INFORMAL WILLS

INTRODUCTION

Most of you by now have probably had a client come to you with a scrap piece of paper, or, perhaps, parts of a torn envelope (now that gets interesting!) and have asked you: is this a will?

Where do you start?

Before you send them away thinking that your time would be better spent watching tv instead of working out if it is a “Will” or not, STOP. DON’T DO IT. YOU JUST NEVER KNOW.

Of course, not every measly ‘document’ handed to you will be a Will. BUT: it is important to know what it is you need to look out for before you decide to call it rubbish.

Firstly, what is meant by the phrase “informal will”? 

The phrase ‘informal wills’ is actually not a term which is defined in the Succession Act 2006. The phrase has been used in practise however to refer to wills which do not satisfy the formal requirements of a will.

Informal wills are documents (more about that later) upon which the testamentary intentions of the deceased appear and there is evidence that shows that it was more probable than not, that the deceased intended that particular document, with nothing more, to constitute his/her will.

What is a “will”? 

The SA does not actually define the term “will”. Section 3(1) of the SA however defines ‘will’ “to include a codicil and any other testamentary disposition.”

According to their original meanings, a ‘will’ was a disposition of real property taking effect upon the death of the testator, and a ‘testament’ was a similar disposition of personal property. “Codicil” originally meant a will in which no executors were named, but such an instrument was nevertheless considered binding upon the persons administering the estate of the deceased. The present meaning of ‘codicil’ is a supplement by which a will is added to or altered.¹

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¹ Geddes, Rowland & Studdert ‘Wills, Probate and Administration Law in New South Wales’ LBC (1996) at p35.
The word “will” is now sometimes used to mean the totality of the testator’s unrevoked testamentary instruments, or of the unrevoked parts of those instruments.\(^2\)

In *Douglas-Menzies v Umphelby* [1908] AC 224 the Privy Council said at 233:

> “Whether a man leaves one testamentary writing or several testamentary writings, it is the aggregate or the net result that constitutes his will, or, in other words, the expression of his testamentary wishes. The law, on a man’s death, finds out what are the instruments which express his last will. If some extant writing be revoked, or is inconsistent with a later testamentary writing, it is discarded. But all that survive this scrutiny form parts of the ultimate will or effective expression of his wishes about his estate. In this sense it is inaccurate to speak of a man leaving two wills; he does leave, and can leave, but one will.”

In *Newman v Brinkgreve* [2013] NSWSC 371 Hallen J said at [81]:

> “It is not necessary that the document said to be a will should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient if it is intended to dispose of property, or of rights of the deceased, in a disposition that is to take effect upon death, but until then is not to take effect but is to be revocable. Although usual, it is not legally essential to find a clear statement identifying the document as a will: *Romano v Romano* [2003] NSWSC 436, per Bryson J, at [6] - [8].”

Where there is clear proof, intrinsic or extrinsic, that it was the intention of the writer to convey the benefits expressed to be conveyed and that death was the event that was to give effect to it, such document may be admitted to probate as testamentary.\(^3\) If the document does not appear testamentary on its face, the propounder bears the onus of proving a testamentary intention.

If a will disposes of property within the jurisdiction, the executor(s) named in that will is/are entitled to a grant of probate of that will. A will which does not appoint executors is not entitled to probate unless it disposes of property.\(^4\)

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\(^2\) *Lemage v Goodban* (1865) LR 1 P & D 57 at 62.

\(^3\) *King’s Proctor v Daines* (1830) 3 Hagg Ecc 218; 162 ER 1136.

\(^4\) *Mohun v Mohun* (1818) 1 Swans 201; 36 ER 357.
LEGISLATIVE PROVISIONS

Section 8 of the *Succession Act 2006* (NSW), which appears in Part 2.1 Division 3 of the SA, is the operative provision for informal wills. It applies to wills whether made before, on or after 1 March 2008, if the testator dies on or after 1 March 2008.

Where the testator died on or after 1 November 1989 and before 1 March 2008, s18A of the *Wills Probate And Administration Act 1898* (NSW) (*WPAA*) continues to apply. The scope of this paper is limited to s8.

Section 8 of the SA

Section 8 deals with the Supreme Court’s dispensing power in relation to will formalities regarding execution, alteration or revocation if the court is satisfied that the deceased intended the document, or part of the document, to: Constitute his/her will; Amend his/her will; Revoke, partially or fully, his/her will.

Section 8 is reproduced below:

“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?

(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.

In order to better understand the legislative requirements, I consider it best to ‘break up’ the
section and focus on distinct parts or phrases used throughout and following a step-by-step
approach to working out whether a document might be an informal will.

**STEP ONE**

**Do you have a “document”?**

To work this out, you need to know what a ‘document’ is for the purposes of s8.

The wide definition of ‘document’ in s21 of the *Interpretation Act 1987* (NSW) applies to s8
and a ‘document’ is not restricted to “any paper or material on which there is writing”: (as the
term ‘document’ is defined in s3(1) of the SA).

The **s21 Interpretation Act** definition is:

‘*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.’

As you see, ‘document’ is not limited to a piece of paper.

In *Treacey v Edwards* (2000) 49 NSWLR 739 Austin J considered the application of s21 of
the *Interpretation Act* definition to the WPAA. His Honour in that case held that an audio tape
was capable of being incorporated by reference into a formally executed will or alternatively treated as a testamentary document in accordance with s 18A of the WPAA. The same reasoning would apply to an audio tape, CD or DVD.

_Treacey v Edwards_ was cited with approval by Slattery J in _Yazbek v Yazbek_ [2012] NSWSC 594.

In _Yazbek_, Slattery J held that a Microsoft Word file named “Will.doc” was a “document” for the purposes of s8 of the SA. The plaintiff’s argument was accepted that the computer file ‘Will.doc’ was “something from which images or writings can be reproduced with or without the aid of anything else”. Will.doc could be reproduced either with the use of Microsoft Word or by printing Will.doc using Microsoft Word's command and the operating system to print a copy of the electronic file. Once Will.doc was printed out, the printed document would also be a "document" for the purposes of s8, as would Will.doc itself. Probate was granted of the Microsoft Word file “Will.doc”.

It should be remembered that s8 also applies to a part or parts of a document and to documents which came into existence outside NSW. In this sense, the scope of s8 is enlarged as compared to the position under the former s18A WPAA.

So, you think you have a ‘document’? Then what?

**STEP TWO**

Is the document an original or a copy?

If it is a copy, you will need to make enquiries to try and find the original. You are not prevented from applying for a grant of probate of a copy will however, if the original cannot be found, the Court will require evidence as to the searches conducted to find the original. If there is any doubt about the authenticity of the document, you will need to prove the document is an actual copy of the original. You will also need evidence to rebut the presumption of revocation.

If the document is an original, inspect the document for pen marks, alterations, inprints embedded in the document, are different coloured inks used (sometimes it may suggest the document was created at different points in time), is there any liquid paper? Are any words deleted or scribbled out? If the document appears in a notepad, have a look at the pages before and after the document to see if any dates appear on those pages which might help you date your document if it is undated. If the document is a computer file, take a look at the file’s properties to see when the document was created, accessed, modified, open, closed or
printed. Sometimes you may need the services of an appropriate expert to undertake some forensic investigations.

**STEP THREE**

Does the ‘document’ purport to state the testamentary intentions of the deceased?

**What are “testamentary intentions”?**

The Courts draw a distinction between “a generalised homily as to testamentary intentions” and a document which “sufficiently evidences the fact that by it the deceased intended to govern the disposition of his or her property after death”: *In the Estate of Masters (dec’d); Hill v Plummer* (1994) 33 NSWLR 446 per Kirby P at 452.

As stated above, the document, in order to have testamentary effect, must deal with the disposition of the testator's property and its terms are to come operation upon the death of the deceased. Sometimes, if the document is not intended to come into effect upon the testator’s death, it might be said that the document is an inter vivos gift or merely a letter of wishes.

In *Newman v Brinkgreve* [2013] NSWSC 371 Hallen J cited some of the authorities that have considered what is meant by the phrase “purporting to state testamentary intentions”. His honour referred to *Re Broad, Smith v Draeger* [1901] 2 Ch 86 at 91 - 92, in which Kekewich J, in dealing with a marriage settlement which provided that property should be disposed of as the wife should direct, or appoint, by deed, will or codicil, or any writing in the nature of or “purporting to be a will” or codicil, said:

"What is the meaning of the expression 'purporting to be' a will or codicil? ... [T]he question here is whether a document which is in form and substance a will, but which, because it was not duly executed as such, fails to be a will, in the legal sense, is or is not a document which 'purports', to be a will... This document... is on the face of it a disposition of property made in contemplation of death, and it only fails to be a will because the maker of it did not comply with the requirement of the Wills Act that the witnesses should be present when she signed it. I think, therefore, that I must hold that this document... is one which 'purports' to be a will."

In *Kalamunda Meat Wholesalers Pty Ltd v Reg Russell & Sons Pty Ltd* [1994] FCA 1059; (1994) 51 FCR 446, at 452, Hill J in dealing with the *Corporations Law*, said:
"The word 'purport' is defined relevantly in the Macquarie Dictionary (2nd Rev Ed) as: ‘1. To profess or claim: 'a document purporting to be official'. 2. To convey to the mind as the meaning or thing intended; express; imply.'"

In Hill v Plummer; In The Estate of Masters, Priestley JA pointed out, at 469, that:

"A document in which a person says what that person intends shall be done with [his/her] property upon death seems to me to be a document which embodies the testamentary intentions of that person.”

In Yazbek v Yazbek, Slattery J said, at [83]:

"Testamentary intentions are an expression of what a person wants to happen to his or her property upon death: Re Trethewey [2002] VSC 83 at [16] per Beach J. In the context of informal wills "a document in which a person says what that person intends shall be done with that person's property upon death seems...to be a document which embodies the testamentary intentions of that person": Re Estate of Masters (1994) 33 NSWLR 446 at 469 per Priestley JA. Furthermore, although dissenting in the decision, Mahoney JA defined testamentary intentions as "how property is to pass or be disposed of after...death": Re Estate of Masters (1994) 33 NSWLR 446 at 455 per Mahoney JA."

Read through the document, over and over again. Look for words of disposal such as “I give”. Does it dispose of property? Is the word “will” or “testament” used anywhere? Is there a revocation clause? Are executors appointed? Is the word “beneficiary” used? Has the testator made any reference in the document as to what is to happen ‘upon my death’? or used the phrase “my estate”? Has the testator actually signed the document? Has anyone witnessed the signature?

**STEP FOUR**

If you consider the document purports to state the testamentary intentions of the deceased, then ask yourself: Is the ‘document’ not executed in accordance with the provisions of Part 2.1 of the SA, namely, s6 of the SA. If the document was made before 1 March 2008, whether the testator died before, on or after that date, the provisions of ss7 and 9 of the WPAA apply.

What are the requirements for execution in accordance with part 2.1 of the SA?
Section 6 SA – Will Execution Requirements

Section 6(1) of the SA specifies with the way in which a will should be validly executed. It provides:

(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).

For example, if your document is not signed by the testator, or, it is signed but not witnessed by two witnesses (or at all), then your document is not executed in accordance with the provisions of Part 2.1 of the SA and you have, prima facie, an 'informal will'.

There is no need to prove that the deceased attempted to comply with the formalities, provided there is the requisite testamentary intention. If, however, the deceased believed that s/he had to execute the will to make it valid but refrained from doing so, s8 is unlikely to apply: see for example Estate of Gonda [2012] NSWSC 357 in which the deceased’s familiarity with the formal requirements for making a will was a factor in White J holding that a document signed by the deceased but not attested was not intended to have immediate operation as a will.

The more the document departs from the formalities for execution the more difficult it is to prove the deceased intended the document to be a will. Some of the things to consider include whether the deceased signed and/or dated the document.

In Newman v Brinkgreve Hallen J made the following observations about signatures at [104 - 105]:

“A signature, placed at the foot of a testamentary document would, in most cases, carry the implication that the testator intended the signature to give testamentary effect to the document: Wood v Smith [1993] Ch. 90 (C.A.) at 111.”
The object of a signature on a testamentary document was recently considered in Marley v Rawlings [2012] EWCA Civ 61; [2013] 2 WLR 205. After referring to Wood v Smith, Mrs Justice Proudman, at [51], wrote:

“Scott LJ’s observation that the object of a signature by a testator is “to authenticate the written document in question as the will of the testator” is interesting. There seem to me to be two elements in that. By his signature, the testator is not only executing the document as a will with immediate effect but also (at least in a broad sense, subject to adjustment arising from issues of want of knowledge and approval and matters within the scope of section 20) confirming that the document represents his testamentary intentions. This dual function is consistent with the historical roots of the present provision. Part of the motivation for the original requirements as to the position of the signature on a will was, it seems to me, the desire to provide a simple and reliable way of establishing, without oral evidence, that the will contained the provision that the testator wished to make. So initially the signature executing the document had to be at the foot or end of it and therefore almost inevitably had to be applied after the substance of the will had been set out, and even when that was relaxed in the 1852 amendment, it was still provided that no signature would be operative to give effect to any disposition or direction underneath or following it or which was inserted after the signature was made. In support of this view of the purpose of the signature, it is worth noting that in devising rules to apply after the Wills Act, in Guardhouse v Blackburn (1865-69) LR 1 P & D 109 at 116, Sir J P Wilde included the following:

“Secondly, that except in certain cases, where suspicion attaches to the document, the fact of the testator’s execution is sufficient proof that he knew and approved the contents.”

STEP FIVE

At this point, do you contact the client whose name appears throughout the document as a beneficiary and tell him/her there are reasonable prospects of success in propounding the document as a Will and say the Summons will be filed by the end of the week?

No. Before you advise a client that there are reasonable prospects of success in having the Supreme Court declare that the document is the last will of the deceased, ask: is there any evidence either within the terms of the document itself, or extrinsically, that may prove, on the balance of probabilities, that the deceased intended the document, with nothing more, to
operate as his will? The document (or part of a document) will form the deceased’s will if the Court is satisfied that the person intended it to form his/her will: s8(2) SA.

(I am currently focusing on whether a document can be declared by the Court as a will. Remember however, s8 also applies to a document that alters a will or revokes a will. The requirement of evidence of the deceased’s intentions is equally applicable).

Evidence of the deceased’s intention can be inferred by the Court from the evidence.

The Court is not limited by s8(3) in relation to the evidence it may consider in making its decision under s (2). Section 18A of the former WPAA did not have a corresponding provision. Extrinsic evidence can be adduced to establish the deceased’s testamentary intentions. For example, words that were said by the deceased to persons either at the time of making the document or after. Other relevant evidence includes: where the document was found, whether it was found with other important documents, whether the testator ever referred to the document, the habits of the testator, was s/he a person who would normally approach a solicitor for things like this or was s/he a person who would tend to do things on his/her own bat or with the advice of a relative? And of course, the text of the document itself including whether it is signed in any way or dated.

Evidence that the testator intended the document to operate as a will and not merely a draft will be critical. Acts and statements of the deceased after the date of making the document may be relevant. The intention of the deceased at the time of making the document is important, and later acts or statements may shed light on that.

The standard of proof is a civil standard. That is, the Court must be satisfied that it is more likely than not that the deceased intended the document to constitute his/her will. The question of intention is a question of fact.

In Newman v Brinkgreve Hallen J agreed with what White J said in NSW Trustee and Guardian v Halsey; Estate of Von Skala [2012] NSWSC 872, at [15]:

"To restate the last requirement, the question is whether the deceased intended the document to be his or her testamentary act, that is, to have present operation as a will (Re Estate of Masters (decd); Hill v Plummer (1994) 33 NSWLR 446 at 455; Oreski v Ikac [2008] WASCA 220 at [52]-[55])."

Hallen J also accepted, as Windeyer AJ pointed out in National Australia Trustees Ltd v Fazey [2011] NSWSC 559, at [18], that:
"Great care must be taken in determining this question. Many people write out proposals for their wills on pieces of paper headed 'will' but often these are no more than present thoughts not testamentary intentions and certainly not intended to be wills."

In *Dolan v Dolan* [2007] WASC 249, at [22], Murray J put the matter this way:

"... 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."

Hallen J said at [99]:

It is important, in this regard, to remember what Wrangham J said in *In the Estate of Knibbs, deceased; Flay v Trueman* [1962] 1 WLR 852, at 855 - 856:

"As Salter J said in *Beech's case (In the Estate of Beech, deceased [1923] P 46 at 57):`

'I think that, in order to constitute a will, the words used by the testator must be intended by him, at or after the time when he uses them, to be preserved or remembered so as to form the guide to those who survive in carrying out his wishes.'

In other words, in order to be a testamentary act there must be a statement of the deceased's wishes for the disposition of his property after his death which is not merely imparted to his audience as a matter of information or interest, but is intended by him to convey to that audience a request, explicit or implicit, to see that his wishes are acted on."

