# Informal Testamentary Documents

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## UNSW CLE

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## About the author

Craig was admitted to practice as a solicitor in 2008. He commenced practice with Teece Hodgson & Ward solicitors in 2008 and worked predominately in estate litigation and protective matters until April 2017.

Craig commenced practice as a barrister (with reader's conditions) at 13 Wentworth Selborne Chambers in May 2017, reading in the first year under Colin Hodgson (of 13 Wentworth Selborne Chambers) and Simon Chapple (of 13th Floor St James Hall Chambers). The restrictions on a reader's practicing certificate can be found here: http://www.nswbar.asn.au/coming-to-the-bar/reading-programme/conditions.

Before he was called to the Bar, Craig was an Accredited Specialist in Wills & Estates Law.

Craig is a member of the Society of Trust & Estate Practitioners (STEP) and an co-author of C Birtles and R Neal, Hutley's Australian Wills Precedents 8th Edition (LexisNexis Butterworths) 2013 and 9th Edition 2016. He is an adjunct lecturer for College of Law (Masters of Applied Law), Family Provision subject and is also a casual lecturer in the Law Extension Committee Diploma of Law, Succession Law subject.

## Introduction

The starting point is the formalities prescribed by section 6 of the *Succession Act* 2006 ["**SA**"], set out below:

**"6 How should a will be executed?**

(1) A will is not valid unless:

(a) it is in writing and signed by the testator or by some other person in the presence of and at the direction of the testator, and

(b) the signature is made or acknowledged by the testator in the presence of 2 or more witnesses present at the same time, and

(c) at least 2 of those witnesses attest and sign the will in the presence of the testator (but not necessarily in the presence of each other).

(2) The signature of the testator or of the other person signing in the presence and at the direction of the testator must be made with the intention of executing the will, but it is not essential that the signature be at the foot of the will.

(3) It is not essential for a will to have an attestation clause.

(4) If a testator purports to make an appointment by his or her will in the exercise of a power of appointment by will, the appointment is not valid unless the will is executed in accordance with this section.

(5) If a power is conferred on a person to make an appointment by a will that is to be executed in some particular way or with some particular solemnity, the person may exercise the power by a will that is executed in accordance with this section, but is not executed in the particular way or with the particular solemnity.

(6) This section does not apply to a will made by an order under section 18 (Court may authorise a will to be made, altered or revoked for a person without testamentary capacity)."

Section 8(2)(a) SA gives the Court the power to order that a document which purports to state the testamentary intentions of a deceased person which has not been executed in accordance with the required formalities, is the deceased person's will, if the Court is satisfied that the person intended it to be his or her Will. Similarly, the Court has power to make orders with respect to documents which alter or revoke a deceased person's will. The full text of s 8 SA is set out below:

**"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."

The power to dispense with formalities is not new – the corresponding provision, which continues to apply to a document made by a testator who died on or after 1 November 1989 and before 1 March 2008, is s18A of the (*Wills) Probate and Administration Act* 1898 ["**WPAA**"], set out below:

**"18A Certain documents to constitute wills etc**

(1) A document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in accordance with the formal requirements of this Act, constitutes a will of the deceased person, an amendment of such a will or the revocation of such a will if the Court is satisfied that the deceased person intended the document to constitute the person's will, an amendment of the person's will or the revocation of the person's will.

(2) In forming its view, the Court may have regard (in addition to the document) to any other evidence relating to the manner of execution or testamentary intentions of the deceased person, including evidence (whether admissible before the commencement of this section or otherwise) of statements made by the deceased person."

Section 8 in its present form commenced with the introduction of the Succession Act 2006 and applies to wills whenever made provided the testator died after the commencement of the clause on 1 March 2008[1].

Section 8(3) SA [which re-states s 18A(2) WPAA] provides that the Court may have regard to evidence relating to the manner in which the document was executed and evidence of the testamentary intentions of the deceased person including statements of the deceased person.

The differences between s8 SA and s 18A WPAA are minor. The cases decided pursuant to s18A WPAA continue to be relevant.

**Application of s 18A WPAA; the Powell JA formulation**

For a long time it was accepted that the requirements for an order under s 18A WPAA were those stated by Powell J in *Hatsatouris v Hatsatouris* [2001] NSWCA 408, as follows:

(a) "Was there a document;

(b) Did that document purport to embody the testamentary intentions of the person;

(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

[1] Succession Act 2006, First Schedule, cl 3(2); Historical Notes

> intention that the subject document should, *without more* on her or his part, operate as her or his will?"

The above was, in fact, a re-statement of the principles set out by his Honour in earlier first instance decisions, such as The Public Trustee v. Commins; The Estate of Gwendolyn Myrtle Wray Powell J, 19 June 1992 (unreported).

The first two limbs are uncontroversial. A document is defined in s 21 *Interpretation Act* 1987, set out below:

> **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.

"Testamentary intentions" are an expression of what a person wants to happen to his or her property after his or her death.

The relevance of the third limb, described as the "without more" component of the test, is a matter for debate.

In Re Estate of Masters (decd); Hill v Plummer (1994) 33 NSWLR 446, Mahoney JA said at 462 that the dispensing provisions should be given a "beneficial application".

In NSW Trustee and Guardian v Halsey; Estate of Von Skala [2012] NSWSC 872, White J at [15] restated the requirement as "whether the deceased intended the document to be his or her testamentary act, that is, to have present operation as a will".

In Estate of Laura Angius; Angius v Angius [2013] NSWSC 1895 Hallen J said:

> "[260] In my view, the use of the words "without more on her, or his, part", does not really add anything. What the words do is direct attention to a consideration of the particular document itself, which must purport to "state the testamentary intentions of the deceased person", and then determine whether the Court is satisfied that the deceased person intended that particular document to form his, or her, Will, or to form an alteration to his, or her, Will. Thus, the focus of the section is on the actual testamentary intention of the deceased so far as it relates to the particular document in question. Both elements need to be satisfied."

The comments of Hallen J were endorsed by Lindsay J in Estate Moran; Teasel v Hooke [2014] NSWSC 1839 at [28] and by and by Stevenson J in In the Estate of the Late Ronald Robert Irvine; Evans v Gibbs [2015] NSWSC 432 at [27]–[29].

In Estate Moran; Teasel v Hooke [2014] NSWSC 1839, Lindsay J said at [28] "what those words do is direct attention to a consideration of whether the particular document was intended to operate as a will: to have present operation as such, not to serve merely as a draft, a diary note or the like".

There was an opportunity for the matter to be considered by the NSW Court of Appeal in Burge v Burge [2015] NSWCA 289. However, Leeming JA with whom Macfarlan JA and Meagher JA agreed, said

> "[51] Ground three focussed upon the formulation of the third element of the test arising under s 8 (and its predecessor, s 18A of the *Wills, Probate and Administration Act 1898* (NSW)) in *Hatsatouris v Hatsatouris* at [56]:

> "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?" (Original emphasis).
>
> [52] The short answer to this ground is that nothing in the reasoning of the primary judge suggests that any material weight was given to the emphasised words. The emphasis in his Honour's judgment recorded, accurately, the emphasis given by Powell JA in *Hatsatouris v Hatsatouris.*"

The technical result is that the "without more" test continues to apply until the NSW Court of Appeal (or the High Court of Australia, should an informal documents case ever be considered by that Court) says otherwise; but at first instance it does not seem to be consistently applied or given great weight.

