of an informal will. It is, at best, only obliquely visible on the making of a statutory will.

43 The question whether a formal will or an informal will is valid begins, and ends, with the ultimate question whether the instrument represents the last will of the deceased as a free and capable testator.

44 That question is conventionally (and logically) analysed by reference to four main, subsidiary questions:

(a) whether, at the time the will was made (or, possibly, at the time instructions were given for a will prepared by a solicitor), the testator had "testamentary capacity": *Banks v Goodfellow* (1870)

LR 5 QB 549 at 564-566; *Bailey v Bailey* (1924) 34 CLR 558; *Timbury v Coffee* (1941) 66 CLR 277; *Worth v Clasohm* (1952) 86 CLR 439; *Re Estate of Griffith*; *Easter v Griffith* (1995) 217 ALR 284.

(b) whether the will was made with the testator's "knowledge and approval" of its contents: *Nock v Austin* (1918) 25 CLR 519 at 528; *Tobin v Ezekiel* (2012) 83 NSWLR 757; *Lewis v Lewis* [2021] NSWCA 168.

(c) whether the testator's execution of the will was obtained by an exercise of "undue influence" on the part of an identified individual or individuals: *Winter v Crichton* (1991) 23 NSWLR 116; *Hall v Hall* (1868) LR 1 P&D 481; *Wingrove v Wingrove* (1885) 11 PD 81; *Petrovski v Nasev* [2011] NSWSC 1275 at [269]; *Dickman v Holly* [2013] NSWSC 18; *Estate Rofe* [2021] NSWSC 257.

(d) whether the testator's execution of the will was obtained by the "fraud" of an identified individual or individuals: *Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 136.

THE SUBSIDIARY QUESTIONS IN DETAIL

45 Conceptually, the subsidiary questions underlying the question whether a testamentary instrument was the (last) will of a free and capable testator each have a distinct field of operation:

(a) The concept of "testamentary capacity" is directed to whether the testator had the *mental capacity* to make a valid will. That generally requires consideration of a further layer of logical, subsidiary questions considered, in common experience, to bear upon the existence of testamentary capacity: whether, at the time the will was made, the testator understood the nature of a will and its effects; whether he or she understood the extent of the

property available for disposition; whether he or she was able to comprehend and weigh claims on his or her bounty; and whether his or her faculties were materially impaired by a medical condition.

(b) The concept of "knowledge and approval" is directed (upon an assumption of testamentary capacity) to whether the testator truly *knew* the terms of a will and *intended* to give effect to them.

(c) The concept of "undue influence" (upon an exercise of probate jurisdiction) is directed to whether the will (that is, the independent mind) of the testator was *overborne* in execution of a testamentary instrument so that he or she could not be said to have been a free agent and the instrument cannot be said to express his or her true intentions, but the intentions of another. In a probate case, "influence" is "undue" if it overbears the testator's independent judgement. In probate law, "undue influence" is often described as "coercion"; but that word, standing alone, is inadequate to describe the essence of the concept, which is the fact that (by whatever means) the will of the testator is overborne. A testamentary instrument the execution of which is procured by another person's undue influence (coercion) is not the instrument of the testator, but of the other.

(d) The concept of "fraud" (upon an exercise of probate jurisdiction) is directed to whether the testator was *misled* into execution of a testamentary instrument such that the instrument cannot be said to be that of a free and capable testator.

46 The ostensibly logical precision of these concepts provides a structured approach to a determination of whether a testamentary instrument was the (last) will of a free and capable testator. However, their application is not a mechanical exercise: *Carr v Homersham* (2018) 97 NSWLR 328 at [6] and [133]-[134]; *Re Estate of Griffith (Dec'd); Easter v Griffith* (1995) 217 ALR 284

at 295-296. Any “tests” they embody are evaluative in character. An element of practical wisdom is required in the evaluation of evidence, focusing upon the perspective and personal circumstances of the testator, whose absence from the witness box is a central fact of probate proceedings. Medical evidence may be critical but, in contested proceedings it may not in the final analysis be determinative.

47 An assessment of the validity of a formal will or an informal will is routinely made after the death of the testator. Making orders authorising the making of a statutory will for a person who lacks, or may lack, testamentary capacity, the Court has to make decisions about the presumed intention of an incapable person, taking into account his or her personal circumstances and looking prospectively to his or her death. This is a profoundly different exercise because it involves an exercise of protective jurisdiction and the making of a statutory will, or a refusal to make a statutory will, may have profound significance for the welfare of the incapable person during the balance of his or her life.