In *Fry v Lukas; Brown v Fry; Estate of Honey; Application of Fry* [2011] NSWSC 1329, White J, at [17], noted:

"Section 8 permits part of a document to form a deceased person's will if it states his or her testamentary intentions and the person intended that part of the document to operate as his will. The intention that the document, or part, form the person's will may, and usually will, exist at the time the document is brought into existence. But the section may also be satisfied if the deceased subsequently forms the intention that the document, or part, have a present operation as the deceased's will. (See Bell
In determining whether the Court is satisfied that the deceased person "intended the document to form his, or her, will, or to form an alteration to his, or her, will", the Court may, in addition to the document or part, have regard to, amongst any other matter, (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.

Hallen J said at [102]:

"It is always difficult to assess the intentions of a person who has left no specific directions, or indications, relating to his, or her, will. All that the Court can do, in those circumstances, is to look at such facts as are available, in order to determine what was more likely to have been intended by the deceased in respect of the document concerned: In The Estate of Stewart (unreported decision, Cohen J 12 April, 1996)".

In Re Application of Brown; Estate of Springfield (1991) 23 NSWLR 535, Powell J noted, at 539-540:

"While each case must depend upon its own facts, the greater the departure from compliance with the requirements of s 7 of the Act, the more difficult will it be for the court to be satisfied that the relevant deceased intended the subject document to be his will.

It will, I think, be apparent from what I have said - and, as well, from the declarations which I have already made in similar matters which have been referred to me since my appointment as Probate Judge - that, in cases where the subject document is either wholly written out, or, being on a will form, has been filled in, in the handwriting of the relevant deceased, and in cases where the subject document bears the signature of, or some mark made by, the relevant deceased indicating his intention to adopt it as his own, I would have little difficulty in finding myself satisfied that it was intended by the relevant deceased that the subject document should constitute his will. Where, however, the subject document was not seen, or read, or written, or in some way authenticated, or adopted, by the relevant deceased, or where the subject document, even if seen, or read, by the relevant deceased, was, in truth, no more
than "instructions", or a note of "instructions", for a will (see, eg, In the Estate of Allan (Needham AJ, 24 September 1990, unreported); Cloonan v Allingham (Needham AJ, 14 December 1990, unreported) I would, I believe, find it very difficult, indeed, to find myself satisfied that it was intended by the relevant deceased that the subject document was intended to be his will."

As to dating a document, Hallen J said in Newman v Brinkgreve (Supra) at [106 – 109]:

“While dating a document is not necessary for it to be adopted by a person who causes it to be produced, dating is often an indication that the document is in its final form and intended to be operative: In the Estate of Kiepas (Dec'd); Twemlow v Kiepas [2004] NSWSC 452.”

The document, itself, must also be considered in context (Estate of Gwendoline Myrtle Wray; Public Trustee v Commins; Masters v Cameron [1954] 91 CLR 353; The Estate of Silady (NSWSC, 21 November, 1994, unreported). An intention that the document be the will of the person who wrote it may be inferred from the physical form of the document itself: The Estate of Kevin John Hines & Anor v Hines [1999] WASC 111; In the Estate of Margaret, Deceased, [2012] NSWSC 1490, at [31].

Also important to bear in mind will be the degree of closeness in time of death to the preparation of the document; evidence of the deceased's state of mind leading up to the preparation of the document; and the availability of persons to act as attesting witnesses (Re Nicholls [1996] 1 Qd R 179, at 181-182); and the relative publicity given to the document: Snape v Gibson Re Estate of Paul Francis Snape [2006] NSWSC 829.”

STEP SIX - COURT PROCEDURE UNDER THE NEW PROBATE RULES

So you think you have the evidence and have instructions to commence proceedings. What proceedings do you commence and what is the procedure?

On 21 January 2013 the Supreme Court Rules (Amendment No 421) came into effect. It repealed the former, and substituted, Pt 78 of the Supreme Court Rules 1970 (the Probate Rules) and repealed the existing forms for deceased estates. The new forms are forms 116-149 which were made under the Civil Procedure Act 2005. The new forms and rules apply to proceedings commenced on or after 21 January 2013.
Division 6 of Pt 78 of the Supreme Court Rules applies to proceedings on an application for a grant of probate or administration of a will that comprises or includes an informal testamentary document: Pt 78 r 41 SCR.

Who do you name as the plaintiff? If the document names an ‘executor’, then that person should bring the application as the plaintiff. If that person is unwilling to propound the document as a will it is ideal to obtain a form of renunciation of probate (slightly modified to refer to a document instead of ‘the will’ as until the Court declares it to be the will, it remains a document), or a letter to that effect, from that person. The renunciation or letter should be annexed to an affidavit.

Otherwise ordinarily, a person named in the Will as a beneficiary with the major interest can apply for a grant of letters of administration with the will annexed.

Non-contentious proceedings are commenced by Summons: Pt78 r8 SCR. Contentious proceedings must be commenced by Statement of Claim if there is a defendant: Pt78 r35(a) or Summons if there is no defendant: Pt78 r35(b).

Contentious proceedings are defined in Pt78 r1 as proceedings in which a notice of proceedings has been served on any person or there is a defendant. However, in relation to proceedings under s8 in which the defendant has only become a defendant by entering an appearance, it includes only such parts of the proceedings which deal with s8: Pt78 r1 SCR.

Proceedings are filed in the Supreme Court Equity Division, Probate List. A copy of the document should be annexed and marked “A” to the Summons or Statement of Claim. The pleading should seek, as a prayer for relief, a declaration under s8 of the SA that the document annexed and marked “A” to the Summons/Statement of Claim is the will of the late [insert name of deceased].

Sometimes, there may be no defendant at the time of filing the proceedings and the Summons can also seek directions as to the joinder of any person to the proceedings as a defendant, and such further or other orders as the Court considers fit. The Summons/Statement of Claim should also seek an order for the Plaintiff’s costs to be paid out of the estate of the deceased or, if you have a defendant, an order that the defendant pay the plaintiff’s costs of the proceedings. More about costs later.

A caveator under any caveat in force in respect of an informal testamentary document is to be a party to the proceedings, unless the Court otherwise directs: Pt78 r72 SCR. If a caveat is in force, proceedings must be commenced by Statement of Claim: Pt78 r72(1) SCR.
If there are more than 2 defendants, a List of Parties should be filed and served: r4.6A UCPR (Form 2 V2).

The plaintiff must serve all persons whose interest may be affected by the Court’s decision regarding the document with notice of the application (“a prescribed notice”): Pt 78 r42(1) SCR. A prescribed notice however is not required to be served upon any caveator under any caveat in force regarding the document or on any person who has consented to a grant of the document to the plaintiff: Pt 78 rr42(2)(a) and (b) SCR. Any consent obtained must be filed by the plaintiff: Pt 78 r42(3) SCR.

A notice under Division 9 must be served personally: Pt78 r64(1) SCR. Part 11 of the UCPR (which deals with service outside of Australia) does not apply to the service of a notice under Division 9: Pt78 r64(2) SCR.

If the person whose interests are effected is a person under legal incapacity, that person cannot give a consent and a prescribed notice must be served on that person’s tutor. If the person has no tutor, service of the prescribed notice is ineffective: Pt 78 r42(4). Part 78 r61 SCR sets out the requirements for service on persons under legal incapacity.

Pt78 rr62 – 63 SCR also deal with notices served on persons under legal incapacity.

The Court may, in the following circumstances, dispense with the requirement of the plaintiff to serve a prescribed notice:

The person affected cannot readily be ascertained,

The person affected, though ascertained, cannot readily be found,

It would be expedient to dispense with the requirement having regard to all the circumstances, including the amount at stake and degree of difficulty of the point to be determined so as to save expense: Pt 78 r42(5) SCR.

A person on whom a prescribed notice is served may enter an appearance: Pt78 r43(1). Division 3 of Part 6 of the Uniform Civil Procedure Rules 2005 applies to an appearance as if the person were a defendant in the proceedings. The person entering an appearance is made a defendant: Pt78 r44(2) and may only take part in the parts of the proceedings relating to the decision under s8, and may only take part in any other parts of the proceedings as the Court directs: Pt78 r44(4) SCR.

The time for entering an appearance in the case of service within NSW is 14 days: Pt78 r43(4)(a) SCR, or in the case of service outside of NSW, 28 days: Pt78 r43(4)(b) SCR.
The time limit for entering an appearance is different to the time allowed in UCPR 6.10(1)(b)(i) which provides an appearance can be filed on or before the first return date of the Summons.

An appearance may not be entered after the expiration of the time limit except by leave: Pt78 r43(5) SCR.

Rule 12.11 UCPR (which deals with applications by defendants to set aside an originating process) does not apply to the proceedings: Pt 78 r43(3) SCR.

If the Court makes a decision under s8 about the document (whether in favour of the plaintiff or not), subject to any order of the Court, the following are bound by the decision to the same extent as if s/he had been a party to the proceedings when the decision was made:

Any person whose consent to the grant has been filed in relation to the document,

Any person whose interest may be affected by the Court’s decision as to the deceased’s intentions in relation to the document, but only if:

A prescribed notice has been served on the person, or

The Court has, pursuant to rule 42(5), dispensed with the requirement for service: Pt78 r45 SCR.

In non-contentious applications for a grant of probate or administration in respect of an estate of a person who has died leaving an informal document, the affidavit in support must include:

the name and address of each person whose interests may be affected by the Court’s decision as to the deceased’s intentions regarding the document (designating which of them, in the plaintiff’s opinion, is or may be a person under legal incapacity), or,

if the name and address of any such person cannot be ascertained, the best information the plaintiff can give to assist in ascertaining the person’s identity and whereabouts: Pt78 r14 SCR.

Non-contentious applications for probate of an informal document can be dealt with by the Registrar: Pt78 r94 SCR.
COSTS: WHO PAYS?

Costs are in the discretion of the court. Pursuant to r 42.1 of the Uniform Civil Procedure Rules 2005, the court is to order that the costs follow the event, unless it appears to the court that some other order should be made as to the whole or any part of the costs.

It is recognized that exceptions to the general rule, that costs follow the event, can apply in probate actions. If the testator has been the cause of the litigation, then costs of all parties may come from the estate.

In Re Estate of Hodges (dec’d); Shorter v Hodges (1988) 14 NSWLR 698, Powell J recognized a further exception, that if the circumstances led reasonably to an investigation in regard to the document propounded, the costs may be left to be borne by those who respectively incurred them (at 709).

This was referred to with approval by the Court of Appeal in Shorten v Shorten (No 2) [2003] NSWCA 60. Those cases concerned testamentary capacity.

In Public Trustee v New South Wales Cancer Council [2002] NSWSC 220, a case concerning the admission of a document as an informal will under s 18A, Einstein J said that where the testator had made the informal document, the case could be treated as one in which the testator was the cause of the litigation. His Honour ordered that the costs of all parties be paid out of the estate.

That approach was followed by Young CJ in Eq (as his Honour then was) in Macey v Finch [2002] NSWSC 933. Subject to adjustment to ensure there were not excessive costs recovered by reason of the separate representation of persons who had the same interest, his Honour ordered that the costs be paid out of the estate.

If a plaintiff’s case is characterised as being hopeless, the court may order the plaintiff to bear his own costs and pay the defendant’s costs.
CASE STUDIES

When does a Solicitor owe a duty of care to procure an informal will?

Fisher v Howe [2013] NSW SC 462 per Adamson J

In Fisher v Howe, Adamson J found the Defendant Solicitor liable in negligence for failing to make an informal Will that expressed the Deceased's instructions as to a new Will in which she wished to execute to change the disposition of property and a previous Will made in November 2009.

The Plaintiff, Henry, was a son of the Deceased who died on 6 April 2010. Under the 2009 Will, the Deceased bequeathed 25% of her residual estate to him. On 25 March 2010 she instructed the solicitor draw a Will in which 50% of her residual estate would pass to Henry. Prior to her death, the Deceased had made at least nine different Wills, each of which were a formal Will. The 2009 Will appointed her accountant as executor. In March 2010 the Deceased had lost faith in her accountant and former solicitor and spoke to her GP about it and asked if the doctor knew a solicitor. The doctor got into contact with Mr Howe who happened to be her patient. Mr Howe attended on the Deceased at her home at 9.00 am on 25 March 2010 for a conference. She was at home with her carer as she could not get out about very well which was why she wanted a home visit.

The Judge found that Mr Howe was a very experienced solicitor who was admitted to practice over 40 years ago. He had continuously conducted a general legal practice, including Wills and estates and had attended to the preparation and execution of thousands of Wills for clients, including those that had to be prepared urgently. He also gave evidence that he kept up to date with developments in the law by attending regular CLE’s in the area.

During the conference on 25 March 2010, the solicitor was not aware of her precise age although she was 94 years old. He appreciates she was elderly and he had assumed she was in her 90's. The conference lasted for about one and a half hours. Mr Howe asked her for a copy of her 2009 Will which she indicated that she wanted to replace, she told him she did not have a copy because it was with her former solicitor. She had said that she had lost confidence with her accountant and she also wanted to replace her former solicitor who was a co-executor. She identified her assets as including unencumbered properties, shares, a bank account and a pension fund. The solicitor was aware that her estate was a substantial one.

They discussed who the new executor would be and she suggested whether Mr Howe would be appointed. He asked her to think about it and to let him know when he presented her
with a draft of the Will. There were some changes made to some bequests. She instructed him she wanted the residue of her estate to be as follows:

- 50% to the Plaintiff, Henry;
- 25% to her granddaughter; and
- 25% to her grandson.

She said that she did not want to leave anything to her daughter and gave her reasons as to why. The solicitor explained the ability of a daughter to make a family provision claim and undertook some instructions about her daughter’s financial circumstances. At no time during the conference did the Deceased appear to the solicitor to be suffering from ill health. She did not complain about the length of the conference or ask for any rest. She did not disclose any problems with her health. Whilst the solicitor as to the identity of the executors on the 2009 Will and that the Deceased wanted them both removed, he did not know who the beneficiaries under that Will were. The solicitor accepted at the hearing that there was no practical impediment to him making an informal Will at the end of the conference, since it would not have taken long and there was no indication that the Deceased’s attention or energy was flagging but he admitted that he did not give any consideration to making a formal Will which the Deceased could have signed that day or shortly thereafter. At the end of the conference, he told the Deceased he would be away on leave over the Christmas break and would not return to work until after Easter. He proposed he would prepare a draft Will and come and see her on his return, during the week after Easter. She agreed and she actually wanted Henry to be present when he returned. The arrangement was left on that basis and he would call her to arrange a time on his return.

One of the effects of the proposed Will was the increase of the family share of the residual estate from 50% under the 2009 Will, to 100%. Another effect was that it doubled the Plaintiff’s share and, of course, a change of executors. The Defendant did not know how material the changes to the Will were and made no inquiry in that regard.

**The period from 25 March 2010 Conference until the death of the Deceased on 6 April 2010**

On about 25 March 2010, Henry spoke to his mother over the phone and whereby she told him “everything’s okay. I have seen the lawyer. The dispositions are done and I want you and Ross to be there as well as Dr Zwi... I want to schedule for him to come back when you arrive”. 

On the evening of 25 March 2010, the Deceased’s health took a turn for the worse. On 26 March 2010, her doctor attended her at home. She had a high temperature and pneumonia was diagnosed. It was suggested that she go to hospital but she refused.

Her doctor made further home visits on 29 March and 30 March. Her doctor was not aware that she’d had a conference with the solicitor for the preparation of a Will. The Deceased had low oxygen saturation levels and her condition was deteriorating and she was advised to go to hospital. For the period 25 March 2010 to 30 March 2010, Mr Howe worked in his office on each of the business days. He commenced his leave on Wednesday, 31 March 2010. Meanwhile on 1 April 2010, the Deceased was seen again by her doctor. Then Easter intervened. On 6 April 2010 the Deceased told her she did not want to die and asked whether she thought she would. The doctor told her that she thought she would “pull through”. Her doctor was not concerned that the Deceased was at risk of dying within the next few hours or within the day. That afternoon, the doctor received a call from the carer to tell her that the Deceased had died. The doctor was “absolutely shocked” because she had not expected the Deceased to die that day.

Expert evidence was relied upon at the hearing by both sides as to whether a competent practitioner, when considering those circumstances, would have procured an informal Will. Her Honour Justice Adamson found that in those circumstances, a competent solicitor was under a duty to procure an informal Will and found that a duty of care was owed to the Plaintiff, who was a residual beneficiary under the proposed Will.

The Plaintiff’s case was pleaded on the basis that the Defendant was negligent in failing to procure an informal Will at the conclusion of the conference on 25 March 2010. Her Honour cited the authorities that outlined the duty of care of a solicitor as to how a testator’s intention to benefit intended beneficiaries is to be made legally effective and said:

“There are two principal mechanisms whereby a solicitor can ensure that the client’s testamentary intentions are legally effective when the client dies: first, the solicitor can draw up a formal Will and ensure that it is duly executed; or secondly, the solicitor can draw up an informal Will which will take effect by reason of s8 of the Succession Act. These steps are not strictly alternatives since an informal Will can be prepared and may be superseded by a formal Will” at [88].