**Perspective – relevance of presumptions to knowledge and approval**

A person propounding a will that is not executed in accordance with the prescribed formalities does not receive the benefit of certain presumptions arising from due execution.

The presumptions which apply with respect to testamentary capacity and knowledge and approval were summarized by Isaacs J in *Bailey v Bailey* (1924) 34 CLR 558 at 570. They were considered by Meagher JA (with whom Basten and Campbell JJA agreed) in *Tobin v Ezekiel* (2012) 83 NSWLR 757; [2012] NSWCA 285 at [44] – [48] in a passage most recently cited, with approval, by Robb J in *Hobhouse v Macarthur-Onslow* [2016] NSWSC 1831 at [397] as follows:

> "[44] The starting point is that the onus of proof lies upon the proponent of the will to satisfy the court that it is the last will of a "free and capable" testator: Barry v Butlin at 482; 1092; Fulton v Andrew [1875] LR 7 HL 448 at 461; Tyrrell v Painton [1894] P 151 at 157; Bailey v Bailey [1924] HCA 21 ; 34 CLR 558 at 570; Timbury v Coffee [1941] HCA 22 ; 66 CLR 277 at 283.
>
> To establish that a document is the last will, it must be proved that the testator knew and approved its contents at the time it was executed so that it can be said that the testator comprehended the effect of what he or she was doing: Barry v Butlin at 484; 1091; Cleare v Cleare (1869) LR 1 P & D 655 at 657–658; Atter v Atkinson (1869) LR 1 P & D 665 at 668 and 670; Nock v Austin [1918] HCA 73 ; 25 CLR 519 at 522, 528.
>
> [45] If the will is rational on its face and is proved to have been duly executed, there is a presumption that the testator was mentally competent. That presumption may be displaced by circumstances which raise a doubt as to the existence of testamentary capacity. Those circumstances shift the evidential burden to the party propounding the will to show that the testator was of "sound disposing mind": Waring v Waring [1848] EngR 693; (1848) 6 Moo PC 341 at 355; [1848] EngR 693; 13 ER 715 at 720; Sutton v Sadler [1857] EngR 738; (1857) 3 CB NS 87 at 97–98 ; [1857] EngR 738; 140 ER 671 at 675–676; Smith v Tebbitt (1867) LR 1 P & D 398 at 436; Bull v Fulton [1942] HCA 13 ; 66 CLR 295 at 343; Kantor v Vosahlo [2004] VSCA 235 at [49], [50].
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> That doubt, unless resolved on a consideration of the evidence as a whole, may be sufficient to preclude the court being affirmatively satisfied as to testamentary capacity: Bull v Fulton at 299, 341; Worth v Clasohm [1952] HCA 67; 86 CLR 439 at 453.
>
> [46] Upon proof of testamentary capacity and due execution there is also a presumption of knowledge and approval of the contents of the Will at the time of execution. That presumption may be displaced by any circumstance which creates a

> well-grounded suspicion or doubt as to whether the will expresses the mind of the testator. In Thompson v Bella-Lewis [1996] QCA 27; [1997] 1 Qd R 429 McPherson JA (dissenting in the result) said (at 451) of the circumstances able to raise a suspicion concerning knowledge and approval that, except perhaps where the will is retained by someone who participated in its preparation or execution or who benefits under it, "a circumstance must, to be accounted 'suspicious', be related to the preparation or execution of the will, or its intrinsic terms, and not to events happening after the testator's death". See also McKinnon v Voigt [1998] 3 VR 543 at 562–563; Robertson v Smith [1998] 4 VR 165 at 173–174. Once the presumption is displaced, the proponent must prove affirmatively that the testator knew and approved of the contents of the document: Barry v Butlin at 484–485; 1091; Cleare v Cleare at 658; Tyrrell v Painton at 157, 159; Nock v Austin at 528.
>
> [47] Evidence that the testator gave instructions for the will or that it was read over by or to the testator is said to be "the most satisfactory evidence" of actual knowledge of the contents of the will: Barry v Butlin at 484; 1091; Gregson v Taylor [1917] P 256 at 261; Re Fenwick [1972] VicRp 75; [1972] VR 646 at 652.
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> What is sufficient to dispel the relevant doubt or suspicion will vary with the circumstances of the case; for example in Wintle v Nye [1959] 1 WLR 284 the relevant circumstances were described (at 291) as being such as to impose "as heavy a burden as can be imagined". Those circumstances may include the mental acuity and sophistication of the testator, the complexity of the will and the estate being disposed of, the exclusion or non-exclusion of persons naturally having a claim upon the testator, and whether there has been an opportunity in the preparation and execution of the will for reflection and independent advice. Particular vigilance is required where a person who played a part in the preparation of the will takes a substantial benefit under it.
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> In those circumstances it is said that such a person has the onus of showing the righteousness of the transaction: Fulton v Andrew at 472; Tyrrell v Painton at 160. That requires that it be affirmatively established that the testator knew the contents of the will and appreciated the effect of what he or she was doing so that it can be said that the will contains the real intention and reflects the true will of the testator: Tyrrell v Painton at 157, 160; Nock v Austin at 523–524, 528; Fuller v Strum [2001] EWCA Civ 1879; [2002] 1 WLR 1097 at [33]; Dore v Billinghurst [2006] QCA 494 at [32], [42].
>
> [48] In this context the statements prescribing "vigilance" and "careful scrutiny" and referring to the court being "affirmatively satisfied" as to testamentary capacity and knowledge and approval are not to be understood as requiring any more than the satisfaction of the conventional civil standard of proof: see Worth v Clasohm at 453. What such statements do is emphasise that the cogency of the evidence necessary to discharge that burden will depend on the circumstances of each case and in particular the source and nature of any doubt or suspicion in relation to either of these matters: Kantor v Vosahlo at [22], [58]; Dore v Billinghurst at [44]. They also recognise that deciding whether a document is indeed a person's last will is a serious matter, so any decision about whether the civil standard of proof is satisfied should be approached in accordance with Briginshaw v Briginshaw [1938] HCA 34; 60 CLR 336 or, now, s 140(2) of the Evidence Act 1995."

Those presumptions were described by Lindsay J in Boyce v Bunce [2015] NSWSC 1924 as follows:

> [58] "Part of the machinery of judicial decision-making designed to address the essential question whether a particular document was the last will of a free and capable testator, probate presumptions are a means to that end, not an end in themselves.

> [59] That they do not displace the necessity for the Court to focus on the essential question is confirmed by traditional language of probate judges:
>
> (a) calling upon a court of probate to exercise vigilant care and circumspection in investigating a case, and not to grant probate without full and entire satisfaction that an instrument propounded as a will did express the real intentions of the deceased (Barry v Butlin [1838] EngR 1056; (1838) 2 Moo PC 480 at 485; [1838] EngR 1056; 12 ER 1089 at 1091); and
>
> (b) speaking of a need to "satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator" (Tyrrell v Painton [1894] P 151)."