48 Nevertheless, the statutory criteria for the making of a statutory will can be regarded as implicitly predicated upon an understanding by the Court of the logical framework underpinning a finding of a (presumed) testamentary intention. Thus, for example, upon an inquiry about an incapable person’s preferences the Court needs to be mindful of a need to comprehend and weigh claims on the bounty of the person; a need to understand what types of testamentary gift would be likely to be approved by the incapable person, if he or she had capacity; a need to be satisfied that any evidence about the wishes of the incapable person is not tainted by an exercise of undue influence (however understood) affecting the reliability of the evidence; and a need to ensure that any expression of wishes by the incapable person was not procured by misleading conduct.

IDIOSYNCRASIES OF A FORMAL WILL

49 The feature of an analysis of the validity of a formal will which is unique to it is the tendency, at least on an application for a grant of probate in common form or in interlocutory proceedings, to rely upon “presumptions” (presumptions of fact, not law) arising, ultimately, from an assumption that a testator had the capacity to make a will at the time of its execution and a finding that his or her will was duly executed.

50 The starting point is a presumption (assumption) that everybody is to be taken to be “sane” unless proven otherwise. From there, it is presumed (assumed) that, if a sane person goes to the trouble of compliance with formalities for the due execution of a will, he or she is likely to have knowledge of the contents of the duly executed will, and to approve the terms of the will, as his or her statement of testamentary intent.

51 The rational foundation for such “presumptions” is found in inferences of fact drawn from common experience. The inherent difference between a probate “presumption” and an “inference” may be negligible when viewed in the abstract. The practical difference (if there is any) derives from old case law that mandates a form of reasoning by distinct steps based upon the application or rebuttal of a presumption.

52 Although a traditional view of probate law may be that, on any contest about the validity of a formal will, it is necessary to engage in a multi-stage process of reasoning (viewing presumptions and rebuttal evidence in sequence) that is not the way a judge, sitting alone, is likely to reason at a final hearing of a case considering evidence in which parties have been required to adduce most of their evidence in the form of affidavits filed and served before the commencement of the hearing and all parties have had an opportunity to cross-examine on those affidavits. In such a case, the task of the judge is essentially to draw such inferences bearing upon the validity of a will as may be drawn from the whole of the evidence. There is no necessity to encumber logical

reasoning by the ebb and flow of presumptions directed to particular parts of the evidence.

IDIOSYNCRASIES OF AN INFORMAL WILL

53 The foundational feature of an "informal will" is that it is "a document" that "has not been executed in accordance with" the sections governing due execution of a formal will.

54 A combination of the absence of any requirement for a formal procedure to be followed, and the broad definition of the word "document" in section 21 of the *Interpretation Act* 1997, means that an "informal will" can take almost any form and be created in almost any manner.

55 The absence of "due execution" means that, in terms, the presumptions arising from due execution of a formal will have no scope for operation.

56 Although section 8 is predicated upon a need for evidence of a deceased person's "testamentary intentions", the section does not, in terms, articulate the formal logic underpinning a search for the testamentary intentions of a testator who duly executes a formal will.

57 In practice, difficulties attend assessment of whether a document was intended by its maker to operate as a will or whether it was no more than a "draft", not intended to take effect unless and until engrossed as a formal will or otherwise adopted as a testamentary instrument. An intermediate characterisation of a document is one that classes it as a "stop-gap will"; that is, a document intended to take immediate effect, but to be replaced at some future time by another testamentary instrument.

IDIOSYNCRASIES OF A STATUTORY WILL

58 The foundational feature of a "statutory will" is that it is a testamentary instrument, not made by but attributed to a living person, in reliance on

legislation that lies at the intersection of the Court's protective and probate jurisdictions.

59 The Court's protective jurisdiction is called in aid because the statutory will jurisdiction is predicated upon the existence of a living person who lacks (testamentary) capacity.

60 The Court's probate jurisdiction is called in aid by the statutory will jurisdiction because it is directed to the making of "a will".

61 A properly informed exercise of the jurisdiction to authorise the making of a statutory will requires an appreciation of the purpose, nature and principles of both the Court's protective jurisdiction and its probate jurisdiction.

62 There are many unanswered questions about the operation of the Court's statutory will jurisdiction, some of which are canvassed in the paper "A Platypus in NSW Succession Law" to which reference has been made.

CONCLUSION

63 Knowledge of the three types of "will" currently admitted to probate, and a recognition of their different characteristics, is essential to an understanding of what constitutes a "will" and how it may be given effect.

64 Knowledge of what constitutes "a will" is also necessary if, upon an exercise of estate planning or in litigation concerning a deceased estate, consideration is to be given to the various types of "will substitutes" that might engage with an exercise of probate jurisdiction. That, however, is a topic for another day.

GCL
21 March 2022

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