Her Honour considered that that the Defendant’s retainer was to give legal effect to the Deceased’s testamentary intentions and not merely to prepare a formal Will and arrange for its execution. Where the law provides as in section 8 of the Succession Act for an avenue for giving legal effect to testamentary intention in addition to making a formal Will, her
Honour found its “informality” was no reason to disregard the availability of that avenue. The making of an informal Will was merely another way of achieving particular legal effect and the circumstances of the instant case, the Defendant owed a duty of care to the Plaintiff as an intended beneficiary to procure the informal Will. In particular, Her Honour found the Deceased had a settled dispositive intention in respect of the whole of the estate and wanted to change her executors. Such a change was a matter of importance and the Defendant should have regarded as such. The fact that the Deceased had also said to the Plaintiff, shortly after the conference, that the “dispositions are done” was, according to Her Honour, a powerful indication that she regarded the dispositions as being settled and not the subject of further consideration in the foreseeable future.

Her Honour found that the solicitor did not even give consideration to the making of an informal Will despite his awareness of the fact that she was in her 90’s, had difficulties with her mobility and required a carer, she had fallen down some stairs some years prior and broken a hip requiring her hospitalisation and residence in a nursing home before her return home, she was at a greater risk of falling, sustaining serious injury or having a stroke or other cerebral event or some other incident that could compromise her testamentary capacity, she was adamant she wanted to change the identity of the executors and the dispositions, she had a firm view of the bequests to her carer and a charity and that the reason for the delay in the preparation of the formal Will for execution was because of the Defendant’s own commitments.

Her Honour found the Plaintiff was entitled to the net loss of a further 25% share of the estate which was the difference between what he was to receive in the 2009 Will being 25% of residue as opposed to what he stood to receive in the proposed Will of 50% of residue.

Her Honour reserved the question of quantum, but it seems the Plaintiff was entitled to judgement in the sum of about $800,000 or so, plus interest.
Hospital Clinical Notes – an informal will?

*Newman v Brinkgreve; The Estate of Floris Verzijden [2013] NSWSC 371 - Hallen J*

The deceased, Floris Verzijden made a Will on 11 May 2004 ("the 2004 Will"). The Plaintiff sought a declaration that a document contained on one page of a form headed "Progress/Clinical Notes", dated 2 December 2012, and signed by the deceased and by one witness to his signature ("the 2011 document") was a codicil to the 2004 Will, and sought a grant of Probate, in solemn form.

The Defendant was one of the nieces of the deceased. She was a beneficiary named in both the 2004 Will and in the 2011 document. She only opposed a grant of Probate of the 2011 document.

A declaration was sought pursuant to s 8 of the Succession Act 2006 that the document signed by the late Floris Verzijden (also known as Floris Verzyden) on or about 2 December 2011 was an alteration or codicil to the Will of the deceased made on 11 May 2004.

The deceased died on 4 December 2011, aged 92 years. The deceased died leaving property in New South Wales. His estate, at the date of death, had an estimated gross value of $1,642,791 and an estimated net value of $1,640,391. He had no children. The deceased's wife predeceased him. did not remarry after May 2004.

The 2004 Will, relevantly, provided:

(a) for the appointment of the Plaintiff as sole executor;

(b) for the division of the deceased's estate equally among named nieces and nephews of the deceased, including the Defendant and the Plaintiff, who survived the deceased. (All survived the deceased).

A solicitor, and a secretary were the attesting witnesses to the deceased's signature on the 2004 Will.

There was no dispute about the validity of the 2004 Will.
The 2011 Document

The 2011 document stated:

"TO HAMER & HAMER LEGAL 2-12-2011

DEAR MICHAEL

I WISH YOU TO MAKE THE FOLLOWING CHANGES TO MY CURRENT WILL

(1) ELIMINATE MY NIECE GERDA BRINKGREVE AS PRINCIPAL BENEFICIARY AND INSTEAD GRANT HER A BEQUEST OF $50,000 (FIFTY THOUSAN)

(2) A BEQUEST OF $75000 (SEVENTY FIVE THOUSAND)

TO

REGINALD TREVOR WEBSTER

OF UNIT 7 NO 29-33 WOOD ST

WEST LANE COVE OR IF HE IS NOT ALIVE TO HIS WIFE

MARY KATHLEEN

(3) AFTER OBTAINING HIS CONSENT APPOINT HIM THE EXECUTOR OF MY WILL

HIS PHONE NO IS xxxx

FLORIS VERZIJDEN

[SIGNATURE]"

It was in the handwriting of the deceased and appeared on one page of a printed form of "Progress/Clinical Notes" of the NSW Government Department of Health. On the reverse side of the page, medical information appeared.

On the 2011 document, there appeared a signature and the letter, words, sign and numbers "B John # 55587", under which was written, and crossed out, "Witnessed by Beatrice John Senior Physiotherapist". Ms John's signature and her position, where first appearing, were
crossed out, but her signature appeared, again, under those words, as did the date (which was not crossed out).

The original handwritten 2011 document contained some interlineations and alterations.

The 2011 document was not a valid Will because the deceased's signature was not made, or acknowledged, by him in the presence of two, or more, witnesses, present at the same time, and because at least two witnesses did not attest and sign the Will in the presence of the deceased: s 6(1) of the Act. The sole basis of the Defendant's opposition was that the Court should not be satisfied that the deceased intended the 2011 document to form an amendment to his Will.

He remained an in-patient, in isolation, in the Intensive Care Unit, at the time he made the 2011 document and at the time of his death. The Hospital records revealed that neither the deceased, nor the hospital staff, considered that his death was imminent. A Progress/Clinical note made on 30 November 2011 stated "Contact Trevor. Pt has a brother & nieces/nephew in Brisbane & sister in Holland". The reference to "Trevor" was to Mr Webster, the person referred to in the 2011 document.

Another note on the same date recorded: "Social: Request from patient to contact lawyer re pending sale of his unit in Cammeray. Hamer & Hamer Belrose (Michael Hamer)." "Michael contacted & will speak to Mr Verzijden soon regarding legal matters."

In an affidavit, Ms John stated that she had been a physiotherapist employed at Mona Vale Hospital; in early December 2011, the deceased was a patient in the intensive care unit at Mona Vale Hospital; on 2 December 2011, she was required to treat the deceased by administering physiotherapy to him.

On that day, she entered the deceased's room and she "saw the deceased writing on a hospital clinical notes form" and that he said to her words to the effect of:

"I want you to witness this. My mind is strong and I know what I'm doing. I want to talk to my solicitor but he is not here, and I want to make sure this gets witnessed. I'm waiting for the social worker too. This is really important."

She stated that she observed the deceased sign the 2011 document, and that he handed it to her, following which she wrote the words in the bottom right hand corner of the document, signed and dated it. She then placed the 2011 document on the table near his bed.
The deceased requested Ms John to put the 2011 document "with my medical notes".

Ms John then stated that she left the deceased's room and called over another staff member, to whom she said: "I have a piece of paper that the patient asked me to sign. Where should I put it?"

The nurse informed her, after reading the 2011 document: "Hospital staff are not allowed to witness wills". The nurse, in Ms John's presence, then crossed out Ms John's signature and the other words, handed the 2011 document back to Ms John, and requested her to "Sign where I have crossed out", which Ms John then did adding her pager number. Ms John then observed the nurse take the 2011 document and leave with it.

In her affidavit, Ms John also said that she had no further contact with the deceased again and did not discuss the 2011 document with any other person. She did not know what had happened to the 2011 document until the Plaintiff's solicitors informed her that they were in possession of it.

The Progress/Clinical note made on 2 December 2011, at 1:30 p.m., which Ms John wrote stated:

"(S) Came into room, patient was distressed +++ as wanted to have witnesses sign his "will". Difficulties in calming patient down.

RN to ring SW re: Cte [?] lawyer.

Patient declined PT session, asked to be left alone.

(P) Will try again later pm --------

If not, for W/E PT."

Ms John stated, in answer to some questions from the Court, that "(S)" referred to "Subjective", meaning her observations of the patient and what she had been told by other medical staff; "RN" meant "registered nurse; "SW", was "social worker"; (P) meant "Plan" of treatment; "+++" meant "very"; that "Cte" meant "contacting"; and that "W/E PT" meant "weekend physiotherapy".

Ms John gave evidence, in cross-examination, that she used inverted commas around the word "will" to identify that it was the deceased who had used that word. She denied that she
had misunderstood, or mistakenly inserted that word, or otherwise made an error in what she had written.

Hallen J was impressed by Ms John as a witness. She candidly acknowledged that, in December 2011 when she saw the deceased, and at the hearing, she had no knowledge of the legal requirements for a valid will in New South Wales. Thus, it was more likely that the deceased would have described the 2011 document as a "will" and that it was he who referred to wanting to have "witnesses" sign his "will".

His Honour accepted Ms John's evidence as to the events that occurred and the words she attributed to the deceased.

Michael Hamer, the principal, stated that on 10 November 2011, he received an email from the deceased in the following terms:

"Dear Michael

Do you run a general legal practice apart from conveyancing? If so I would like to put my legal affairs (will, property) in your hands. I have been handed over twice to the present firm Somerville Legal due to amalgamation. Your location is very handy for me.

Regards

Flor Verzyden"

He stated that the deceased attended his office on 24 November 2011. During their meeting, the primary purpose of which related to the proposed sale of an investment property and the retainer of the firm to act for him on the sale, the deceased requested Mr Hamer to seek the release of all documents held on his behalf by Somerville Legal. There was no discussion of the deceased's Will on this occasion.

On 2 December 2011, Mr Hamer's secretary received a document, sent by facsimile transmission, from Carol Burrowes, of the Social Work Department of the Mona Vale Hospital, which was in the following terms:

"Please find note from Mr Verzyden requesting changes to his Will.

At present Mr Verzyden is in ICU at Mona Vale Hospital.

Please note hospital staff cannot be witness to documents."
Neither party could point to any evidence to establish that the deceased had given instructions to Ms Burrowes, or to anyone else, to forward the 2011 document, or a copy of it, to Mr Hamer's office after it had been signed by the deceased and witnessed by Ms John.

On 6 December 2011, Mr Hamer telephoned Ms Burrowes regarding the facsimile transmission. He was informed that the deceased had died on 4 December 2011.

There was other evidence, being a copy of a typed document dated 24 November 2011 addressed to Somerville Legal, from the deceased, which stated:

"I authorise and instruct you to forward my certificates of title, will, power of attorney and any other documents held by you in safe keeping on my behalf to Hamer and Hamer Solicitors at PO Box 6, Belrose West 2085."

Somerville Legal forwarded various documents, including a copy of a Will dated 19 June 1989 of the deceased, to Hamer & Hamer.

The deceased had made three previous formal Wills. This evidence was relied upon to demonstrate that the deceased had made a number of prior Wills and that it was likely that he was aware of the formal requirements necessary to make a valid Will. His Honour accepted this evidence.

Mr Webster stated that he and the deceased did discuss trips that the deceased made to Holland in the last three or four years of his life. The deceased told Mr Webster that he had visited his sister, and her daughter, the Defendant, and that he had said on several occasions, after his return from the last couple of trips:

"I don't think too much of Gerda. We don't really get on. She's not very friendly to me and I guess I'm the same with her."

In a Progress/Clinical Note dated 30 November 2011, there was a reference to various persons in the life of the deceased, namely Mr Webster, a brother and nieces and a nephew in Brisbane and a sister in Holland. There was no reference to the Defendant noted.

Given the 2011 document commenced with the words "To Hamer & Hamer Legal ... I wish you to make the following changes to my current will", the Defendant submitted that the document should be regarded as "nothing other than a list of instructions to Mr Hamer for (as the document states) changes to my current will".
His Honour considered that:

“This submission requires a consideration of the principles that apply in respect of instructions and whether instructions for a will may be admitted to probate.”

His Honour adopted what was stated by Philippides J in the Supreme Court of Queensland in *Re Gloria May Limpus Deceased* [2013] QSC 66:

"[6] In Theobald on Wills, it is stated in respect of "instructions for a will" that:

"A duly executed instrument, described as instructions for a will, may have effect as a will, if it appears that it was intended to take effect in the absence of a more formal instrument."

[7] On that topic the learned authors of Jarman on Wills state as follows:

"Instructions for a will

A paper merely expressing an intention to instruct a solicitor to prepare a will making a particular disposition of property, will not be admitted to probate in the absence of evidence of intention that such paper should have a testamentary operation. But instruments headed 'Plan of a will', or 'Heads of a will', or 'Sketch of my will', or 'Memorandum of my intended will', or 'Notes of an intended settlement', have been held to operate as valid testamentary dispositions, if duly executed. But probate was refused of an instrument duly executed and attested as a will, but headed 'This is not meant as a legal will, but as a guide'."

[8] Likewise, Williams on Wills states:

"Instructions for will. These can be admitted only if executed as a will[ and must be something more than mere heads of instructions."

[9] The matters has been considered in New Zealand in the decisions of *In re Gilmour* [1948] NZLR 687 and *In re Barnes (Deceased)*, Public Trustee v Barnes [1954] NZLR 714.

[10] In *In re Barnes* the testator signed, in his solicitor's office, a document headed "Instructions for the will of [the testator]" and the signatures of two witnesses were appended to it. The testator was informed that a will in proper form could be prepared ready for execution the same afternoon by 5.00 pm, but he said he could not wait. He
died more than a year later, without having executed any other testamentary
document. The evidence showed that, during the last weeks of his life, he intended to
make a new final will, and the making of such will would have included the revocation
of the "instructions" document.

[11] Turner J held that, on the evidence, the testator executed the document meaning
that it should operate as his effective will unless before his death he should execute
in its stead a more formal document, embodying the same provisions, which his
solicitor was to prepare. There was no need to rely on the presumption that the
document, duly executed, was intended to be a will, as the testator's solicitor's
evidence was sufficient to help to convince the court that the testator executed the
document intending that it would operate as a will until some more formal document
should be prepared and executed. Having considered the decision of In re Gilmour
[1948] NZLR 687, Turner J said (at 718):

"In the present case, like Gresson J [in In re Gilmour], I am put upon inquiry
by the use of the term 'instructions for a will', by the lack of form of the
document, and by the absence of any words designating it as a final
testamentary instrument. Like Gresson J, I listened to such extrinsic evidence
as was available as to the circumstances in which the document came to be
executed; but, unlike him, I was presented with direct and cogent evidence -
that of [the testator's solicitor]. It clearly appears from this evidence that the
document was signed so as to operate as a will until a more formal document
should be signed."

[12] In re Barnes was considered by the Supreme Court of Western Australian in Re
Ogley (dec'd); Ex parte The Public Trustee [2004] WASC 277. In that case, Mr
Johnstone, a Wills Manager with the Public Trust Office completed a form headed
"Will Instructions" with information provided by Mr Ogley's wife. The form was a
standard form used by the Public Trustee to take down instructions from a testator
with the intent that a formal will will be drawn up at a later date. Mr Johnstone then
met with Mr Ogley, who was suffering from cancer and expected to have three to six
months to live, and read through the instructions and explained to him what was in
those instructions in some detail. Mr Ogley confirmed that what was written was in
accordance with his wishes. Mr Ogley, Mrs Ogley and Mr Johnstone signed the form
at the bottom of the final page and it was dated by Mr Johnstone. The signatures of
Mr and Mrs Ogley were then witnessed. The Registrar declined to grant probate in
common form because he was not satisfied that the deceased intended the
document in question to be his will. An appeal against that decision was allowed and probate in common form was granted.

[13] In determining the matter, Sanderson M referred to the South Australian decision of Estate of Treloar (1984) 36 SASR 41, to In re Barnes, and to some of the early English authorities, and said:

"[13] The circumstances in which a Will can be contained in instructions were discussed by Legoe J in the Estate of Treloar (1984) 36 SASR 41. His Honour refers to Tristam & Coote, Theobald and Halsbury's Laws of England, in setting out the circumstances when instructions for a Will may have effect as a Will: see pp 43-44. These include:

(a) if it can be shown that the instructions represented how the testator intended to dispose of the estate;

(b) if the instrument was intended to take effect in the absence of a more formal document;

(c) if the document should be depository and operate provisionally until a more formal will was prepared.

[14] In the Goods of Fisher (1869) 20 LTR 684, Lord Penzance directs that a presumption arises when instructions are executed that it is intended will take effect as a Will, even where in future a more regular form is intended. In Re Meynill; Meynill v Meynill (1940) WN 273, Barnard J accepts that the presumption arises where formalities have not been complied with. In In re Barnes (Dec) [1954] NZLR 714 Turner J expressed the view that if the document has been executed animo testandi and the formalities observed, it becomes the last Will and testament of the deceased and was not revoked by any 'mere change of intention'. It is to be noted that the authorities suggest that a Will is not to be regarded as contained in instructions in the absence of evidence of animus testandi: see Lister v Smith (1863) 3 Sw & Tr 282; Torre v Castle (1836) 1 Curt 303; Whyte v Pollok (1882) 7 App Cas 400."