In Re Estate of Wai Fun CHAN, Deceased [2015] NSWSC 1107, Lindsay J said:

> "[18] By its very nature, an informal will (that is, a testamentary document not executed in accordance with section 6) does not, without fundamental reservations, attract a traditional "presumption" of capacity or knowledge and approval arising from "due execution".
>
> [19] However, a reference to a "presumption" of this character in probate discourse is more empirical than prescriptive. It is an aid to the investigation of questions of fact, and to the determination of disputed questions of fact, in a world of imperfect knowledge. It might better be understood as an inference commonly drawn from established facts: *Calverley v Green* [1984] HCA 81; (1984) 155 CLR 242 at 264.
>
> [20] So understood, the wisdom probate "presumptions" encapsulate may be able to be harnessed in dealing with informal wills.
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> [21] For example, if (as in the present proceedings) an informal will is rational on its face, and the process of its creation is equally, patently rational, common experience would lead most observers to infer (in the absence of some other fact) that the will-maker was mentally competent and that he or she knew and approved of the contents of the will.
>
> [22] The circumstance (fact) that the informal will was created at the instigation, or (as in this case) with the active involvement, of a substantial beneficiary would be likely, in common experience, to raise a suspicion about the status of the document which would, pending closer examination of all material facts, displace any inference of regularity that might otherwise commonly be drawn.
>
> [23] The facts that are to be regarded as "material" in this context are those that bear upon a decision as to whether the particular document was the last will of a free and capable testator.
>
> [24] In each case the essential question, in deciding whether a particular document should be admitted to probate in whole or part, is whether it was the last will of a free and capable testator: *Woodley-Page v Symons* (1987) 217 ALR 25 at 35"

It is the present opinion of the writer that, despite the absence of clear guidance from an appellate Court as to the continuing relevance of the Powell J "without more" test, where the informal document is signed or authenticated in some way, there is usually little difference between seeking a section 8 SA declaration in respect of an informal testamentary document, and seeking a grant of Probate of a properly executed document where suspicious circumstances endure.

**The significance of a signature**

The testator's signature is one of the formal requirements for the making of a Will.

In R Geddes, C Rowland & P Studdert, Wills Probate and Administration Law in New South Wales, LBC Information Services 1996 at p 92, it is said that the requirement for a signature has been liberally interpreted. Reference is there made to *re Male* [1934] VLR 318 where the Court said at [320] "*the real test is whether what has been written by the testator was written by him as an authentication of what precedes it as his will*". [2]

In *Re Estate Stojic deceased* [2017] NSWSC 168, Lindsay J described the execution of the last Will said to have been made by the testator in the following terms (at [5] –[6]): "The June 2014 Will was executed by the deceased, at a time of extreme frailty, not by a signature but by a mark, an ink impression of a fingerprint, affixed to each page." His Honour accepted that "a thumbnail dipped in tar" can serve as a signature.

Strictly these authorities are relevant to the test for formal validity, and they will not strictly apply where there is some other defect in execution.

However the concept of a signature as "an act of authentication" is important. A signature or mark made by a testator is very significant to the question of the testator's intention, and the absence of a signature or mark may provoke an inference that testamentary writings are precatory or contemplative.

**Other evidence to prove intention**

An application pursuant to section 8 where there is no mark or signature on the document is more difficult to prove an intention by the testator to operate as a Will – but it is not impossible. There is other evidence, when considered in light of the whole of the evidence, which can prove intention. This other evidence may include, for example, evidence of:

A. The form of the document or alteration, and the circumstances of its preparation.

B. The location and storage of the original in a significant place.

C. The testator informing the executor or beneficiary of the location of the original and how to gain access to it.

D. The testator's conversations about the changing of the Will, and/or by evidence of the testator's changing or consistent relationships (and the evidence of independent persons may be most significant).

E. The testator's imminent death or the proximity of the testator's death to the making of the document.

In a more liberal world, where the conveyor of passengers for a commercial reward are not required to hold a taxi-license, and property-owners can license the whole or part of property owned by them without using an agent, and over the objection of the owner's corporation, it is suggested that the general public have probably caught on to the notion that a Will can be valid without formal validity, even if they do not have a deeper understanding of what is involved in seeking to have the document admitted to probate.

That being the case it is suggested that evidence of the testator's knowledge of the requirements for a formal Will is not as significant as it might have been in the past.

But as stated, those sorts of considerations continue to be relevant.

[2] During the course of preparing this paper I have spoken with former Senior Deputy Registrar Paul Studdert, and his contribution has assisted me in forming some of the ideas set out in this paper.

**Procedure**

An application for an order under s 8 of the Succession Act 2006 and a grant of Probate of an informal testamentary document should be made by way of Summons unless the applicant has notice of a Probate Caveat having been filed. Part 78 of the *Supreme Court Rules* 1970 (NSW) includes the following provisions:

- Rule 8 provides that non-contentious proceedings are to be commenced by Summons.
- Rule 1 defines:
    - "contentious proceedings" as proceedings in which either a "notice of proceedings" has been served on any person or in which there is a defendant.
    - "notice of proceedings" as a notice referred to in rule 57(1).
    - "non-contentious proceedings" as proceedings that are not contentious proceedings.
- Rule 9 provides that non-contentious proceedings may be determined by the Registrar in the absence of the public and without attendance by any person.
- Subdivision 2 of Division 3 is headed "evidence in support of non-contentious proceedings". Rule 14, which forms part of that sub-division, is headed "informal testamentary documents". That rule requires an affidavit in support of an application in respect of the estate of a person who has died leaving an informal testamentary document to include (if possible) the name and address of any person whose interests may be affected by the Court's decision as to the deceased's intentions in relation to the document.
- Rule 42 requires a "prescribed notice" to be served <u>on each person whose interests may be affected by the Court's decision</u> as to the deceased's intentions in relation to the informal testamentary document, except on any caveator (because Rule 71 provides that if a caveat has been filed the caveator should be named as a defendant and the proceedings should be commenced by statement of claim) or on any person who has consented to the application. Importantly, a "prescribed notice" is not a "notice of proceedings" having regard to the definitions in Rule 1. A “prescribed notice” is a Form 135 Notice to Affected Persons (in contrast to the Form 140 Notice of Proceedings).
- Rule 42(4) provides that service of a prescribed notice on a person under legal incapacity does not take effect until a tutor is appointed. This rule over-rides rule 10.12 of the Uniform Civil Procedure Rules 2005 (permitting a notice to be served on a minor over the age of 16, or a parent or guardian, or a financial manager where appropriate).
- Rule 42(5) permits the Court to dispense with the requirement for service of a Prescribed Notice where the person cannot readily be ascertained or found, or where it would be expedient to do so. This rule may permit the Court to dispense with the requirement for a tutor to be appointed for a person under legal incapacity, and compliance with rule 10.12 of the Uniform Civil Procedure Rules 2005 may be relevant to such an application.
- Rule 43(1) provides that any person on whom a prescribed notice is served may enter an appearance.
- Rule 44(2) provides that a person on entering an appearance becomes a defendant in the proceedings.
- Rule 45 provides that persons who have been served with a prescribed notice (or the Court has dispensed with the requirement for service), or have consented to the application, are bound by the Court's decision with respect to the application.

- Rule 35 provides that contentious proceedings are to be commenced by statement of claim if there is a defendant or by summons if there is no defendant.
- Rule 44(3) provides that upon a person who has been served with a prescribed notice entering an appearance the proceedings are to continue as if the person had been joined as a defendant by the application for the grant of probate and the person has been served with that application on the day on which he or she was served with the prescribed notice. However, after the filing of an appearance strictly the matter should proceed on pleadings in accordance with rule 35 unless the parties agree and make submissions to the Registrar on the next directions date accordingly.
- All of the usual documents which are required on an application for a grant of Probate (if the informal document names an executor and the executor is making the application) or Administration with the Will annexed (if the informal document is propounded by a person not named as executor) will need to be filed.

This includes the original Will and the Form 118 Affidavit of Executor or Form 120 Affidavit of Applicant for Administration with the Will Annexed.

For further information on the usual requirements for an application for a grant of Probate or Letters of Administration, see the Supreme Court of NSW website www.supremecourt.justice.nsw.gov.au and click on “Tips on Preparing Probate Applications” under the Probate tab, where a checklist is available.

The Court is entitled to charge a filing fee for the filing of an originating process when the statement of claim is filed. The Court is also entitled to charge a fee for a Probate Summons. The fee is calculated by reference to the sworn value of the estate. If an application is filed as an uncontentious application, the probate filing fee will be charged. If the application is filed as a contentious application, the Statement of Claim filing fee will be changed, and the difference between the probate fee and the contentious fee will be charged following determination of the proceedings.

**Procedure where you are seeking an order under s 8 SA and a grant of Probate of the informal document or Administration with the Informal Document Annexed**

1. A summons should be filing seeking:
    a. a declaration pursuant to s 8 SA that the document is the testator’s will;
    b. where there are alterations, a declaration pursuant to s 8 SA as to the testator’s intention with respect to each alteration;
    c. an order that Probate of the Will (or Letters of Administration CTA) be granted to the plaintiff(s);
2. The following should be filed with the Summons:
    a. The usual documents required for an application for Probate or Administration, including the Affidavit of executor (UCPR Form 118) or administrator CTA (UCPR Form 120) as the case may be. See the Supreme Court of NSW website www.supremecourt.justice.nsw.gov.au and click on “Tips on Preparing Probate Applications” under the Probate tab, where a checklist is available.
    b. Affidavit addressing the matters required by Part 78 Rule 14 SCR (that is, the name and address of persons whose interests may be affected by the Court’s decision or the best known information as to their identity and whereabouts).
    c. Consent of each person affected or Affidavit proving service of a Form 135 Notice to Affected Persons on each person.

d. Affidavit providing evidence addressing the matters of which the Court must be satisfied in order to make an order under s 8 SA.

e. The original document which is the subject of the application.

f. The proposed form of Grant, together with a stamped self-addressed A4 envelope (Part 78 Rule 10 SCR).

g. In the case of Administration CTA, evidence of renunciation if an executor is appointed by the informal document (Part 78 Rule 18 SCR) and/or evidence of consent or service of notice on other persons who may be entitled to apply for administration (Part 78 Rule 19).

3. If a person upon whom a Prescribed Notice is served has entered an Appearance they should be named as Defendant to the proceedings and the proceedings should be listed in the Registrar's Probate List for directions.

4. The Plaintiff should be directed to file a Statement of Claim unless the parties agree that pleading is unnecessary and make submissions to the Registrar accordingly.

5. The Defendant should be directed to file a Defence and Cross Claim seeking either a grant of Probate of the last formal Will, or a declaration pursuant to s 8 SA concerning a different document and a grant of Probate of it, or a grant of Letters of Administration on intestacy. If the requirement for pleadings has been dispensed with, the Defendant should be directed to file a Cross Summons.

6. Directions will then be made for the service of a Defence to the Cross Claim (if pleading is required), additional affidavit evidence by the Plaintiff, affidavit evidence by the Defendant, affidavits in reply by the Plaintiff, and directions for expert evidence if that is necessary.

7. Mediation would be encouraged but it is not compulsory.

8. If the proceedings do not resolve at mediation the proceedings would be listed for hearing, or if the time for hearing is estimated to be less than 2 hours, referred to the Probate List Judge on a Monday (the Probate List presently runs every two weeks).

**Procedure where you are seeking a grant of Probate of a formal Will (or a grant of Letters of Administration on intestacy) notwithstanding a later informal testamentary document**

1. A summons should be filing seeking:

   a. an order that Probate of the Will (or Letters of Administration CTA, or Letters of Administration) be granted to the plaintiff(s);

2. The following should be filed with the Summons:

   a. The usual documents required for an application for Probate or Administration, including the Affidavit of executor (UCPR Form 118) or administrator CTA (UCPR Form 120) as the case may be. This affidavit should disclose the existence of the informal document and the known facts and circumstances in which it was found and/or made. See the Supreme Court of NSW website www.supremecourt.justice.nsw.gov.au and click on "Tips on Preparing Probate Applications" under the Probate tab, where a checklist is available.

   b. The original document which is the subject of the application.

   c. The proposed form of Grant, together with a stamped self-addressed A4 envelope (Part 78 Rule 10 SCR).

d. Affidavit addressing the matters required by Part 78 Rule 14 SCR (that is, the name and address of persons whose interests may be affected by the Court's decision or the best known information as to their identity and whereabouts).[3]

e. Consent of each person affected or Affidavit proving service of a Form 135 Notice to Affected Persons on each person.

3. Steps 3 to 8 as above except the Defendant would plead that the formal Will was revoked by the later document, and would seek a declaration under s 8 SA and an order that probate or administration be granted of it in the Cross Summons/Cross Claim.

**Procedure where the client cannot work out whether to seek an order under s 8 SA**

1. There is no duty to propound an informal document but it must be disclosed. Choose the document to put forward as being the subject of the application.
2. State alternatives if that is desired but take a position on the most likely.
3. Serve the Form 135 Notices to Affected Persons on the affected persons.
4. Follow one or other of the courses proposed above.
5. If making a decision is too difficult, consider renouncing probate and letting the primary beneficiaries determine the matter between them, noting that the Court cannot grant judicial advice to litigants in probate matters prior to grant (because they are not, until a grant is made, executors or trustees - *Joel Lewis Hubbard, Re the Estate of the late John Gordon Ross* [2011] NSWSC 617).

**Alterations**

Where the original Will includes alterations, each of them must be dealt with by seeking declarations in the Summons, each must be dealt with by the filing of evidence, and the persons affected by each alteration must be served with the Form 135 Notice to Affected Persons. If evidence sufficient to satisfy the Court that the alterations were intended to be effective is not available, a reconstruction of the Will may be admitted to Probate.[4]

**Suicide notes**

The draft grant should only include the pages which set out testamentary intentions, although the whole document must be filed. If the original document is held by the Police or the Coroner, the Court will not issue a grant until the original has been produced.

[3] Part 78 Rule 14 SCR must be complied with "*if a grant of probate or administration is made in respect of the estate of a person who has died leaving an informal testamentary document*" – in other words, the matters in which the rule must be satisfied is determined by reference to the deceased person, not whether or not an order is sought in respect of the document.

[4] During the course of preparing this paper I have communicated with Senior Deputy Registrar Louise Brown and I acknowledge her contribution which has assisted me in forming some of the ideas in this paper particularly the practice points.

**Recent cases**

**Burge v Burge [2014] NSWSC 1772; Darke J**

Rupert Burge died on 5 January 2013 at the age of 93. He was married to Anne, they were married in December 1948. They had two children, Conrad and Susanne. In the proceedings, Anne was the Plaintiff/Cross Defendant, propounding the last formal Will dated 15 March 1983. Conrad was the Defendant/Cross Claimant, propounding a document said to have been made on 10 June 2007. The deceased's estate was said to have a value of about $1,000,000.