[14] Nevertheless, Sanderson M cautioned:

"Having said all of that, it is clear that each case must be decided on its merit 'because so much depends on the particular circumstances': see Hines v Hines [1999] WASC 111 per Owen J at 25. In that same case his Honour pointed out (at
26) that determining whether the document is a testamentary instrument is a less difficult task when independent evidence is available."

[15] Sanderson M concluded at [18] that, while the evidence was "thin", he was satisfied that it established that the deceased intended that the signed instructions would be an "interim will". The deceased, by his conduct, had indicated that he had signed a will and was satisfied that what he was signing was consistent with the way he intended to dispose of his property. Sanderson M further observed at [19]:

"It must be borne in mind in an application such as this that it is the Court's role to facilitate, rather than hinder a deceased's intention to settle his affairs. That is what Lord O'Hagan said so long ago [in Whyte v Pollok (1882) 7 App Cas 400] and it is as true today as it was then. In my view, there is no justification for coming to any conclusion other than that the signed instructions contain the Will of the deceased."

Hallen J considered that much stress was placed upon the opening words of the 2011 document ("To Hamer & Hamer Legal ... make the following changes to my current will"). His Honour also noted that the 2011 document referred to the telephone number of Mr Webster and that one would not, normally, include a potential executor’s telephone number in a will or codicil.

At [117 - 118] Hallen J said:

“However, as stated previously, the form of the document, whilst necessary to be considered, is, by no means, solely determinative of the result. Furthermore, as long ago as 1882, in Whyte v Pollok (1882) AC 400, at 405, Lord Selborne noted “it might happen that something which he did not originally intend to be a testamentary act was converted into a testamentary act by a subsequent and sufficient manifestation of intention on his part.

…one must resolve the questions in dispute by looking at the probabilities on the totality of the evidence available to the Court.”

His Honour found at [119] the following facts and circumstances were sufficient to weigh the probabilities in favour of finding that the deceased did intend the 2011 document to form an amendment to his Will:

(a) The deceased was in hospital at the time the 2011 document was written by him. Whilst there is no suggestion of imminent death, he was, on 1 December 2011, quite
ill. The Progress Notes, recorded at 6:30 a.m., described his condition as "critical but stable". He was also, at that time, aged 92 years.

(b) There was no suggestion that anyone, other than the deceased himself, provided the initiative for the preparation of the 2011 document.

(c) The deceased appears to have taken some care to ensure that the 2011 document did not contain errors (by making the alterations and interlineations that appear on it). Also, he appears to have carefully checked what he had written (even though there are two spelling errors). The document was complete in its terms. It was worded in intelligible English, and the bequests make grammatical and legal sense.

(d) The deceased had expressed to Mr Webster some dissatisfaction about his relationship with the Defendant and a lack of closeness he felt towards her. This provided a reason for changing the testamentary disposition to her. It was not inconsistent with what he expressed in the 2011 document.

His relationship with Mr Webster was consistent with providing a pecuniary legacy to him. In other words, the 2011 document could be described as appearing rational on its face and in its context.

(e) All of his previous Wills had been formal Wills and ones that were duly executed by him. One of them had been handwritten in draft, but then typed, completed in handwriting, and duly executed. This suggested some experience, and therefore, knowledge, or at least awareness, of the requirements for a valid will.

(f) That he, himself, when referring to the 2011 document, described it as a "will", is also significant. (That he did so is clear from Ms John's contemporaneous note written at about 1:30 p.m. on 2 December 2011, and from her evidence that it was the word he had used).

(g) The signing of the 2011 document, the printing of his name under his signature, and the dating of the document, all gave support to the conclusion that the deceased did intend this document to operate upon its terms and that he intended it to be effective. Each was a serious act engaged in by the deceased.

(h) The deceased sought "witnesses", one of whom (Ms John), at his request, did act in that capacity. This also suggested that the deceased was a person with some
knowledge, or at least awareness, of the requirements of signature and attestation for a valid Will.

(i) When he spoke with Ms John, the deceased appreciated that his solicitor was not available. He said to Ms John that he wanted to talk to his solicitor "but he is not here". It was in those circumstances that he wanted "to make sure this gets witnessed" and that he was "waiting for the social worker too".

(j) That he was "very distressed" as he wanted "witnesses to sign his will" demonstrates the importance of the 2011 document and his intention that it was to be an alteration to his current will. The failure of the social worker to attend for that purpose was beyond his control. He also stated that it was "really important".

(k) The deceased's reference to his state of mind ("My mind is strong and I know what I am doing") revealed a need to establish capacity.

(l) The deceased requested Ms John to place the 2011 document with his medical papers, presumably for safe-keeping. Giving it to her for retention with his medical records, rather than retaining it himself, is inconsistent with it being tentative, deliberative in nature, a mere draft, or a letter of instructions only.

(m) There was no evidence of the deceased having given anyone instructions to send the document to his solicitor, which was somewhat inconsistent with it being merely a letter of instructions.

Although the opening words of the 2011 document were in terms of an instruction to Mr Hamer requesting changes to his current Will and what immediately followed were usual words commencing a letter, the evidence, overall, pointed clearly to the finality of the deceased's intention that it was to form an alteration to the 2004 Will. When the deceased signed it and had Ms John sign it, the 2011 document expressed his concluded testamentary intentions, rather than being a provisional, preliminary, or tentative, expression of those testamentary intentions. His Honour was satisfied that the deceased intended the 2011 document to form an alteration to his then current Will, namely the 2004 Will.
Unsigned Will

In *Bell v Crewes [2011] NSWSC 1159*, the principal question was whether an unsigned will that had been prepared for the deceased should be admitted to probate under s8. If the document was not admitted to probate, there next question was whether probate should be granted of a will duly executed by the deceased in 2004.

By the 2004 will the deceased gave a 1/11\(^{th}\) share of a property to his wife, granted a life estate to her over the remaining 8/11ths share in the property; directed that the remainder interest be held as to a 60% share for his son and 40% share for his other son; made detailed gifts of certain personal chattels; and left the residue of his estate as to a 55% share to his wife, and the remaining 45% share to his sons in unequal proportions.

The deceased’s wife, a solicitor, was named as a co-executor of the 2004 will. She brought proceedings under s8 in relation to a later document.

She gave evidence that during early to mid 2009, the deceased raised with her his desire to review the terms of his 2004 will. Following an overseas holiday, the deceased said to her “we must change our wills when we get home.” He gave her instructions as to changes he wished to make to his 2004 will and she prepared a new will, the structure of which was similar to the 2004 will but there were specific changes to individual bequests.

The changes included the deceased leaving 3/11ths shares in the property to his wife, and leaving his remaining 6/11ths shares on trust for his wife for her life, and thereafter to his sons in the proportion of 70% and 30%. The residue was to pass to the plaintiff if she survived him.

The plaintiff gave evidence that she and the deceased also discussed changes to be made to her will to “mirror each other’s requirements”. She prepared a new will for herself in which she gave her shares in the property to her husband for his life, and after his death, on remainder for certain of her relatives. Her residuary estate was to be given to her husband if he survived her for, but otherwise on trust for certain of her relatives.

Her evidence was that she and the deceased had discussions about the execution of the documents. She could not remember the detail but said "Certainly we would have been executing them together.”
After she had prepared the new will for the deceased, some time in the week between 4 and 11 October 2009, he said to her words to the effect, "I have read the new will - that's what we want - that's it." She said "We will need to have it signed." He said, "Yes."

The deceased died suddenly on 17 October 2009 without having executed the new will.

It was submitted for the plaintiff that the deceased expressly and unequivocally adopted the unsigned will by his words, "I have read the new will - that's what we want - that's it."

White J said that the evidence given by the plaintiff as to the deceased's intentions must be scrutinized with care, given he is not able to give evidence, and her interest in the proceeding. Having done so, White J concluded he should accept it.

His Honour did not accept that the words used by the deceased indicated that it was his intention that the new will should be operative as his will from the time that he spoke the words, "that's what we want - that's it."

Those words indicated that the deceased was happy that the document prepared by the plaintiff accurately expressed his testamentary intentions. Nonetheless, both he and the plaintiff understood that the will would need to be signed, and he acknowledged the necessity for its signature.

The appropriate inference was that the deceased intended to execute his will at the same time as the plaintiff executed her new will. It was to be inferred that he intended that the document would constitute his will from the time he signed it, which was intended to be the same time that his wife signed.

White J considered it was not probable, nor did the evidence justify a conclusion, that he intended the document to be operative prior to signature, as the parties intended to make wills whose provisions mirrored each other. It was not probable the deceased would have intended that his will be operative before his wife's new will was operative.

His Honour referred to The Application of Kencalo; In the Estate of Buharoff (Supreme Court of New South Wales, Powell J, 23 October 1991, unreported) where Powell J dealt with an application, that a draft will be admitted to probate pursuant to s 18A of the Probate and Administration Act 1988. The draft had been prepared by a solicitor. It had been approved by the deceased, and arrangements had been made for the deceased to attend on the solicitor, to execute not the document with which he was provided, but an engrossed will. She died before that could be done.

Powell J held that the draft will could not be admitted probate.
His Honour said:

"... before the jurisdiction conferred upon the Court by s18A of the Act may be exercised: 1. there must be a document; 2. that document must purport to embody the testamentary intentions of the relevant Deceased; 3. the evidence - whether it be the form, or contents of the document itself, or evidence as to the circumstances in which the document came into being - must be such as to satisfy the Court that, either at the time of the document being brought into being, or subsequently the relevant deceased, by some act, or words, demonstrated that it was his, or her, then intention that the document in question should, without more, operate as his, or her, Will."

The applicant for probate in that case failed because the deceased did not intend the draft document to be her will, but rather, an engrossed copy of the document that she intended to execute.

In the present case, it was submitted that the Court should infer that the deceased intended to execute the very document that he had read and approved.

His Honour accepted that there was this point of factual distinction. Nonetheless, his honour considered the passage from Kenalco required that, to be admitted to probate, the deceased must have intended that the document in question should "without more" operate as his or her will. That intention need not necessarily exist at the time the document was brought into being, but it must exist some time before death: at [28].

The principle that the deceased should intend that the document should have an immediate operation as the deceased's will has been repeated on numerous occasions and was binding on White J.

In Hatsatouris v Hatsatouris [2001] NSWCA 408, Powell JA (with whom Stein JA agreed), said (at [56]):

"It is, and has long been, my view that the questions arising on applications raising a question as to the applicability of s18A are essentially questions of fact, 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?

(see, for example, The Public Trustee v Commins; The Estate of Gwendolyn Myrtle Wray Powell J, 19 June 1992 (unreported))." (Emphasis in original.)

The same principle was expressed in slightly different words in In The Estate of Masters (deceased); Hill v Plummer (1994) 33 NSWLR 446. Mahoney JA said (at 454-455):

"Every document which a person prepares or executes is, in the sense here relevant, intended by him to be something: it may, for example, be intended to be a letter, a personal memorandum, a draft of something to be prepared later or a presently operative document. The section requires, of course, that the document to which it refers be of the latter kind. It must be intended that the document be presently operative and be operative as a 'will'.

There are, in the present context, several things which are relevant in that regard. First, the document must state the deceased's 'testamentary intentions', that is, his wishes or intentions as to how, voluntarily, his property is to pass or be disposed of after his death. A will may, of course, do other things: it may, for example, appoint a legal personal representative, exercise a special power, appoint a guardian or the like: see Halsbury's Laws of England, par 202. But it is the disposition of the deceased's property voluntarily after his death which is, for present purposes, the relevant characteristic of a will.

Secondly, it is a characteristic of a will, in the sense to which I shall refer, that it does not operate to bind the deceased during his lifetime. I mean by this that it is of the nature of a will that the deceased may, during his lifetime, freely dispose of property which has been dealt with by his will and that, during his lifetime, he may revoke or change the will that he has made. The significance of these matters has been referred to in, for example, Russell v Scott (1936) 55 CLR 440 at 448, 454; Kauter v Hilton (1953) 90 CLR 86. Neither of these matters is, I think in issue in the present appeal.

The third matter is of greater significance in the present case. Section 18A(1) requires not merely that the document propounded 'embody the testamentary intentions of' the deceased but also that the deceased 'intended the document to
constitute his ... will’. For the section to operate, the Court must be satisfied that the intention was that the document operate, in the sense to which I shall refer, as an actual act in the law.

There is, in principle, a distinction between a document which merely sets out what a person wishes or intends as to the way his property shall pass on his death and a document which, setting out those things, is intended to cause that to come about, that is, to operate as his will. A will, like, for example, a contract, a deed, and a sale, is, as it has been said, ‘an act in the law’. It is something to which the law attaches the legal consequences of that kind of transaction: see Salmond and Williams, Principles of the Law of Contracts, 2nd ed (1945) at 4 et seq, citing Salmond, Jurisprudence, 7th ed (1924) at 360. Ordinarily, a transaction will or will not be an act in the law of the particular kind according to whether it was of the relevant form or nature and was intended to operate as such. Thus, a document which is in form a will will not operate as such if it is, for example, a draft or ‘a trial run,’ not intended to have a present operation. A person may set down in writing what are his testamentary intentions but not intend that the document be operative as a will. This may occur, for example, in informal circumstances, in a letter or a diary or the like. What is to be determined in respect of a document propounded under s 18A is whether, assuming it to embody the testamentary intentions of the deceased, it was intended by the deceased as his testamentary act in the law, that is, to have present operation as a will.” (Emphasis added.)

If the deceased's intention is that the document will form his will only on the occurrence of a future event, and that event does not occur, then it cannot be said that he or she has the requisite intention. That may lead to apparently harsh results in cases where it can be concluded confidently that the deceased wished his or her property to be left in the way provided for in the document. That was the case in Mitchell v Mitchell, and is the case here. But while a beneficial interpretation must be given to the legislation, it is not possible to apply the section unless it can be found that the deceased intended the document to form his or her will: White J at [45].

In Mitchell v Mitchell [2010] WASC 174, the deceased had been admitted to hospital. He gave instructions to solicitors to prepare a will. A will was prepared in accordance with those instructions. On the morning of his death, the deceased, having apparently expressed his approval of the contents of the draft will, stated that he would execute the document later that morning. He died shortly thereafter without executing the document. The document was not admitted to probate.
Suicide Notes

In *MacDonald v MacDonald* [2012] NSWSC 1376 the Plaintiff (mother of the deceased) sought a declaration that a suicide note, or relevant parts of it, formed the deceased’s will. The defendant was the wife of the deceased.

The Deceased died by his own hand on 30 September 2010, aged 24. He had executed a will on 11 March 2008 by which he left his estate in equal shares to his mother and father, appointing mother as executor and father as executor only if the plaintiff was unable or unwilling to act.

The Deceased had married the defendant in November 2008 – marriage revoked the will.

In 2010, the deceased made statements to the plaintiff which indicated that he considered that his will of 2008 was still operative. He asked his mother to keep it safe and indicated that it was important.

The note that was found on the morning of 13 September 2010 was typed and prepared by the deceased. Under the heading “*Instructions for the distribution of my goods*” the deceased wrote:

"*Mum, you are the beneficiary of my estate. I have boxed everything at Julianne's house and labeled where I believe it should go. If anything is missing, it has been donated or lost years ago. I ask that part of my superannuation payout go to settling my debts with Amy. She can advise on the amount required. Any possessions that Amy currently holds I have given up claim on. Please follow my wishes.*

*Amy, as you are legally my wife, you have a claim to dispute my estate. I ask that you don't dispute my will and only claim what is needed to settle our joint debts and what you feel I owe you. There is a box of possessions that I have set aside for you. You can do with them as you wish, but if you don't wish to keep my wedding ring, I ask that you pass it on [to] Ben. Please follow my wishes.*

*All legal documents and possessions will be found at Julianne's place; [x xxxxxxxxx xx, xxxxxxxxxx]. The keys are enclosed and the alarm pin is [xxxxx]."

Under the 2008 will, the plaintiff was not the sole beneficiary of the deceased's estate, but only one of two beneficiaries. In saying, "*Mum, you are the beneficiary of my estate*," his Honour inferred the deceased intended that the plaintiff, by that document, should be the beneficiary of the estate. The deceased was not merely expressing a mistaken belief as to who would inherit his estate, and then making requests in relation to the dealings with his
assets. Although the same paragraph contained precatory words (such as 'please follow my wishes'), those words did not affect the dispositive nature of the first sentence of the document "mum, you are my beneficiary".

His Honour was satisfied that the deceased intended the paragraphs of the suicide note under the heading 'Instructions for distribution of my goods' to form his will. A grant of letters of administration with the will annexed was made to the mother.

The wife (defendant) had not opposed the orders sought and had come to an agreement with the plaintiffs to how the estate would be dealt pending the outcome of the proceedings. The costs of both parties were ordered to be paid out of the estate.

In *NSW Trustee and Guardian v Pittman - Estate of Koltai* [2010] NSWSC 501 White J considered whether an undated document constituted the will of the deceased. The Court there found that there were conflicting indications in the undated document of whether it operated as a will: at [32]. White J found that the use of the words "of sound mind" indicated that deceased intended to make a testamentary instrument: at [33]. But several other factors outweighed that conclusion. White J found that the statement that the deceased's mother or brother should pay her debts was more consistent with the document being an expression of her wishes as to how her family should act after death rather than being intended to be a will (at [34]); the gift of the stallion used precatory and not dispositive language (at [35]); that the gifts of real property, of debts owed to the deceased and the stallion did not deal with all her property (at [36]); and, the looseness of language in the terms of the document (at [36]) were consistent with an intention that the document not be a testamentary act. Furthermore, White J found that the language including "this is not negotable" [sic] and "do not disregard my last wishes" were consistent with the document being an expression of the deceased's wishes and not emblematic of a testamentary disposition (at [37]).

Similarly, in *Public Trustee v Alexander - Estate of Alexander* [2008] NSWSC 1272 the issue was whether a suicide note should be characterised as the deceased's will. White J there balanced several factors leading to the conclusion that the deceased was expressing testamentary intentions and that the deceased intended the document to be operative as his will. The Court found the use of dispositive language - "All my belongings I give to you" (at [22]), that the deceased had the belief that he was leaving his mother with property (at [22]), that the document was prepared on a solemn occasion (at [22]), that the deceased took steps to ensure that the document would be brought to the attention of other people (at [22]), that the letters set out the arrangements the deceased hoped would wrap up his legal affairs (at [22]) and that the deceased stated his wishes in relation to the disposal of his body were consistent with the intention that the document operate as his will: at [22]. Against these
considerations, White J weighed the fact that the document was unsigned, that the deceased did not refer to the purported will as a "will" in the note the deceased left referring to the letters, including the purported will and that the bulk of the letter is a narrative dealing with matters other than the disposition of his property after death: at [23]-[24]. But White J noted that merely because a document should be characterised as a suicide note does not mean that it cannot also be characterised as the deceased's intended will: at [25]. His Honour found that case here. Will.doc did send messages to Daniel's family upon his death. But that was consistent with its record of his testamentary intentions still operating as a will.

In *Ryan v Kazacos; Estate of Michael Harvey Kazacos* [2001] NSWSC 140, the deceased left a suicide note as follows -

"*Life for me is just an existence. I prefer to end it rather than exist in this apparent prison.*

*I wish to amend my present will by including Michelle Ryan, whom I owe so much for her devotion and love.*

*To Michelle Ryan I leave my 50% share in the business - The Penthouse. Further I leave her my villa - No. 7 at Pacific Mirage. This is to be made unencumbered prior to her receiving full title.*

*I ask Michelle to always keep Josh and Vacentilo in her care and to cherish them.*

*I am of sound mind as I write this and request the above requests be carried out in full.*

*(Signature) Michael Kazacos*."

The suicide note appears to have been written about 36 hours before the deceased took his life. The testator correctly identified property held by him and the name of his partner and cats. He left the suicide note where it would be seen immediately upon the discovery of his body.

Importantly, the testator referred to the document as one which would "amend my present will" by including the deceased's partner (both in business and life).

Justice Young noted (at [58]) -

"*There was also a debate as to whether a person who says in his will that he is of sound mind thereby signifies that he is afraid that other people will think he is not. This, to my mind, is speculation. There are cases where a person may so conduct himself or herself but there will be many cases where he or she will not.*"
The challenge to capacity failed and the trial Judge had no difficulty in finding the Will, rational on its face, should be admitted to probate. Indeed, from a practical point of view, the Will was unexceptional in every respect except it lacked two witnesses. It identified the persons most likely to claim on the estate, it referred to an existing Will, it dealt with assets, it was signed and dated. The fact the deceased introduced the Will with some subjective emotional narrative was of interest but did not detract from the substance of the document. The document was admitted to probate. It may be relevant to appreciate a Will can be admitted with the deletion of offensive or vituperative words.

In *Phillpot v Olney, Estate of Tracey Aubin* [2004] NSWSC 592, the proceedings were settled and Justice White invited to make consent orders. He observed that a grant of Probate or Letters of Administration being a "public act", the Court would not automatically make (consent) orders because the parties had agreed to them but (in a manner somewhat analogous to the making of declarations as to rights) the Court would review the evidence to see if the ultimate orders were available to be made at the end of a hearing.

The deceased died by her own hand on about 15 September 2002. Probably within a few hours prior to her death, she had prepared two documents which were found with her. One of those documents might have been a Section 18A informal testamentary document. It referred to the deceased's principal assets, it appointed an executrix and it said - "*I want everything to go to my godson* …". The status of these documents was challenged by the deceased's husband who would receive the whole of her estate in the event of an intestacy.

There was no dispute that, *prima facie*, the substantive document satisfied the requirements of Section 18A. The argument was whether the deceased had testamentary capacity when creating the document.

Taking all matters into account, the trial Judge came to the conclusion (which had been agreed to by the parties) that when she created the documents, the deceased lacked testamentary capacity and as such, the propounding of the documents could go no further. This was one of those cases where there was clearly sufficient material for the onus to be thrown on the propounder to positively demonstrate capacity. This would have been an insurmountable task.

In *Costa & Anor v Public Trustee in the Estate of Robert Costa aka Wayne Geary Coaster* [2007] NSWSC 1271, Justice Windeyer had for consideration the testamentary effect of a handwritten (but unsigned) suicide note as follows -
"MUM AND
DAD I THINK
I M DYING
PLEASE
LOOK
AFTER
ALL
MY
GOOD
WRITING.
THERE
MIGHT
BE
SOME
MORE
IN
THE DRAWER
TAKE CARE OF ’EM
I WANT YOU
TO HAVE MY HOUSE”.

There was no dispute the document was written by the deceased and "Mum and Dad" referred to the deceased's biological parents, the Plaintiffs in the proceedings. His only asset was his home.

Although the deceased's suffered from schizophrenia and had been recently admitted to hospital, there was no suggestion he lacked testamentary capacity when he wrote the document.
The trial Judge found [14] there was a document and "it does embody the wishes of the deceased as to who should get his house on his death".

Dealing with the fundamental point at issue, His Honour said -

"15. The question to decide is whether the deceased intended the document to operate as his will. The facts going to support a positive finding are the place where the document was located and the fact it was made at a time when death was imminent. The facts against this are that the wording is precatory and not dispositive; that as the deceased had made a valid will in 1995 he knew the requirements for a valid will; that there is no signature on the document; and the way in which the writing runs down the paper indicating it was expressing emotions and not legal intentions.

16. It could be said that the deceased might not have thought there could be any difference between saying "I want you have my home" and "I give my home to you". It could also be said that a man about to take his life is unlikely to bring to mind the requirements for execution of a will and, in any event, he would not have been able to arrange execution. This last matter does not of course deal with the problem of the absence of his signature."

Ultimately, His Honour found (at [19]) there was no intention the document operate as a Will. His Honour said -

"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."

His Honour used the word "precatory". This means words in a will praying or expressing a desire that a thing be done such as a wish or desire.

The deceased's parents appealed to the Court of Appeal - see Costa & Anor v Public Trustee of New South Wales [2008] NSWCA 223. Hodgson JA concluded:

"26 The crucial questions in this case are whether the document purports to govern the disposition of the deceased's property after his death, and whether the deceased actually intended it to do so. I agree with the way the question was posed in Estate of Masters (1994) 33 NSWLR 446 at 452 by Kirby P; namely whether the document "sufficiently evidences the fact that by it the deceased intended to govern the disposition of his or her property after death".

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27 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.

28 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.

His honour had a firm preference for the view that the document did purport to govern the disposition of the deceased's house after his death, and that the deceased did in fact intend by the document to govern the disposition of the house after his death.

Justices Ipp and Basten agreed with the reasoning of Hodgson JA.

Stationer's Will Form - Smith, Estate of A.N.H. - Application of P.A. Smith [2009]
NSWSC 907

The Plaintiff sought a declaration under s 8 that a document dated 14 January 2008 constituted the last Will of the deceased.

The document was wholly in the handwriting of the deceased, was a stationer's form of Will, had been completely filled in by the deceased, had appointed the Plaintiff as Executor and then made dispositions of the whole of his estate.

The document was, on the back, filled in with the name of the deceased (his initials and surname), his address and the date of the document. The document was not, however, formally executed and witnessed as required. The space provided for the signature of the testator and the signature of witnesses had been left blank entirely, although above it the deceased had written the date of the document, “14 January 2008”.

Palmer J inferred the testator intended the document represent his Will. His Honour said at [4]:

“The absence of his duly witnessed signature may possibly be explained by the fact that he lived alone on a farm property with no convenient neighbours. Perhaps he could not
Immediately find anyone to witness his signature and contented himself with filling in the details on the back of the document, regarding that as an indication that the Will was final and immediately effective.

His honour was satisfied that, after he had completed the document dated 14 January 2008, the deceased made statements to third parties confirming that he had made an effective will in terms of the document and therefore, had not regarded it as a draft." The document was admitted to probate.

**Codicil - Quartermain Estate - Steggall v Quartermain [2009] NSWSC 553**

This was an application in solemn form that there be admitted to probate a will, formally and duly executed, together with a handwritten document, not executed by the deceased, but said to be a codicil to the formal will. The Plaintiff sought a declaration, pursuant to s 8 of the *Succession Act 2006* (NSW), that the informal codicil constituted a valid codicil to the formal will. All beneficiaries under the formal will and the informal codicil, being six of deceased’s eight children, were given notice of the proceedings and only one appeared to oppose the declaration as to the validity of the informal codicil.

The Plaintiff was the executor appointed by the deceased in a will dated 21 June 2005. That will was prepared by the Plaintiff, who was the deceased’s solicitor for many years. The will was duly executed and witnessed. There was no issue as to its validity.

The deceased was admitted to hospital on 25 April 2008 and died there on 22 May 2008.

After his death, there was found on the dining room table in the deceased’s home a spiral bound notebook, about A5 in size, in which the deceased had written in his own handwriting. The writing, which occupied two and a half pages, was not dated but Sackville J inferred from the evidence of the deceased’s daughter and his ex-wife that it was written by the deceased between 24 March and 25 April 2008.

There was no one else living in the deceased’s home at that time. There are no words in the document which expressly stated that the deceased intended it to operate as a will or codicil. This was the ‘informal codicil’.

In October 2007 the deceased said to a solicitor in the Plaintiff’s office that he intended to change the formal will. He did not say what changes he wished to make. He never asked the solicitor, with whom he had dealt for many years, to take instructions for a new will or a codicil.
One of the deceased’s daughters, Kanisa (also known as Alicia and, familiarly, as PeeWee) received nothing under the formal will. The evidence was that over the years she was “in and out of favour” with the deceased. However, the evidence suggested that there was a reconciliation between the deceased and this daughter before the deceased’s death. Sackville AJ accept that the deceased expressed an intention to include her in his will.

The deceased was a successful company director and was obviously well acquainted with business affairs. Sackville AJ inferred that the deceased would have appreciated that it was highly advisable to have a solicitor assist him to change his will. Because of the size of his estate and his long term dealings with the Plaintiff and his firm, I infer that the deceased would have had no difficulty, in ordinary circumstances, in contacting the Plaintiff or his firm between October 2007 and April 2008 if he had wished to give instructions for a new will or a codicil.

The informal codicil commenced without preamble or explanation as follows:

“Lyn & Mark NIL

Bernice, her painting, also paintings of Paul, Adrian and Raquel to be sent to each.”

There then followed a list of personal items of relatively little value. At the conclusion of the list are the words “Bernice also receives A$250,000”. (Under the formal will Bernice received UK£250,000 and a fifth of residue).

On the next line of the document appears “Paul”, followed by a list of personal items amongst which appear the words “A$500,000 + family coat of arms” and then more personal items. Under the formal will Paul received UK£250,000 and a fifth of residue.

On the next line appears “Adrian As above” and a list of personal items amongst which are the words “A$250,000”. Under the formal will Adrian received UK£250,000 and a fifth of residue.

There was a space of one line and then the words: “Raquel to received Leather products same as Bernice plus her portrait. In addition she is to receive A$400,000 + 10 paintings from my home”. Under the formal will Raquel received UK£25,000 and a fifth of residue.

Then follows: “Jomphol (who is a son of the deceased) you have received so much but never enough I bequeath you A$500,000. You liked my leather jackets, black & red (2). There may be other clothes that Paul cannot use. You are welcome after Paul has helped himself.”
Then follow the words: “PeeWee (Kanisa) Well kid, last but not least. I leave you A$500,000 and [undecipherable] furniture, fixtures, fittings + 3 4 paintings”.

On the next page appears: “Gold. To be put into 6 piles. Gems to be valued and divied as evenly as possible between all. My watch collection to be divided between the three sons on a value basis. The ladies gold watch to go to Bernice.”

On a new line appears: “The balance of value above what has been bequeathed after costs to be shared on an equal basis between Bernice Paul Adrian, Raquel, Kim and Alicia (6)”.

There was nothing further written in the notebook.

The informal codicil gave expression to the deceased’s stated intention of including Kanisa (“PeeWee”).

His Honour said [at 20-27]:

“The question is purely one of fact: am I satisfied that the deceased intended the informal codicil, though not executed as a will, to form an immediately effective alteration to the formal will: In the estate of Masters (dec’d); Hill v Plummer (1994) 33 NSWLR 446, at 449 per Kirby P and at 466 per Priestley JA.

There are two possibilities. The first, for which Bernice contends, is that the deceased wrote the document merely as an aide memoire, or draft, of instructions which he might have wished to give his solicitors for the alteration of the formal will. If this is so, then it may be assumed that the deceased had no intention that any alteration of the formal will should be effective until embodied in a formally executed codicil. The second possibility, for which Kanisa contends, is that the deceased intended that the informal codicil be given testamentary effect even though he must have realised that it had not been executed formally.

I am satisfied that the second possibility is correct. It is true that the deceased had the opportunity to instruct his solicitors to prepare a formal codicil. It is true also that the deceased did not write anything at the commencement of the document to show that he intended it to have immediate testamentary effect. The document in part reads like an aide memoire in that it lists minor personal items that the testator would like the relevant beneficiary to have although it does not always make a gift of those items in so many words. If the document had contained no more than such lists I could not have concluded that it was anything more than a draft or an aide memoire. However, when the deceased came to deal with Jomphol and Alicia (Kanisa) it is
very clear that he was addressing each of them directly. He intended Jomphol to read the document because he admonished Jomphol about his past conduct. Then, despite the admonition, the testator immediately made an effective disposition in the language of will-making: “I bequeath you A$500,000”.

Likewise, the deceased clearly intended Kanisa to read and understand what he had written to her. As with Jomphol, he expressed himself in words of immediate gift in the language of will-making: “I leave you A$500,000”, etc.

In the final paragraph, the deceased again uses the formal language of will-making, i.e. “bequeath” to refer to the specific dispositions which, he suggests, have been made earlier in the document. He then directs that the “balance of value” is to be divided equally between six of his children, including Kanisa.

I consider it to be of significance that the notebook containing the informal codicil was left by the deceased on the dining table, where it would doubtless be seen immediately, rather than left amongst other papers in some less visible or accessible place. As I have noted, in the weeks before he was taken to hospital the deceased was living alone in his home. There was nobody to whom he could easily give the informal codicil for safe keeping. It is highly possible, if not probable, that the deceased, realising that he would have to go to hospital very soon and that he might not have the opportunity of instructing his solicitors to draw a formal codicil, decided to write down his testamentary intentions in his notebook and leave it where it would easily be seen so that it could be given effect.

The informal codicil certainly contains vague terms as to the identity of various personal items to be given to various beneficiaries. This vagueness may give rise to problems of construction. However, there is nothing in the document as a whole to suggest that it is merely a rough draft or notes of instructions to be given to a solicitor. The document is written fluently and without multiple crossings out or insertions. Indeed, the deceased seems to have made an effort to control shaky handwriting and to write legibly.

For these reasons, I am satisfied that the deceased intended that the informal codicil form an alteration to the formal will. Both the formal will and the informal codicil will be admitted to probate.”
These were proceedings for the plaintiff to obtain a grant of probate in solemn form of the will of the deceased testatrix which was made on 24 December 2002.

Young CJ in Eq said at [2] “Were it not for a document of 15 February 2005, which the defendants say should be held to constitute Mrs Blake's last will pursuant to s 18A of the Wills, Probate and Administration Act 1898, there would be no doubt that probate should be granted of the 2002 will. However, the document of February 2005 at least purported to revoke the 2002 will.”

The document of 15 February 2005 as presented to the court had two separate pieces of paper. On the larger piece of paper, a double sheet, the first page was numbered 1 on the obverse side and on the reverse side the page was numbered 2. It appeared to have been torn from an A4 size exercise book. Pages 3 and 4 were blank, however, there was on page 3, that is the blank page, the impression of page 1 which showed that page 3 was directly under page 1 when the document was written. The separate and smaller sheet did not bear any impression of the writing on pages 1 or 2 and was a single sheet of paper which appeared as if it may well have been taken from the same exercise book, but it was not written resting on the double sheet.