His Honour described the informal document as follows:

> "[28] The 2007 document was created on 10 June 2007 when Rupert Burge made handwritten alterations to an unexecuted copy of the will that had been prepared for him in 1983 by Braham McLaughlin & Co. Changes were made to clauses 2, 4 and 6. Rupert Burge placed his signature and/or his initials near to the changes he made.
>
> [29] Clause 2 concerns the identity of the executor in the event that the plaintiff predeceased him or died within one month of his death. Susanne's name and address was crossed out and the defendant's address in Dee Why was added.
>
> [30] Clause 4 contains a gift of the entirety of the estate (after payment of debts). The primary recipient was changed from the plaintiff to the defendant.
>
> [31] Clause 6 concerns the appointment of a guardian of infant children. It appears that Rupert Burge changed the guardian from the plaintiff to the defendant, before striking through the clause and writing "CANCELLED AS INAPPLICABLE".
>
> [32] At the foot of the third page of the document, Rupert Burge inserted the date 10 June and changed "one thousand nine hundred an eighty three" to "two thousand and seven". The date 10 June 2007 was also written in the space provided on the cover page of the document. Rupert Burge signed his name on the fourth page of the document next to the attestation clause.
>
> [33] Taking the handwritten changes into account, the 2007 document is relevantly in the following terms:
>
> > "I, RUPERT WEBB BURGE of 56 Bay St, Beauty Point in the State of New South Wales, Investment Banker hereby rescind and revoke all former testamentary dispositions made by me and declare this to be my last Will and Testament.
> >
> > 1 I APPOINT my dear wife ANNE BELLE BURGE to be the sole Executrix and Trustee of this my Will.
> >
> > 2 SHOULD my said wife predecease me or die within one calendar month of my death then I APPOINT my son CONRAD MICHAEL BURGE of 33, 98 Dee Why Pde, Dee Why 2099 New South Wales to be my Executor and Trustee of this my Will.
> >
> > 3 MY Executrix and Trustee or my Executors and Trustees whether original or substituted are hereby referred to in this my Will as "My Trustees".
> >
> > 4 I GIVE DEVISE AND BEQUEATH unto my Trustees all my estate both real and personal whatsoever and wheresoever situate UPON TRUST to sell call in and convert into money such part or parts thereof shall not consist of money and after payment thereout of all my just debts funeral and testamentary expenses including all State death duties or Federal estate duties and other duties of whatsoever kind or nature payable upon or by reason of my death to hold the same UPON TRUST for my dear son Conrad M Burge if HE shall survive me and live for a period of one calendar month after my death or if he

shall not survive me or surviving me shall not live for a period of one calendar month after the date of my death then UPON TRUST for such of my children as shall survive me and attain the age of 21 years and if more than one in equal shares as tenants in common [...]

IN WITNESS WHEREOF I have hereunto set my hand to this and the preceding pages of this my Will this 10 day of June two thousand and seven.

SIGNED by the said RUPERT M BURGE as and for his last Will and Testament in the presence of us both present at the same time who in his presence at his request and in the site and presence of each other have hereunto subscribed our names as attesting witnesses:-"

**Whereabouts of document**

The following parts of his Honour's judgment are relevant to the whereabouts of the original document:

"[36] In the dining and living area of the unit in which her parents had lived, there was a desk placed up against floor to ceiling glass windows, which gave a person sitting at the desk a view of the ocean. About three metres behind the desk there was a bookshelf about one metre wide and two metres high. According to Susanne, it held some books and a few cardboard accordion files, although in cross-examination she said that there was only one such file in the bookcase. That file (exhibit 1), has cardboard dividers marked with the letters of the alphabet. Amongst the handwriting on the "W" divider, the word "WILL" was written.

[37] Susanne deposed that his files contained, in an apparently organised fashion, "bank statements, bills, letters and the like". She says that within a short time, she found an envelope in the cardboard file, which envelope contained a will completed in the 1960s, the 1983 will, and the envelope containing the 5 October 1994 letter as amended in 1999. She did not say where in the file she found the envelope.

[38] Susanne showed the two wills and the letter to her mother and to her brother. The plaintiff deposed that the 1960s will also named her as the sole beneficiary. This will was not adduced in evidence, and the evidence was unclear as to its whereabouts.

[39] About a week after her father's death, Susanne conducted a further search of her father's papers. She says that she did so because her brother had suggested that there might be another will. The defendant denies that he said such words. In any event, Susanne again searched the bookshelf and also looked behind the desk. She gave evidence that she pulled the desk out and found another cardboard accordion file sitting, not on the floor, but on a flat wooden cross-piece in a space (or "cubby" as she described it) behind a desk drawer. The location can be seen most clearly in the photograph which became exhibit L. She described the file "as a very small accordion file of pockets". She found the 2007 document inside the file. She was unsure whether the document was inside an envelope. She thought that there may have been a few other bits and pieces of paper in the file. Neither the file itself (or any other of its contents), nor any envelope, was adduced in evidence. Again, the evidence was unclear as to the whereabouts of any such items."

**Reasons for change**

The following parts of his Honour's judgment are relevant to the deceased's reasons for the change:

"[26] In about late 2005 or early 2006, when the boat was in Phoenix, arrangements were made for Susanne to oversee the carrying out of certain repairs. This project did

not go well, or at least did not meet the expectations of Rupert Burge. The issue became a source of considerable tension in the relationship between Susanne and her father. There is no doubt that he became very angry with her over the matter. This is illustrated by the terms of a letter he composed in May 2007. The letter remained on his computer and was never sent, but it nonetheless reveals that well over a year after the repairs were carried out, Rupert Burge remained very upset with his daughter. Their relationship improved in time.

…

[44] Mr Blackburn-Hart also submitted that an intention to make a will in the terms of the 2007 document was explicable, given that Rupert Burge believed, rightly or wrongly, that the plaintiff was comfortably set up and had been well provided for. Moreover, making the defendant the only primary beneficiary to the exclusion of Susanne was explicable in circumstances where Rupert Burge was conscious that his son, who was then almost 57 years of age, with two young children, had experienced significant health issues and some financial strains, whereas Susanne, with whom he was very angry at the time, was in relatively comfortable financial circumstances.

…

[61] Dealing with these contentions is difficult in circumstances where, as accepted by both parties, Rupert Burge was a very private man, not one to discuss his testamentary acts or intentions."

**Plaintiff's submissions:**

The Plaintiff's submissions are set out in his Honour's Judgment at paragraph [48] as follows:

"(1) that having executed formal wills in the 1960s and in 1983, Rupert Burge can be taken to have been aware of the formal requirements for execution of a valid will, including the need for two witnesses (see *Estate of John James Dunn; Anderson v Scrivener* [2002] NSWSC 900 at [43]);

(2) that, as an educated and meticulous man, it is unlikely that he would have trusted the administration of his substantial property to a purely informal document (see *Estate of Ivan John Gonda* [2012] NSWSC 357 at [6]-[7]);

(3) that despite being 87 years of age in June 2007, there was no reason why he could not have made arrangements for a will to be executed in accordance with the necessary formalities, and he had ample time to do so before his death;

(4) that he retained the formally prepared and executed will of 15 March 1983 and kept it in an envelope bearing the word "WILLS" which was placed in a location where it would be easily found after his death, whereas the 2007 document, even if not "hidden", was kept separately and not in an accessible location (see *Williams v Public Trustee of New South Wales (No.2)* [2007] NSWSC 974 at [85]); and

(5) that it is highly unlikely that he would have wanted to take the step of entirely disinheriting the plaintiff, with whom he had been happily married for more than 58 years, without legal advice and without telling anybody about it, or providing any explanation for it."

**Outcome**

In respect of the Will, it was significant that the opening sentence of the document included an address that was many years out of date. Further, the signature of the deceased was placed next to an attestation clause that clearly referred to signing in the presence of two witnesses.

His Honour said:

> "[55] I infer that Rupert Burge, having previously executed two formal wills, would have been aware in June 2007 of the formal requirements for execution of a valid will, including the need for two attesting witnesses.
>
> …
>
> [57] In my view, it is unlikely that Rupert Burge, being aware of the need for two attesting witnesses, would have considered that the 2007 document, signed by himself alone, was itself capable of operating as a valid will.
>
> …
>
> [64] I regard this as a borderline case. Ultimately, having considered the totality of the evidence and the various matters raised by the parties in submissions, I am not satisfied that Rupert Burge intended the 2007 document to form his will. First, for the reasons given earlier, I consider it unlikely that Rupert Burge, being aware of the need for two attesting witnesses, would have considered that the 2007 document was itself capable of operating as a valid will. Secondly, had Rupert Burge intended the 2007 document to operate as his will, it is likely that he would have placed it with the 1983 will and the other documents in the envelope marked "WILLS". Thirdly, even if he considered his wife to be financially comfortable, it would be a big step to entirely disinherit her, without explanation."

The Court ordered that a grant of Probate of the Will dated 10 June 2007 be made to the Plaintiff.

**Burge v Burge (No. 2) [2015] NSWSC 141**

The plaintiff submitted that the defendant had unreasonably failed to accept a Calderbank offer made on 19 June 2014 which, had it been accepted, would have resulted in the defendant receiving about $200,000 out of an estate with a net value of about $1,000,000. The response to the offer, made by the defendant on 9 July 2014, was to the effect that he required the matter to be determined by the Court.

Costs of the plaintiff ordered to be paid out of the estate on the indemnity basis, costs of the defendant on the party/party basis.

**Burge v Burge [2015] NSWCA 289, Macfarlan JA, Meagher JA and Leeming JA**

The Defendant appealed. The appeal was dismissed.

Leeming JA with whom Macfarlan JA and Meagher JA agreed, said

> "[51] Ground three focussed upon the formulation of the third element of the test arising under s 8 (and its predecessor, s 18A of the *Wills, Probate and Administration Act 1898* (NSW)) in *Hatsatouris v Hatsatouris* at [56]:
>
> > "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?" (Original emphasis).
>
> [52] The short answer to this ground is that nothing in the reasoning of the primary judge suggests that any material weight was given to the emphasised words. The emphasis in his Honour's judgment recorded, accurately, the emphasis given by Powell JA in *Hatsatouris v Hatsatouris.*"

**Estate Moran; Teasel v Hooke [2014] NSWSC 1839, Lindsay J**

**Estate Moran; Teasel v Hooke (No 2) [2015] NSWSC 88, Lindsay J**

The late Raquel Bridgette Bernadette Moran died on 10 April 2014 aged 43. Her estate was valued at $795,000 plus an interest in a joint bank account with about $245,000 in it.

The Defendant was said to have been in a de facto relationship with the deceased for about 6 years before death.

The deceased suffered from cancer for a period before her death. The evidence was that she made a handwritten document, in a notepad, on 24 October 2013, at a time when she was seriously ill and contemplating death. The document was in her handwriting. It was signed by the deceased, in the margin, at the top, and the bottom, of each page except the last page, which was signed only at the top. The document is paginated. Nothing else is known about the document. The document provided as follows:

> "This is the last will and Testament of Raquel Brigette Bernadette Moran, born 08 December 1970. When writing this I am of sound mind. Due to an unexpected turn in my [sic] progression of my cancer. My intent is to make this will with a solicitor but I do feel a sense of urgency at this time.
>
> Firstly my intention is for the mortgage that is held over my property at [Greenacre] to be paid out by any Insurance monies that I have, That will be paid out. I currently have nominations (binding) being processed by three insurance companies. My intention once the mortgage is paid out is to have my residence [the Greenacre property] placed into a trust that will be managed by my [two named brothers].
>
> My intention is that the residence is held in trust for my daughter [Jessica, the plaintiff]. Jessica is my own child who has no means of supporting herself or her child and the purchase of this house in 2007 in my sole name was always with the intent of bequeathing my home to my only daughter.
>
> I have made my intention clear to my family. My mother ... and my father ... are aware of the intention of my house since purchase in 2007.
>
> I am currently in a dysfunctional, non-romantic existence with Mr ... [the defendant]"

The document then becomes discursive.

There was evidence that, after the making of this document, the deceased attended Chullora Post Office, and spent the same amount of money as the cost of a Will kit ($24.30) but no incomplete or complete Will kit was found.

There was also evidence that the deceased contacted the Cancer Council Pro Bono Legal Assistance service and attempts were made for her to be contacted by a solicitor to make a Will. Documents produced on Subpoena to Produce revealed that an instruction sheet had been completed and next to "does the client have an existing Will", someone had completed "no", presumably on the deceased's instructions.

It was submitted by the Defendant that the document was incomplete, or that it was a "stop gap" will which only served to be her Will until the opportunity arose for her to make a further

Will. Further, when she did not take up the opportunity to make a Will, it was submitted that the deceased ceased to have the intention that the "stop gap" will should operate.

His Honour said that the possibility of making a later Will does not dictate the conclusion that the document was not intended to be her Will, nor does the shift from present tense to future tense, which could have been as a consequence of the general understanding that a Will operates after death.

His Honour made an order under section 8 of the Succession Act 2006 in respect of the document.

His Honour also made an order that the Defendant pay the Plaintiff's costs. His Honour said that the Defendant had conducted the proceedings in a strident, adversarial manner, for personal advantage. This order was confirmed in the second judgment after further submissions.

**Campton v Hedges [2016] NSWSC 201, Hallen J**

**The deceased's background**

His Honour described the deceased as follows:

> "[1] Neil Clive Hedges (hereafter called "the deceased") died on either 2 or 3 July 2014, leaving property in New South Wales. He was then aged 76 years. At the date of his death, the deceased was a widower, his wife, Marie Hedges, having died in May 2006. They had no children. The deceased did not remarry after the death of his wife.

**The contentions of the parties**

The plaintiffs were the deceased's niece and brother, they being name as executors in a Will dated September 2008. They propounded that document. They also sought a declaration pursuant to section 8 of the Succession Act 2006 that certain alterations were intended by the deceased to take effect as alterations to his Will.

In respect of the defendant, his Honour said:

> "[20] It is difficult to comprehend the reason for Ms Hedges lodging the caveats and defending these proceedings in the manner that she has since it is only her entitlement to a pecuniary legacy of $2,000 under the typewritten Will that may be lost. It follows that she does not gain any personal advantage (other than as to $2,000) by opposing the grant of Probate of the altered Will.
>
> [21] In addition, Ms Hedges has commenced separate proceedings for a family provision order, and the continuation of those proceedings is being delayed until the completion of these proceedings."

**The document**

His Honour described the document as follows:

> "[7] A copy of the typewritten Will is annexed to one of Ms Campton's affidavits read in the proceedings, as well as to the affidavit of each attesting witness. The copy reveals that the bottom of each page of the typewritten Will bears only the signature of each attesting witness, but not the signature of the deceased; the last page is undated, except as to the year 2008; the deceased's signature appears near the standard attestation clause, as does the signature of each attesting witness; and that under the signature of each attesting witness is her name, occupation and address. The copy also reveals that there are no alterations, interlineations or deletions, and the only

handwriting on it is the signature of the deceased, the signature of each attesting witness and her printed name, address and occupation. A copy of the typewritten Will was marked as Ex. A in the proceedings.

[9] Ms Campton states that "subsequent to Easter 2014", the deceased orally requested her to return the typewritten Will to him, which she did, about three or four weeks later.