The document was as follows:

“1
TUESDAY 15th FEBRUARY 2005 THIS DOCUMENT IS MY LAST WILL AND TESTAMENT. I HAVE ONE SON, PAUL JONATHAN BLAKE AND ONE GRANDSON DUSTIN BLAKE. I OWN MY HOME WHERE I HAVE RESIDED SINCE 1970 WITH MY SON PAUL JONATHAN BLAKE. MY GRANDSON, DUSTIN BLAKE RESIDES AT THE HOME OF HIS MOTHER ESTELLA CAMPBELL IN GOSFORD AND HIS STEPFATHER SCOTTIE CAMPBELL. I WISH TO REVOKE ALL PREVIOUS WILLS WHICH WERE DEPOSITED WITH MR PETER KENNEDY LAWYER OF SYDNEY N.S.W. AND MR LEON DAVIES LAWYER OF SYDNEY N.S.W. AT THIS TIME I HAVE SPOKEN WITH MR BRUCE HOCKING LAWYER OF SYDNEY N.S.W.

2
MAINLY ABOUT ESTABLISHING A DRAMA S IN MY SONS NAME PAUL JONATHAN BLAKE. BUT THIS IS STILL BEING NEGOTIATED I WISH MY SON TO BE CARED FOR IN MY HOME AT CASTLECRAG UNTIL HIS DEATH. PERPETUAL TRUSTEES WHO
MANAGE MY SONS ESTATE WILL APPLY TO THE COURT FOR DISTRIBUTION OF FUNDS HELD BY THEM, AT THE TIME OF PAULS DEATH. IT IS MY UNDERSTANDING THAT IF PAUL PREDEC ME [deleted] HIS MOTHER, THEN HIS NEXT OF KIN IS DUSTIN BLAKE TO WHOM CONSIDERATION MUST BE GIVEN REGARDING [deleted] CAREFUL MANAGEMENT OF HIS INHERITENCE.

5

VALUE OF MY HOME IN CASTLECRAG MONIES IN WESTPAC BANK (NORTHBRIDGE BRANCH AT THE TIME OF MY DEATH RENOVATIONS AND ADDITIONS TO MY HOME IN CASTLECRAG, UNDER MR DENNIS LEACH (ARCHITECT) OF LEACH & ASSOCIATES MR JOHN HERBERT BANNISTER [line deleted] [line deleted] IN THE EVENT OF MY DEATH IS TO BE CONSIDERED FINANCIALLY FOR HAVING FAITHFULLY SERVED PAUL, MYSELF AND THE STAFF IN CASTLECRAG, [deleted] IN ADDITION TO WHICH HE LIASED WITH THE ARCHITECT (LEACH) AND SIMPLIFIED THE COMPLEXITIES OF MY UNDERSTANDING [deleted] PLANS ETC.”

Young CJ in Eq (as his Honour then was) said “However, it is impossible to set out exactly how it appears in the handwritten original. For instance, where on page 5 two lines are crossed out, in the original before the crossing out they read: "MR JOHN HERBERT BANNISTER, DR DESERVES AND IS ENTITLED TO A FEE FOR HAVING FOR FAITHFULLY." In relation to s18A His Honour said at [10] “the section has been construed by courts on a number of occasions though there is little conflict in the various decisions. One of the early decisions is Re Masters (1994) 33 NSWLR 446 where the Court of Appeal made it clear that s 18A should be given a beneficial application. In Permanent Trustee Co Ltd v Milton (1995) 39 NSWLR 330 at 334, Hodgson J said that where a section 18A document operates as a will, then once the testator has evidenced the intention that that document operate as a will, “it is clear that it is not sufficient to deprive the document of effect that the testator forgets about the document or loses testamentary capacity.”

[11] So that once a testator evinces the intention, either at the time the testator makes the document or subsequently, that it is to operate as a will or revocation or an amendment under s 18A, then the document is not deprived of that effect by the testator afterwards forgetting about it. However, the fact that the testator does forget about it or acts inconsistently with it may assist the court to find that it was never intended to be a will in the first place.”
[13] The court must under s 18A be satisfied of certain things and that is that the document was intended by the deceased to constitute either a will or, in the present case, revocation.

[14] Courts look at various guidelines when working out that matter. One guideline is where the document was found. In the instant case, it appears that the 2005 document was found with other important documents. Secondly, whether the testatrix ever referred to the document. I will revert to that. Thirdly, the habits of the testatrix, was she a person who would normally approach a solicitor for things like this or was she a person who would tend to do things on her own bat or with the advice of a relative. And, fourthly, the text of the document itself. Of course, there will be other cases where other factors will also impinge on it.

His Honour said, in relation to testatrix's acknowledgement of the document [at 16] “the strongest the evidence appears to me to go is in paragraph 19 of the affidavit of Ms Marshall where she says that the testatrix phoned her on about 28 April 2007, that was about ten days before she died, and said that she had done a deal with the devil and that she thought that she was being overheard whenever she discussed things on the phone. She said: "I have done the wrong thing with a really important document, I was stupid doing it but I had to. I've written more paperwork and I've fixed it." Ms Marshall said: "Do you mean your will?" to which the testatrix replied: "It is not a safe line. We will talk when you come over next." However, there was no such occasion because the testatrix died.

[18] The document itself says that it is the last will and testament of the deceased, however, it hardly qualifies as a will because it neither appoints an executor, nor does it make any disposition of property. It also contains wishes such as, "I wish my son to be cared for", rather than setting out any firm arrangement. If the one page document is part of the whole document then it also shows that the testatrix was thinking about what property she had and what she should do with it.

[19] In my view, it is more likely than not that the odd page is part of the document. It is written, it would seem to me, in the same pen and on paper from the same exercise book. Furthermore, the text on page 2 shows that the testatrix was still thinking about establishing a drama studio or such in her son's name, but she acknowledged that this had not yet come to fruition. It was still being negotiated and, indeed, other evidence shows that this thought had come to her from time to time from at least 2002, but had never come to fruition. Accordingly, it seems to me that the whole document was one where the testatrix was setting down her thoughts about what she would do rather than something which was to operate as a testamentary instrument.
[20] It is clear from the authorities that ordinarily drafts or instructions to solicitors to prepare a will are not within s 18A because they are not intended by the testatrix to have immediate effect, but, as Hodgson J said in Milton’s case, it does not disqualify if it is intended to be an interim testamentary document to take effect until a solicitor prepares a better one.

[21] Speaking of solicitors, it is clear in this case that previous wills were made by the testatrix with the aid of a solicitor and this was acknowledged by her on the first page, which indicates that her previous wills were with two named solicitors and that further, she had spoken with a third solicitor about establishing a trust. It is, accordingly, unlikely that she would want her own writing to constitute a will.

[22] Accordingly, in my view, the document cannot operate as a will and that there is not the intention there that the document constitute the deceased’s will.

[23] The next matter is whether it can operate to revoke. Certainly she says, "I wish to revoke all previous wills". Now, one could be semantically precise and say that that was not a statement of revocation, it is only a wish of what she wants to do and, indeed, that would fit in with the general intention that the thing was to operate as a recording of her thoughts. However, if one put that thought aside and said: "Well, here we have the words, ‘revoke all previous wills’", surely that should be enough.

[24] However, revocation involves two elements, namely (1) a physical doing of something to satisfy s17 or s 18A; and (2) an intention. When one looks at the whole document one can see that primarily the testatrix was thinking that if this document was to operate, it was to operate as her last will and testament and that the revocation bit was only part of a whole. This marries in with the doctrine of dependent relative revocation, which is to the effect that if a testator revokes a will with the intention of setting up a new will, and the new will fails for some reason or other, then the revocation clause lapses or does not take effect.

[25] It seems to me that either there is insufficient evidence to show that this was merely an indication that when the new will was set up the old will would be revoked or, alternatively, if technically it does operate as a revocation, the doctrine of dependent relative revocation applies. It follows then that I cannot give this document, which is DXO1, testamentary effect, either as a will or as an instrument of revocation, and thus the plaintiff is entitled to a grant of probate in solemn form of the will of 24 December 2002.”

In relation to costs, His Honour said:

[29] The question then is whether the first defendant is entitled to any costs. The rule is that in adversary proceedings, the person who is successful gets his costs and the
person who is unsuccessful pays the costs. However, an exception, which is relevant in this sort of case, is that where the problem has been caused by the testator it is fair that the estate should bear all the costs of undoing the problem the testator caused.

[30] It would seem from a surface look at the authorities that in s 18A cases if the testator has written the document which causes the problem, as is clear that the testatrix did in the instant case, and that the case is one which at least should not be struck out, that ordinarily the costs are paid out of the estate on the party and party basis. I think the instant case comes within that exception. Accordingly, the first defendant's costs should be paid out of the estate on the party and party basis and I suppose it follows that the second defendant's costs on a submitting basis should also come out of the estate.

Handwriting Experts and Informal Documents - Kwon v Tran [2010] NSWSC 1092

The relevant issue in the substantive proceedings was whether a statutory declaration apparently made by the deceased on 10 September 2005 and apparently before William Tricker JP ought be admitted as an informal will pursuant to s 8 of the Act. The defendant in the probate proceedings (2008/299069), who is the deceased's widower, applied for leave to obtain and adduce the evidence of an expert handwriting witness as to the authenticity of the signature which appeared as that of the deceased on the statutory declaration.

Mr Tricker had sworn an affidavit in the proceedings, deposing that the statutory declaration was made and signed by the deceased in his presence on 10 September 2005. He also deposed that he had on a previous occasion witnessed a guarantee signed by the deceased.

Two specimen signatures of the deceased, one on a passport and one on a bank authority, were in evidence. There were some minor differences between each of those specimen signatures and the signature that appeared on the statutory declaration, however His Honour said that they could not be said to be outside the normal range of variation for an individual's signature. He also found there were significant consistencies between the two specimens and the questioned signature. However, the specimens were photocopies, and the observations of an untrained and uneducated eye of a judge are not of a handwriting expert.

His Honour ultimately concluded that the plaintiff was likely to be prejudiced greater than the defendant in any decision refusing leave to adduce expert evidence. He ordered that an expert be engaged jointly by the plaintiff and the defendant in respect of the question arising
in the proceedings whether the signature purporting to be that of the deceased Thi Nam Kwon on the statutory declaration of 10 September 2005 is authentic.

**One witness, not two - Estate of Johnston [2010] NSWSC 382**

This was another case under section 8.


The informal document was not witnessed in compliance with the formal requirements of s 6(1)(c) *Succession Act* 2006 (NSW) in that only one of the two required witnesses executed part of the document. The principal issue for determination in the case was whether the informal document was intended to form the testator’s will. If the Court found that the informal document was so intended, the Court can dispense with the usual requirements for the execution of a valid will: s 8 (2) of the *Succession Act*.

The matter for determination was whether the testator intended the informal document “to form” his will.

His Honour also commented that s 8 “should not be applied with too stringent a requirement of proof that a propounded document otherwise clearly embodying the testamentary intentions of the deceased does constitute his will: *Re Estate of Masters; Hill v Plummer* (1994) 33 NSWLR 446 at 452V per Kirby P. It would be a mistake to regard the third element of Powell JA’s elements as requiring evidence that the deceased consciously set his or her mind to the legal formalities for will making”.

The informal document that the testator created consisted of three parts. The first part described itself as “the Last Will and Testament of Mr Ronald George Johnston of RMB 106 Nelson Bay Road, Fullerton Cove in the State of New South Wales, Company Director”. This first part appointed an Executrix and Trustee “of this my will” and then gave the whole of his estate to her absolutely. The first part also provides that should a Ms Johnston not survive the testator then two friends of the testator, Messrs Taggart and Jackson are appointed as executors and trustees, upon the trusts then provided for in detail.

In summary the trusts created dispose of the whole of the testator’s interests in various classes of shares in a family company. Throughout the document the words “this my will” were used. This first part of the informal document ended with an attestation clause. Were it executed in conformity with *Succession Act* s 6 it would on its own operate as a complete will of the testator.
The second part of the informal document was headed “Schedule 1” and set out a list of powers that the trustees “in the execution of their office as trustees of the trusts created under this will may exercise in their discretion.” These powers included “any powers given to [the trustees] by law” and any powers and rights as if the trustee “was the absolute owner of the Trust Fund”. The second part then extensively list a series of additional powers, said to be “without limitation” as to the previous broader description of the trustees powers earlier in the second part of the informal document headed “Schedule 1”.

The third part of the informal document is entitled “Memorandum of Wishes” and declared itself to be a memorandum made “to indicate to the Executors and Trustees of my Estate the manner in which they should deal with the assets and affairs of the Johnston Family Trust inter vivos effectively controlled by me during my lifetime”. The “Memorandum of Wishes” then gave directions as to how the testator would wish for the assets of the Johnston Family Trust to be administered. However the third part of the informal document declared that it “…is signed in the knowledge that my Executors and Trustees will not be bound by the terms of this Memorandum.”

The testator and other persons present executed the informal document defectively. The last page of part one, was signed by the Testator next to a usual form of attestation clause that describes the steps for attestation in conformity with s 6 Succession Act. No other page of part one was signed or witnessed. Part two of the informal document “The Schedule” was neither signed nor witnessed by the testator. Part three of the informal document the “Memorandum of Wishes” was signed by the testator and witnessed by Mr Langsford whose full name and address were also recorded. No other handwritten markings appeared on the informal document. The manner of execution tended to indicate that the testator regarded the informal document as one whole document rather than three separate documents.

There were no signatures complying with s6 in the informal document. The testator’s daughter identified her father’s signature at the foot of part one of the informal document. She also attests to the fact that her father did not re-marry after the informal document was made.

His Honour said at [16]:

“When making the s 8 Succession Act decision in this case all the evidentiary sources in s 8 (3) are useful including s 3(a) “evidence relating to the manner in which the document or part was executed” and s 3(b) “evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person”. All these categories of
evidence in this case base an inference that the document reflected the testamentary intentions of the testator."

The Court considered the following as relevant factors:

(a) the testator spoke and gave instructions to his financial advisers to create the document. The testator’s accountant attested to taking detailed instructions in 2005 from the testator and Ms Johnston to prepare their wills. He had a discussion with and invited one Mr Taggart to consent to being an executor of the estates of the testator and Ms Johnston.

(b) the instructions to Mr Jackson required him to consult solicitors to prepare wills for Mr and Mrs Johnston, and arrange for the wills to be checked and executed.

(c) once the solicitors had prepared the informal document and upon his checking with the testator and Mrs Johnston, Mr Jackson received their instructions that their prepared wills accurately reflected their testamentary wishes and that they wished to sign them. On the day of execution Mr Langsford, a financial planner conducting his practice in the same building as Taggart Partners, was called into a meeting with Mr Jackson and the Johnstons to witness the testator and Mrs Johnston signing their wills. Mr Langsford and Mr Jackson observed that Mr and Mrs Johnston signed what was described as their “wills”. Mr Langsford did sign his name at the end of the document entitled ‘Memorandum of Wishes’. All of this indicates an intention that the informal document was to be a will.

Further, the detail of the will and the care with which it has been drafted to dispose of his “A” class shares in the family company to his daughter and his grandson and then the giving of various portions of his “B” class shares to a range of named family members in various proportions was found to be by his honour as strongly indicative of a well developed intention on his part to treat the informal document as his will. The time and trouble that was invested in its drafting and the conspicuous care with which it has been physically set out, for the testator’s approval all pointed to the testator intending the informal document to be his will.

Additionally, it was with only very minor adjustments that the will was in terms almost identical to the testator’s 14 June 2001 will which was executed in conformity with s 7 of the Wills Probate and Administration Act 1898 (NSW). The two documents showed such similarity of detailed intentions that it could be inferred that the latter document was intended to have an equivalent testamentary effect to the earlier document.
The testator and his wife executed complementary informal documents in the same fashion at the same time. The two documents were both defective as wills by reason of the same omissions of witnesses' signatures.

Mrs Johnston's participation in a joint execution ceremony with an instrument in the complementary form assisted the inference that the testator intended to create a will on this occasion. It was difficult to explain such formality involving both of them other than as to make their wills.

His Honour was satisfied that the testator intended the informal document to form a will and made the declaration.

_Yazbek v Yazbek [2012] NSWSC 594_ – Microsoft Word file Will.doc an informal will

Daniel Yazbek ("Daniel") died at the age of 39 on 18 or 19 September 2010. In the proceedings the plaintiff, ("Alan"), one of Daniel's brothers, propounded an informal testamentary document as Daniel's will. The defendants, Ghosn Yazbek ("Ghosn"), Daniel's father, and Mouna Yazbek ("Mouna"), Daniel's mother said Daniel died intestate.

Alan claimed that Daniel prepared a Microsoft Word document, entitled "Will.doc" on his computer between 11 and 14 July 2009, just before he left for a holiday on the Greek Island, Mykonos. It was later found on Daniel's computer. Alan says that Will.doc recorded Daniel's testamentary intentions and that Daniel intended it to be his will. The primary issue in dispute was whether the electronic document, "Will.doc", or a printed out paper copy of Will.doc, satisfied the requirements of s8 of the _Succession Act_ 2006 sufficiently for the Court to declare either to be Daniel's last will.

Ghosn and Mouna said that Daniel did not intend Will.doc to be his will. They contended that if he intended anything to be his will it was the paper copy of Will.doc; that he printed out and signed. Daniel's parents further said Daniel destroyed the printed document thereby either (1) revoking his will represented by the paper document and (2) negativing any inference that the surviving electronic document, Will.doc, continued to reflect his testamentary intentions or that he continued to intend Will.doc to be his will.

The plaintiff sought a declaration pursuant to _Succession Act_, s 8 that the content of Will.doc was Daniel's last will. The plaintiff's Amended Statement of Claim sought probate of Will.doc rather than the printed document. Will.doc and the printed document, were accepted as necessarily having the same text. But Daniel may have treated them differently.
The police searched the folders of documents created by the deceased. In the computer's C drive at "C:/users/danielyazbek/documents/will.doc" the police found an electronic file named "Will.doc". According to the technical evidence adduced, where Will.doc was found on the computer was a conventional and system-designated place for a user to store personal and business documents. Will.doc was printed out and examined. Will.doc's metadata (embedded data showing the document's history and technical characteristics) and the computer's other technical information about its creation, editing and printing was analysed.

Will.doc provided in full as follows:-

"Dear Family,

I want to say that it was an absolute pleasure to be a part of this family in this life. I want to say to mum and pop that I could not ask for more in a parent.

Mum, your unconditional love is the reason I made it to 38 and that I will never forget you. You were the soul of my very existence.

Pop, thankyou for being there for me. I know in my heart that you loved me more than words could have ever been said.

To all of my brothers and sister. Thankyou for everything and every memory that I have of you all.

I want to tell you all that I love you all and will miss your company in every way.

Following is the list of things that I have accumulated over the years and would like to hand out to the following persons.

MUM- I want you to have the car of your dreams. With the equity I have I want you purchase whatever you want.

POP- I know that you don't want anything but my love, so this is yours.

ANWAR- I want to give you my Ibanez guitar, my CD collection any electrical goods I have. Plus $100,000 from my equity in my Ashton st property.

DAVID- I want to give you $50,000 in cash from the equity in my Ashton st property.

MAL- I want to give you $50,000 in cash from my superannuation fund.

AL- I want to give you all of my architecture books and 50% of my equity in our business.
MAT- I want to give you my motorbikes, and 50% of my equity in our business and my equity in Stewart st property.

AMANDA- I want to give you [address not published] Lorna ave, and my share of money overseas.

CHRIS, MIKEY & ROCCO- Thanks for our friendship. I could not ask for better friends.

Ps I want you to tell of my friends that I love then and will miss them all.

Pss I want to give my Gibson Les Paul to rocco and $20,000 which I have in my savings accounts with Westpac and commonwealth bank so you can finish your album.

Love and light

Daniel Yazbek."

The name "Daniel Yazbek" at the end of Will.doc was not in the form of an electronic signature, reproducing his handwriting. The words of his name were typed like the rest of Will.doc. His Honour found the internal evidence of Will.doc strongly supported the inference that Daniel created it. Daniel's password could have been discovered by other users by trial and error methods. But there was no suggestion in the evidence that any other individual was either in a position to access Daniel's laptop or had any motive to create documents such as Will.doc on Daniel's laptop. From this evidence and some later evidence that it was unlikely that other users had access to Daniel's laptop, His Honour inferred that Daniel created Will.doc. But Will.doc was best analysed in the light of Daniel and the family's history.

Mr Girgis was the sole source of evidence supporting the existence of any printed copy of Will.doc. Mr Girgis said that in July 2009 Daniel was leaving to go to Mykonos by taxi. He stopped outside the Crown Street office on the way to the airport. Daniel said to Mr Girgis "if anything happens to me there is a will on my computer and also one at home in a draw". Mr Girgis said "don't worry about it, Dan, it will be fine". Daniel grunted a reply, "something he commonly did".

Mr Girgis committed himself to this version before a will was actually found on the deceased's computer by telling family members after Daniels' death of what Daniel has told him. This caused the Police to search Daniel's computer.

There was another conversation of significance at the time involving the deceased, but which only emerged after his death. The conversation was between Matthew and Daniel
about two weeks before Daniel's death. Its occurrence was strongly contested. The conversation was revealed after Daniel's death, when Mal and Matthew were speaking.

Mal's account which the Judge accepted was that a conversation took place at their parents' home at Blakehurst on the Monday or Tuesday after Daniel had died. Mal says that Matthew and he were discussing events prior to Daniel's death and that Matthew said to him "About two weeks ago Daniel came to me in my office and said: ‘You know I have a will don't you?’ and I said to him: 'So?"' Mal recalled that Matthew then said "Dan gave me one of those stupid grins and he walked away". Mal said, that he recalled thinking at the time of the conversation with Matthew why Matthew did not question Daniel further. Matthew did not recall the conversation. The Court inferred that the time that Daniel was having this conversation with Matthew was about 7 September 2010.

These three technical reports were provided: (1) mainly dealt with the creation and editing of Will.doc; (2) mainly dealt with Daniel's last access to the computer and the police and lawyers' access after Daniel's death; (3) mainly dealt with the printing of Will.doc from the deceased's computer and some analysis of the contents of a desktop computer located in Daniel's office at the restaurant.

After examining the laptop Mr Snell prepared his first report - 16 March 2012, which recorded findings about how and when Will.doc had been created and dealt with by Daniel on his Toshiba computer, apart from any detailed consideration of the issue of printing Will.doc. His technical findings appear below, followed by the inferences about Daniel's conduct in relation to Will.doc that the Court drew from them.

(i) The electronic copy of Will.doc found by Mr Snell on Daniel's computer was identical to a printed copy he had been given by the parties' solicitors.

(ii) There was no duplicate, or near duplicate, or file similar to Will.doc elsewhere on Daniel's laptop.

(iii) Will.doc was first opened on the laptop as an untitled blank Microsoft Word document at 7:08pm on 11 July 2009. Will.doc was created, by being electronically saved with that particular file name, the same day, 27 minutes later, at 7:35pm. It was last modified on 14 July 2009 at 1:35pm. The first time that the electronic copy of Will.doc was saved was the operator's manual saving at 7:35pm on 11 July 2009.

(iv) Will.doc had changes to it saved four times during the period between 7:35pm on 11 July 2009 and 1:35pm on 14 July 2009.
(v) Will.doc was opened for a total editing time of 34 minutes. This comprised the 27 minutes between 7:08pm and 7:35pm on 11 July 2009 and another 7 minutes between 7:35pm on 11 July 2009 and 1:35pm on 14 July 2009. The computer did not retain information from which it could be determined with any more precision just when this editing time occurred.

(vi) Will.doc was last accessed, prior to Daniel's death, on 1 September 2010.

(vii) The precise form of the edits to Will.doc cannot now be determined by expert analysis, because the track changes feature in Microsoft Word was not enabled as the editing occurred.

(viii) Because Microsoft Vista neither updates access times nor keeps file location history as part of the file system metadata, it could not be determined whether Will.doc had either been copied or moved. If it had been copied, the copy was not left on the hard drive.

(ix) Will.doc was not sent by email - either attached to an email sent via Microsoft Outlook or Hotmail (access via http://login.live.com/).

(x) There was no upload or download activity specific to Will.doc suggesting that Will.doc was either uploaded to or downloaded from the internet.

What did the technical findings mean? There was no evidence other than Mr Snell's technical findings about how Daniel created and edited Will.doc. But using the technical findings a reasonably clear picture was traced of what Daniel did with the document.

Daniel was leaving for Mykonos on 14 July 2009. The date was fixed because his passport showed he arrived at Heathrow in the United Kingdom on 15 July 2009. On 11 July 2009 at about 7.08pm, he commenced to construct Will.doc, initially just as an unentitled Microsoft Word document. He worked on the document for 27 minutes and then saved it for the first time when he closed it at 7.35pm, apparently choosing the document title "Will.doc". The Court found this was the time when the bulk of the text of Will.doc was likely to have been created.

Between closing Will.doc at 7.35pm on the day that he created it, 11 July, and leaving for Mykonos, Daniel spent a total of another 7 minutes in editing the document, which he last saved at 1.35pm on 14 July 2009. He must have caught his flight to Mykonos within 12 hours of closing the document. But just when between the evening of 11 July and the early afternoon of 14 July he did that 7 minutes of editing and how extensive it was is not possible to say. All that could be said was that in the course of so editing the document, he saved his changes a further three times. It did not appear during this period that he emailed the
document anywhere. But it would not be now determined what changes he made in the editing process and whether he may have made copies that did not now remain on the computer.

This evidence tended to suggest a logical plan of completing the document right up until just before he left to catch his flight to Mykonos. Daniel considered the document over a period of just under three days. The recency of the computer activity objectively supported Mr Girgis' version that Daniel told Mr Girgis on the way to the airport that he had left a will in his computer. The co-incidence in time between his statement to Mr Girgis and what he was doing on the computer was sufficient evidence to found the inference that he was speaking to Mr Girgis about the very document that he was then creating and which is now Will.doc.

Mr Snell found there was no record of the electronic copy of Will.doc being printed either to a physical or a virtual printer. Mr Snell also found that the metadata suggested that the electronic copy of Will.doc was not printed.

Mr Snell clarified Will.doc was definitely not accessed after 1 September 2010. His Honour inferred from this evidence that Daniel opened Will.doc on 1 September 2010 and looked at it. He did not wish to make and save any changes that day. He was content to leave Will.doc on his laptop as it was and as it was later found. Daniel had not saved on 1 September 2010 any changes that he may have made that day to Will.doc.

Mr Snell concluded that, based on the computer's operating system, Microsoft Vista, event logs and the metadata properties for the Will.doc file, Will.doc had not been printed out. But Mr Snell's later view was that it was not possible conclusively to state that the document was not printed out. But the defendants could not establish from the expert evidence that Will.doc was printed. They relied, instead, on the evidence of Mr Girgis and general inferences about computer users habits in dealing with documents on computers, to have the Court infer that the document was printed.

Mr Snell conceded that Will.doc may have been printed but that any such act of printing perhaps could not now be detected among the residual electronic data left on the computer, because Will.doc was not saved after such printing.

Because the Court accepted Mr Girgis' evidence and inferred, from that evidence alone, that Daniel printed Will.doc, it was ultimately not necessary to rest the inference of a printing on the technical material. But the material did show that there was not a major technical obstacle to Daniel having printed the document as Mr Girgis said he did. And it is consistent
with printing having occurred that there was nevertheless no residual electronic trace of that printing.

The plaintiff relied on the meaning of "document" provided in Interpretation Act, s 21, "anything from which sounds, images or writings can be reproduced with or without the aid of anything else". The plaintiff's argument was accepted that Will.doc was "something from which images or writings can be reproduced with or without the aid of anything else". Will.doc can be reproduced either with the use of Microsoft Word or by printing Will.doc using Microsoft Word's command and the operating system to print a copy of the electronic file.

Once Will.doc is printed out, the printed document would also be a "document" within Succession Act, s 8, as would Will.doc itself.

His Honour concluded that Will.doc purported to state Daniel's testamentary intentions for a number of reasons. First, the terms of Will.doc purported to distribute the significant parts of Daniel's estate, including his real estate, motor vehicles, bank accounts and superannuation. Daniel's gifts in Will.doc: (1) accounted for a high proportion of the total value of his actual estate; (2) represented a well-considered survey of each significant asset in his estate and disposed of many of such asset to persons who have an existing connection with the assets they were to receive, with the possible exception of his parents; and (3) dealt with the expected principal claims on Daniel's bounty.

Secondly, the deceased saved Will.doc using the Microsoft Word "Save as" function and in doing so gave it the Microsoft Word document title "Will.doc". The Court inferred that Daniel selected this document name, from the many possible document names he could have selected, for a reason. A "will" is a very commonly understood means of recording testamentary intentions.

Thirdly, the deceased used the arresting words "I want to say that it was an absolute pleasure to be part of this family in this life", to introduce the distribution of his assets. The deceased speaks of his own life as only existing in the past. These are words of thanks for that past. His description of the role of his parents in his life operates the same way, "I want to say to mum and pop that I could not ask for more in a parent". A strong inference arises from these words that the deceased intended the subject matter that he was to enter upon in the letter as a subject matter which should apply at his death, and not to operate as a gift during his lifetime. The document showed other unmistakeable signs that the deceased believed he would not be alive at the time that the document would be read. He said to his brothers and sister "thank you for everything and every memory that I have of you all" and "I
want to tell you all that I love you all and will miss your company in every way”. In his ‘Ps’ he thinks of his friends, and says to his family, "I want you to tell of my friends that I love then (sic) and will miss them all". The Judge inferred that the deceased intended that the terms of Will.doc were to operate on his death.

Fourthly, Will.doc was written in the form of a letter to Daniel’s family, commencing with the words, "Dear family", and concluding with an ethereal salutation, "Love and light, Daniel Yazbek". The testator’s embedding of these poignant messages to his family into a single letter with the detailed individual dispositions of his property, reinforced the idea that the contents of Will.doc were testamentary in character.

Whether the Succession Act, s 8 third requirement was satisfied raised issues about the deceased’s creation and management of Will.doc as an electronic document and about the content of Will.doc as in part, a "suicide note".

A feature of Will.doc was there was no evidence that it was ever signed; that the printed document was ever signed. In the application of Succession Act, s 8 this can sometimes assist an inference that the deceased did not intend the document to operate as a will.

In Yazbek, two arguments were advanced by the defendant: that Will.doc only operated as an interim will; and that Will.doc was only a draft.

Did Daniel Intend that Will.doc Operate as an Interim Will? – Stop Gap Wills

The defendants argued that Will.doc, or the printed document should be characterised only as holding documents. Their argument was that Daniel intended that Will.doc only stand as his will until he returned from Mykonos in 2009.

Slattery J said:

“The law in relation to informal wills acting as interim measures is stated in Permanent Trustee v Milton Estate of Herma Monica Brooks (1996) 39 NSWLR 30 and in Public Trustee v New South Wales Cancer Council; Re Estate of McBurney [2002] NSWSC 220. Those cases consider two circumstances in which informal wills acting as interim measures may arise, being, as Hodgson J said in Permanent Trustee v Milton Estate of Herma Monica Brooks, "(1) What if the deceased having evidenced the requisite intention in relation to an existing document, subsequently changes that intention and clearly manifests that change of intention without actually altering the document. (2) What if the intention which is initially manifested is in effect, an intention that the document be a stop gap measure, which is to apply only
until the testator or testatrix has had an opportunity to make a formal will, and the opportunity passes without a formal will being made": Permanent Trustee v Milton Estate of Herma Monica Brooks at 334-335 per Hodgson J and Public Trustee v New South Wales Cancer Council; Re Estate of McBurney at [47] per Einstein J.

In this case, the defendants’ argued that Will.doc was a mere interim measure, intended to have effect until Daniel returned from Mykonos. But nothing either in the terms of Will.doc or in the other evidence of how Daniel referred to it or dealt with it suggested that he intended Will.doc should operate only until he returned from Mykonos. Moreover, the reason as to why Will.doc was not an interim measure, was also reasons that showed that Daniel continued up until the time of his death to state his testamentary intentions and to form his will, within Succession Act, s 8.

First, the Court accepted Mr Girgis’ evidence as to what the deceased said about the document before leaving for Mykonos. Nothing in that evidence suggested that the document would only operate as a will whilst Daniel was travelling. Overseas travel and the possibility of encountering the unexpected can be an occasion to prompt an individual to make a will. But that did not mean that the will so made must only operate whilst the person is overseas.

Secondly, the internal evidence of Will.doc did not support a conclusion that it was only a stop gap. Will.doc did not refer to the trip to Mykonos, or place any time restriction on its effect. It had only one internal time-specific reference point, the end of Daniel's life. It had messages within it to Daniel's family that he was unlikely to have wanted to change.

Thirdly, the expert evidence was that Daniel accessed Will.doc on 1 September 2010, about 14 months after he first created it, and did not delete it. Nor did he remove the expressions of testamentary intention within it. He was a sufficiently sophisticated user to either delete the document if he had wished to do so. He was quite able to remove the testamentary character of the document without deleting it. This was a basis to infer that he continued to regard Will.doc as his will and that it was not an interim measure.

Did Daniel Intend that Will.doc was a draft? – Draft Wills

The defendants put their argument another way, such that Will.doc only really operated as a draft. The argument supported the defendants’ wider contention that Daniel only intended the printed (and they submitted then executed) document to form his will.

The Courts have recognised that Succession Act, s 8 will not apply to draft wills. In Estate of Masters (1994) 33 NSWLR 446 at 455F Mahoney JA said: "a document which is in form a
will will not operate as such if it is, for example, a draft or ‘trial run’, not intended to have a present operation. A person may set down in writing what are his testamentary intentions but not intend that the document will operate as a will. This may occur, for example, in informal circumstances, in a letter or a diary or the like. What is to be determined in respect of a document propounded under s18A is whether, assuming it to embody the testamentary intentions of the deceased, it was intended by the deceased as his testamentary act in the law, that is, to have present operation as a will”.