[11] When it was found, the altered Will had a number of interlineations, obliterations and deletions, handwritten on it. Also, immediately underneath one handwritten addition was the deceased's signature; next to most of the alterations, interlineations and deletions, there appears to be the signed initials of the deceased or his signature; and on the bottom of each page there appears the signature of the deceased. No date appears on the altered Will.

The alterations are summarised in the following paragraphs of his Honour's Judgment:

[35] The Plaintiff tendered (marked Ex. C) a document headed "Will and Hand Written Amendment Chronology", comprising 3 pages, which detailed the alterations, interlineations and deletions, handwritten on the typewritten Will. (Both counsel had participated in the creation of this document.)

[36] Exhibit C, with some amendments which I have made and underlined, is as follows:

"EFFECT OF HANDWRITTEN AMENDMENTS

Graeme Ross Hedges - The inclusion of an additional bequest to receive "the best of my cars which is the RAV regardless of anything else he might receive due to this Will".

- By clause 4 to receive a potential increase as remuneration as a trustee from $5,000 to "AT LEAST $5,000".

- Retains a $4,000 specific legacy

- Retains one third of residue.

Samantha Campton - Retains previous legacies and a share of residue but by clause 4 receives a potential increase as remuneration as a trustee from $5,000 to "AT LEAST $5,000".

By clause 5 - The following persons names are crossed out as beneficiaries of a $4,000 legacy each - Mitchell Clarke, Brian Meath, Neil Meath, Robbie Meath, Melvin Kong, Casey Dempsey,

"Killer" has been added.

By clause 6 - This clause previously provided for a list of beneficiaries to receive a legacy of $2,000 each. By the amendments, $2,000 was crossed out and substituted by "NOTHING" and "$0,000.00".

The list of beneficiaries in clause 6 has subsequently been further altered as follows;

The following have had their names crossed out;

Andrew Hedges, Jennifer Hedges, Lyndall Hedges, James Campton, Nicole Clarke, Brok Clarke, Paulette Meath, Colleen Meath, Janette Meath, Tracey Meath, Robyn Meath, Sharon Meath, Roy Fletcher, Bett Fletcher, Sebastian Hedges, Brian Glenn Meath, Patsy Meath, Ally Higgins, Elizabeth Campton, Nicholas Campton, Gabrielle Campton.

The remaining beneficiaries in this clause have not been crossed out from the list and are as follows;

Terry Meath together with a tick sign and "$3000-00",

Vicki Hedges together with a tick sign,

Melissa Hedges together with a tick sign,

Peter Foskett together with a tick sign and "AT LEAST $10,000-00".

Michelle Fletcher together with a tick sign and "$3000-00".

Declan Campton together with a tick sign and "$2000-00".

By clause 7 Legacies of $1,000 each are altered by:

i. The names Cody Clarke, Lani Stone and "Mario, the person who resides next door to me at 85 Hassall Street, Parramatta" have been crossed out.

ii. The addition of a tick sign and "$2000-00" in respect to both Jade Hedges and Amy-Lee Hedges.

By clause 10 the powers of the executors have been altered by:

i. A direction that they are "NOT" to exercise any powers given to them by law.

ii. Removal of certain previously authorised investments."

[37] In addition to the above, the following matters which are not in dispute, or which I am satisfied have been established, should be noted in respect of the altered Will:

(a) The revocation clause has not been crossed out.

(b) Immediately underneath the bequest of "the best of my cars which is the RAV…" to Mr Hedges, which appears in the altered Will in the handwriting of the deceased above the typewriting that follows, appears the deceased's signature.

(c) The name of the Defendant in Clause 6 of the typewritten Will is not crossed out but the earlier reference to the amount of the legacy is amended in handwriting to be nothing.

(d) Brian Meath (referred to as "Bryan Meath"), who was a brother-in-law of the deceased predeceased the deceased having died on 12 September 2013;

(e) Robbie Meath, who was a brother-in-law of the deceased, predeceased the deceased having died on 5 March 2013;

(f) The reference to "Killer" in the altered Will is a reference to the nickname of Doug Kowalski, a close friend of the deceased. (I accept that this is so bearing in mind the evidence of the Plaintiffs.)

(g) The reference to "Bett Fletcher" whose name was crossed out in the altered Will is a reference to "Betty Fletcher". The deceased lived with the Fletcher family, from time to time, during periods when he worked in the cotton industry in the Moree area. She was referred to as "Bett" in an Address Book located in the deceased's home after his death.

[38] If effective, the altered Will removes a number of the pecuniary legacies with the result that the residue of the estate is increased by about $53,000."

**Evidence**

The relevant evidence is set out at the following paragraphs of his Honour's Judgment:

"[26] In her affidavit sworn 24 April 2015, Ms Campton deposes:

"…

> I do not recall the exact date that I dropped it over, but I do recall that it was approximately 3-4 weeks after Neil had called me. I handed him the original Will and he said to me: "Oh good. I was starting to think you weren't going to drop it back. I was going to go and see Watts McCray to get them to do it if I didn't get this one back from you soon, but that's good I can work off this one."
>
> I said to him: "Naun [the deceased], don't write on this one. It is better to work off this one and work out the changes you want made and then you can get Watts McCray or myself to make any changes."
>
> He said: "Yeah OK. I want to take a few people out." He said the names of a female person (the name of which I cannot recall) "rang me not long ago – I haven't heard from her in ages – and asked me if she was still in my Will! So she's out now! And there are people who I know who have died. I've been thinking about it and there are too many people, I want to cut some of the names out."

[30] In his affidavit sworn 23 April 2015, Mr Hedges deposes:

> "…
>
> 3. In early 2014 Neil started talking to me about asking Samantha for his Will back. I recall him saying words to the effect "*Samantha hasn't brought that Will back*". When I located the copy of his Will that I had, I offered to give him the copy but he said "*No, Samantha has brought it back*." My recollection is by then it was around June, not long before he died.
>
> 4. I recall Neil said words to me to the effect:-
>
> (a) "*I want Mario out*". I knew Mario to be his neighbour who he had a falling out with.
>
> (b) "*I want Peter Foskett to get at least $10,000*". I knew Peter Foskett to be a friend of Neil's who visited him regularly.
>
> (c) *"I have nominated too many people in my Will. I was silly to do so and I want to take some of them out*".
>
> 5. Although Neil spoke to me about his Will and wishes from time to time, I did not get involved in the preparation of his Will. I knew Samantha was looking after his Will for him in accordance with his wishes."

[31] Neither of the Plaintiffs was cross-examined on her, his, or their, affidavits.

[34] The Defendant did not read any affidavit at the hearing and tendered no other evidence.

**Outcome**

His Honour declared that the Court was satisfied that the deceased intended the alterations to take effect, and a grant of Probate of the altered Will was made to the Plaintiffs.

**Costs**

His Honour said the following in relation to costs:

> "[63] I am of the view that the Defendant should not recover her own costs out of the estate. I consider that the signature of the deceased in a number of places on the altered Will together with the fact that the deceased referred to the document as "this Will" are strong reasons to have led her to seriously consider the need to lodge the caveats and to defend the proceedings.

> [64] Put another way, even if the circumstances led reasonably to an investigation in regard to the document propounded, the usual principle is that costs may be left to be borne by those who respectively incurred them. In this case, in exercising my discretion on costs, I am of the view that the Defendant should bear her own costs of the proceedings."