Daniel did not intend Will.doc to operate only as a draft. Nothing in the terms or form of Will.doc suggested that it was intended only to operate as a draft. It was not headed "Draft". It contained no internal evidence that Daniel was yet to complete or add to any part of it. The messages to Daniel's family appeared to be well-formed final statements. Though written in the form of a letter it did not have a street address such as might indicate that Daniel intended to print it out and post it, possibly after signing. Moreover, it being printed did not relegate it to mere draft status.

**Conclusion - Whether Daniel Intended Will.doc to form his will**

His Honour concluded that Daniel intended Will.doc to form his will for the following reasons. First, Daniel named the electronic file "Will". This was his choice, not a default option associated with saving the document. This act of naming the electronic file also supported the second *Succession Act*, s 8 requirement that the document state testamentary intentions. But it went further and supported the third requirement too.

Secondly, Daniel told people that he had a "will". The tenor of the conversation with Mr Girgis was that the will-making process was complete: “there is a will on my computer and also one at home in a drawer”.

Thirdly, in 2009 Daniel's imminent international travel was a reason for him to prepare an instrument which would operate, without more, upon his death, namely a will. His Honour inferred from the technical evidence and Mr Girgis' evidence that Will.doc was created just before Daniel's trip to Mykonos.

Fourthly, Daniel typed his name on the second page of the electronic document after the final salutation. That represented a degree of adoption of Will.doc as operative. This effect of typing the name was reinforced by the messages of affection to his family in Will.doc, matters which are also relevant to the second *Succession Act*, s 8 requirement.

Fifthly, whenever Daniel referred to the existence of his will, he referred to it as being, at least, on his computer and Will.doc was found undeleted on Daniel's computer. Daniel's
computer was in his custody at his death; the computer was password protected and not accessible without the password. Although the password was not challenging to discover. Thus he had continued to keep what he told others was his "will".

Sixthly, Daniel opened Will.doc just over a fortnight before his death, supporting the inference that he then reviewed and was prepared to leave Will.doc in the place that he had told others that his will was. He did not delete it on this occasion, nor change its testamentary elements. He reaffirmed it as his current will by telling Matthew at about the same time that he had a will.

Other matters suggest that Daniel did not intend Will.doc to form his will: the informal language used in Will.doc; and, the words in Will.doc - "Following is the list of things that I have accumulated over the years and would like to hand out to the follow persons" arguably do not specifically convey testamentary intentions. Daniel also kept printed copies of other important documents. The defendants argued this suggested that if Daniel intended the printed copy to be his will he would have kept that printed copy with his other important documents.

The Court found that Daniel intended Will.doc to form his will. Consequently, because Will.doc was (1) a document, (2) expressing Daniel's testamentary intentions, (3) which Daniel intended to operate as his will, the Court exercised its power under Succession Act, s8 to dispense with the requirements for the execution of wills.

See Tristram, Application of Eunice Helen [2012] NSWSC 657 per White J where his honour did not admit to probate two documents found on the deceased's computer saved with the description "willcalcs.xls" and "will.doc.".

SOLICITOR’S DRAFT WILLS

In Re Estate Sharman; Ex parte Versluis [1999] NSWSC 709, Justice Young was invited to admit to probate a draft Will prepared after instructions from the testatrix's daughter had been conveyed to the solicitor. The testatrix was content with an altered draft and a final document was typed but never seen by the testatrix.

His Honour said -
"35 There are great difficulties, when the testatrix has never seen the document, in coming to the conclusion that she must have intended that that document should operate as her will. In one of the early decisions on s 18A of the Act Re Brown (1991) 23 NSWLR 535, Powell J indicated that it was possible but very, very difficult that such could be the case. That it could be so was illustrated in The Estate of Vauk (1986) 41 SASR 242 where, as appears on p
245, just before committing suicide there was a note from the testator, "There will the PU Trustee - changed: to be valid!"

36 The note had been affected by the fact that it had somehow or other become cut and come under the testator's body. Legoe J held that the document should be admitted to probate as there was no reasonable doubt that the document, which the testator had never seen, drafted by the Public Trustee was by his note to constitute the will. That, however, is really a case on very exceptional facts.

37 Here the testatrix knew that wills had to be executed. She knew that the solicitor was going to send the will out. She may have been content because she thought all the processes were over, but there is insufficient material for me to conclude that she at that stage thought a document, which may just have been brought into existence at the moment her daughter was speaking to her, or may not, the evidence is equivocal, was at that moment to constitute her will."

The document was not admitted to probate.

ALTERATIONS

In the Estate of Margaret, deceased [2012] NSWSC 1490 – per White J

The deceased had 4 children: Catherine, Roslyn, Mathew and Louise.

Louise had 4 children.

The deceased left a will dated 19 November 1998 appointing her son Mathew and her daughter Catherine as her executors

The issue was whether the handwritten alterations to the will were intended by the deceased to form her will, or an alteration to her will and should be admitted to probated pursuant to s8 of the SA.

The relevant terms of the will were:

“1 I GIVE the whole of my estate to my executors ON TRUST-

1.1 as to 75% of my estate equally for such of my children [MATHEW], [CATHERINE] and [ROSLYN] who survive me;

1.2 as to the remaining 25% of my estate equally for such of my daughter [LOUISE] and her children [ALISTAIR], [DUANE], [CHRIS] and [CLARA] as survive me and attain the age of 21 years;
If any beneficiary under this will dies before obtaining a vested interest in my estate, but he or she leaves one or more children, then that interest in my estate is divided equally among such of that beneficiary’s children who survive me and who attain the age of 21 years.”

The alleged alteration was contained on a photocopy of the will before it was executed.

White J presumed the deceased had inserted the date of 19 November 1998 on the copy document. Clause 1.2 was roughly crossed out. Against clause 1.1 next to the semicolon that concluded the clause, there was printed in handwriting the word “LOUISE.”

Louise contended that it should be declared that the document with the handwritten alteration was intended by the deceased to be an alteration to her will and that she was entitled to a 25% share of the estate, rather than the 5% share to which she was entitled under the will of 19 November 1998.

The reason the deceased did not leave 25% share of the estate to Louise in the 19 November 1998 was because of Louise’s failure as a parent.

The deceased said to Catherine a number of times words to the effect:

“I want [Louise’s] children to have something themselves from my estate: I am concerned that a gift to [Louise] would be spent on drugs and that her children would be left with nothing.”

The deceased told Clara (her grandchild) in mid to late 2009 that:

‘I’m going to make you financially secure in my will. Your mother has not given you any security while you were children and will not do so – I want you to have a better life than you have had as children.”

Louise deposed in an affidavit that in 2005 or 2006 she raised with her mother whether or not it was still appropriate the she and her 4 children were to share the deceased’s ¼ share of the estate under the will. Louise asked the deceased whether she might want to reconsider providing Louise with the same share as her siblings, leaving it up to Louise to benefit her children upon her death.

The deceased said she would like to talk to her close friend Pauline, and then would decide what to do.

In her oral evidence at trial, Louise went on further. She said her mother told her she wanted her to have one-quarter share of the estate and that it would be up to her what to give her
children, or they could inherit after her death. Louise said that her mother told her that it would be a waste of time to give the estate to Louise’s children as they would blow it on drugs. White J found this was an accusation readily made by Louise against her own children and by her children and siblings against her.

This evidence was missing and inconsistent with Louise’s affidavit – Judge did not accept Louise’s oral evidence of her mother’s stated intentions.

Mathew (Louise’s brother) stated that on many occasions between 1998 and 2007 the deceased told him she did not want to change her will. She repeated this in 2009. Catherine stated that in 2010, her mother told her Pauline was nagging her to change her will but she had no intention of changing it.

After Margaret was admitted to hospital, Pauline sorted Margaret’s paperwork. On 15 October 2010 she found the original 1998 will. Pauline asked Margaret if she wanted to change her will. Margaret looked at both pages and said, “No, leave it as it is, I don’t want the hassle.” She did not say she had already changed the will.

Two weeks later Pauline found an unsigned copy of the 1998 will with Margaret’s handwriting. Pauline deposed that she said to Margaret words to the effect:

“‘You’ve got this Will’ and ‘You have an alteration’ and ‘It would be best if you have it rewritten’ and ‘We can get a solicitor to do it quickly for you.’ She replied with words to the effect - ‘Leave it. It will be alright. I don’t want to go through the hassle.’”

Pauline also said that there were one or two occasions when she spoke briefly to Margaret about re-executing her will and on each occasion the deceased “would simply reaffirm her wishes, but she did not want to have another will prepared and signed.”

Margaret declined to take any step to have a new will prepared by a solicitor or to do anything more to formalize the handwritten changes.

White J held that the document was not sufficient to be admitted to probate and said that the physical form of the document was an important consideration in drawing inferences about the deceased’s intention, specifically:

1. Handwritten alterations were not made to the original will – only to a copy
2. Clause 1.2 was roughly scribbled out
3. Whereas clause 1.1 and 1.2 included full names, Deceased only wrote ‘Louise’ against clause 1.1

4. Clause 1.1 was not changed to delete reference to 75% of the whole estate passing to Margaret’s children. Remaining 25% would pass to her children on intestacy. Although it would make no difference in this instance, it is unlikely the deceased would intend that her will deal with only 75% of the Estate

5. The deceased did not attempt to give any formal effect to the handwritten changes.

From this, White J said that one could infer that the deceased was *contemplating* changes, but did not intend for them to take effect.

Further, in the discussions Pauline had with Margaret about formalising the changes, Margaret did not say that she had already changed it. If she believed that the handwriting had already changed the will, one would expect the deceased to have said that she had already changed the will. The deceased’s response when she was asked about the document with the handwritten changes is equivocal. Counsel for Louise submitted that by responding to Pauline’s suggestion that a solicitor be brought to rewrite the will by saying “Leave it. It will be alright. I don’t want to go through the hassle”, the deceased was adopting the changes and was expressing her intention that they operate as an alteration to her will. This, it was said, is what the deceased meant when she said “Leave it. It will be alright.”

In the Judge’s view, that was not the effect of the evidence. The deceased was saying that she did not want to be troubled by having to re-do her will. She was dying. She did not want the hassle. Louise’s claim was dismissed and she was ordered to bear her own costs.

**Stop Gap Wills & Documents Written in Pencil**

*Bolger & Anor v McDermott & Anor [2013] NSWSC 919 per Hallen J*

In *Bolger*, the Plaintiffs sought declarations pursuant to s8 SA in respect of two documents namely a 2009 handwritten document and a 2009 typewritten document which were said to have been signed by the deceased but not witnessed.

His honour considered a submission that the documents were intended by the deceased to be a "stopgap will" and said the following about the term ‘stop gap wills’ at [111 - ]:
“It has been used to refer to a document that a person has made, intending it to operate as his, or her, will, until a more formal and complete document is prepared: Macey v Finch; Estate of Donald Munro [2002] NSWSC 933.

I refer to NSW Trustee and Guardian v Pittman - Estate of Koltai [2010] NSWSC 501, in which White J, at [42] - [44], wrote:

“A will may be made so as to take effect only on a contingency (see T Jarman, A treatise on wills, 8th ed (1951) Sweet & Maxwell at 39-40). In Permanent Trustee Co Ltd v Milton (1996) 39 NSWLR 330 Hodgson J (as his Honour then was) considered what might be the position of the maker of an informal will who intended the document to be a stop gap measure to operate only until the maker had had the opportunity to make a formal will. His Honour said (at 335D):

If in those circumstances the deceased died before there was that opportunity, then the document would satisfy the provisions of s 18A; while if the deceased subsequently has the opportunity contemplated by that intention and does not take advantage of it, then the s 18A intention is not established.

In Hatsatouris v Hatsatouris [2001] NSWCA 408 Powell JA, with whom Stein JA agreed, said (at [59]):

[59] However, while it is legitimate to have regard to statements made, and actions taken, by the relevant Deceased, after the relevant document has been brought into being or signed, in determining whether or not at the time when the document was brought into being or signed, the relevant Deceased had the relevant intention, once it be held that the relevant Deceased had the relevant intention recourse cannot be had to subsequent statements or events - unless they fall within the provisions of s 17 of the Act - to deprive the relevant document of its status as a testamentary instrument. To the extent to which the Judgment of Hodgson J (as he then was) in Permanent Trustee Co Ltd v Milton (1995) 39 NSWLR 330 at 334G-335C suggests otherwise, I disagree.

As I read Permanent Trustee Co Ltd v Milton in the passage referred to by Powell JA in Hatsatouris v Hatsatouris, Hodgson J expressed the same view as to the effect of a subsequent change of intention. Powell JA did not disapprove of Hodgson J’s analysis that a conditional testamentary intention (“if I die before I have the
opportunity to make a proper will") will be given effect to under s 18A if, but only if, the condition is satisfied. Here, if the deceased ever intended the document to operate as her will, I could not be satisfied that such an intention was absolute rather than being conditional on her taking her own life at the time she then contemplated. The condition not being satisfied she would lack the requisite intent for s 18A to be satisfied."

In Bolger, the typed document concluded - “This has been given to Paul for his and my peace of mind and not to be used unless necessary." It was submitted that these words demonstrated the deceased intended either the 2009 handwritten document or the 2009 typewritten document to operate as a "stopgap will". Hallen J was not satisfied that the words "not to be used unless necessary" could mean “until such time as I make a new will” and found at [288] that “[t]he way in which the words, if said, were used, suggested, during the case, that Paul was not to use either document unless he could not reach agreement with his siblings.”

His Honour also made some comments about the fact that the 2009 handwritten document was written in pencil and whether that suggests the deceased intended it to be deliberative only. He referred to the general rule that what is written in pencil, prima facie, is only deliberative: Bateman v Pennington [1840] UKPC 17; 3 Moo. P. C. C. 223. Ultimately neither party made detailed submissions on this point but it is important to keep in mind if the document is written in pencil it may suggest the deceased did not intend for the document to be a final document.

The case also deals with expert handwriting evidence as to the deceased’s signature on the document. Whilst there was no allegation nor finding of forgery, the Court was not satisfied the deceased intended either of the documents to form his will. After considering the expert handwriting evidence, his Honour could not conclude that the deceased wrote and signed the 2009 handwritten document or that he signed the 2009 typewritten document.
Other Informal Will Cases of Interest

**Slack v Rogan & Anor; Palffy v Rogan & Anor [2013] NSWSC 522 per White J:**
Issues: whether revoked will can be revived by informal instrument not complying with s 6 of the Succession Act 2006 - whether informal instrument operates as will under s 8 by reason of deceased's intention that it form part of her will - whether deceased had intention to revive will when deceased unaware that will had been revoked - meaning of "execution of a will" in s 15.

**Pethers v Pethers; Estate of Pethers [2012] NSWSC 896 per White J:**
Issues: construction of will - whether deceased intended informal document to form will - intention of deceased clear from terms of informal document and accompanying correspondence - Succession Act 2006 (NSW), s 8.

**Currell v Baldock; Estate of Currell [2012] NSWSC 705 per White J**
Issues: whether deceased intended for document, without more, to operate as her will - whether deceased understood requirements of Succession Act 2006, s 8 - effect of informal alterations to wills - whether inference as to intention of deceased affected by absence of any initialling or authentication of informal amendments - held deceased intended latest testamentary instrument to form will

Multiple informal documents written in hand of deceased - no revocation clause in later will - later wills prevail over earlier ones to extent of any inconsistencies - consideration of extent to which prior wills have been revoked - probate granted of will of deceased comprising of two instruments.

Construction of will - whether words of gift or statement of intention - question as to the nature of the gift made - words of will conferring right of residence - gift as conferring only a conditional right of residence.

**Estate of Daly [2012] NSWSC 555 per White J**
Mirror wills prepared for and executed by husband and wife - signatures of both duly witnessed - by mistake husband and wife signed will prepared for the other - probate sought of wife's will - whether rectification by omitting signature of husband - whether order should be made for rectification of document signed by deceased - Succession Act 2006, s 27

Document stated testamentary intentions of the deceased but not validly executed - document admitted as an informal testamentary document pursuant to Succession Act 2006, s 8 - no order for rectification.
**Brown v Hill [2012] NSWSC 464 per Stevenson J**
Informal will - s 8 of the Succession Act 2006 - will written out on standard will form - whether deceased intended document to operate as her will - whether deceased died intestate.
Document admitted to probate.

**Stone & Drabsch v Pinniger [2011] NSWSC 795 per Nicholas J**
Whether informal document made after will purported to state testamentary intention of deceased. Held: not intended to be testamentary; mere expression of wishes. Not admitted to probate.

**Vincent Zang v Deborah Middleton; The estate of Keith Joseph Cook, late of Balgowlah [2011] NSWSC 881 per Slattery J**
1 April 2007 instrument propounded as a will of the deceased does not comply with the Succession Act, s 6 formal requirements for a will - whether the Court should under Succession Act, s 8 dispense with the requirements for execution of the instrument as a will - proceedings settled - analysis of whether the circumstances justify the making of a Succession Act, s 8 order - HELD: the April 2007 instrument is a document that purports to state the testamentary intentions of the deceased and the deceased intended it to form his will.

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