**Bechara v Bechara [2016] NSWSC 513, Hallen J**

**Deceased's information**

Bechara v Bachara concerned the testamentary instruments left by the late Michael Bechara ("the deceased"). His Honour described the deceased's family background as follows:

> "[21] There is very little information about the background and history of the deceased and his family.
>
> [22] The deceased was born in October 1922 and died on 8 April 2014, aged 91 years. I do not know when he came to Australia, but the evidence reveals that he was unable to speak, understand, or read English, and all of the conversations that he had with family members were in Arabic. In addition, the conversation that he is said to have had with Mr Alphonse on 10 October 2012 was in Arabic as Mr Alphonse is able to converse in that language.
>
> [23] The deceased was married to Nadima Bechara, but she predeceased him, having died in July 2012. There were 11 children of their marriage, each of whom survived the deceased. The Court knows virtually nothing about any of the deceased's children."

**The proceedings**

A grant of Probate of a Will dated 2 March 1999 had been made to the Defendants Baddoui Bechara, Joseph Bechara and Victor Bechar. The Plaintiffs, Melham Bechara, Issa Bechara, George Bechara, Hassna Bechara, Marcelle Farah, Jackie Abousleiman, Bechara Becahara, and Mary Rose abou Arrag, sought revocation of the grant, and a declaration pursuant to section 8 of the Succession Act 2006 in respect of an undated and unsigned document prepared by solicitors in about October 2012. Each of the Plaintiffs and the Defendants were children of the deceased. During the course of the hearing an application was made to amend the Statement of Claim to seek alternative relief, including a declaration in respect of a file note made by the solicitor in the following terms:

> "Michael Bechara
>
> Has 11 children – leave equally
>
> Executors joint Melhem or Issa – xxx xxx xxx*
>
> 10/10/12

(set out at paragraph [46] of his Honour's Judgment)

The 2012 document was said by the Plaintiffs to have been prepared in accordance with the instructions recorded on the solicitor's file note.

**The evidence**

The affidavit evidence of a solicitor Mr Alphonse (who prepared and was an attesting witness to the 1999 Will, included the following (set out at paragraph [44] of his Honour's Judgment):

> "…

3. On 10 October 2012 I was at the offices of the Firm. I do not recall the exact conversation that took place but I believe that I was approached by Susie Deeb, the legal secretary of the Firm, to speak to a Michael Bechara on the phone about amending a will that I had previously prepared… I agreed to take the telephone call and speak with the person as Panopoulos the principal of the firm was not available as he was undergoing a medical procedure or recovering from one.

4. I cannot recall the conversation that took place and can only rely upon a file note that I made at the time of the phone call… According to the file note I was advised by Michael Bechara that he had 11 children and that he wanted to leave his estate to all of them equally and that Melhem and Issa were to be the executors jointly.

5. At some point after 10 October 2012 I believe I handed the file note to Susie Deeb to hold for the return of Panopoulos to the office so that he could make the necessary changes to the previously executed will and to confirm the instructions received from Michael Bechara.

…

8. Beyond my statement in this affidavit I have no recollection of any contact with the deceased or family members or any other communication with regards to the deceased's unexecuted will. I have no recollection of seeing the unsigned will the subject of these proceedings."

The affidavit evidence of the solicitor's secretary Ms Deeb was as follows (set out at paragraph [54] of his Honour's Judgment:

"…

2. Sometime before 10 October 2012, on day I cannot recall, I answered the phone and had a conversation with a person I would later identify as Issa Bechara ("Issa") in which words to the following effect were said:

Me: "Alphonse and Associates how can I help you."

Issa: "It's Mr Bechara. My father is Michael Bechara and I am his son. I need to speak to the Lebanese solicitor."

Me: "Mr Bechara, Joe Alphonse is no longer the solicitor here. He sold the business to Tony Panopoulos. Is there anything I can help you with?"

Issa: "Your office has been my mother and father's solicitor for many years. My father is sick and he's in hospital. He wants to change his will."

Me: "I'm sorry to hear. Tony (Solicitor) can't help as he's unavailable. He's had a few operations recently and will not be available for some time."

Issa: "He's very sick and he needs to change the will. Can you please help? You prepared the will."

Me: "I'm sorry there's nothing I can [do]."

Issa: "Can't you do the will for me?"

Me: "No, I'm sorry I can't. The solicitor prepares the wills and he's not here."

3. Issa contacted the office several more times seeking assistance with changing his father's will. The conversations were all very similar to the initial conversation we had as stated above.

4. During the last telephone conversation before 10 October 2012 I concluded the conversation with Issa as follows:

Me: "When Tony (Solicitor) calls the office I will ask him if there is anything that we can do".

5. By 10 October 2012 the Solicitor had not yet returned to work after his last medical procedure. Issa telephoned the office wherein we had a conversation in which words to the following effect were said:

Issa: "Please. Please. My father is sick he needs to change his will"

Me: "I'm sorry Mr Bechara but the solicitor is not back yet."

Issa: "Please, please you need to help."

Me: "Please wait."

6. At this point I put the phone call on hold and approached Alphonse; Alphonse had been at the office that day attending to his own business. I had a conversation with Alphonse in which words to the following effect were said:

Me: "Joe, Robert Bechara's grandfather is in hospital and his son keeps calling the office to change his will. Can you talk to him? He's called a few times while Tony's been away?"

Alphonse: "Ok."

At this point I transferred the call to Alphonse.

7. After Alphonse had finished his telephone conversation with Issa Alphonse approached me and handed me a file note… He then instructed me as follows:

Alphonse: "Michael Bechara wants to change his will. Give this to Tony when he gets back."

8. During the week of 15 October 2012 the Solicitor attended the office for an hour or so to sign some documents. During this visit we had a conversation in which words to the following effect were said:

Me: "While you were away Issa called a few times asking to have his dad's will changed. I told him you weren't here and there was nothing I could do."

Solicitor: "That's fine."

Me: "The last time he called Joe (Alphonse) was here so I asked him if he could talk to Issa."

Solicitor: "Did he speak to him?"

Me: "Yes."

Solicitor: "What happened?"

Me: "He said Michael wanted to change his will to include all the kids."

At this point I handed the Solicitor the file note… The conversation then continued:

Solicitor: "Do we have a copy of the old will?"

Me: "Yes, it's in the sleeve."

Solicitor: "Leave it with me".

9. On or about 13 November 2012 I telephoned Issa advising him the draft will was ready for collection. I reminded him that the fee for the preparation of the draft will was $165.00 and that would need to be paid when collecting it.

10. On 13 November 2012 Issa attended the office to collect the draft will. We had a conversation in which words to the following effect were said:

> Me: "Here is the will. As the will is not being signed in our office in front of the solicitor we have removed any reference to our firm. You will need to make arrangements to get it signed."

The affidavit evidence of Issa (second Plaintiff) included the following (set out at paragraph [64] of his Honour's Judgment):

> "…
>
> 16. I returned to my Dad's home and told him that I got the new will. My dad wanted to sign it in front of all of us. However every time we were together at his home and we talk about the new will, our three brothers the trustees start yelling and screaming at all us and my Dad. My Dad used to get scared and upset. He did not want us fighting, he used to say words to the effect of 'I will sign it later, anyway the solicitor knows what to do.'"

His Honour noted that:

> "[67] Issa did not state that he had given the 2012 document to the deceased at any time. Indeed, I infer that he retained it whilst the deceased was alive and until he delivered it to the Plaintiffs' current solicitors.
>
> [68] Issa did not give any evidence of the 2012 document having been read over, or that it was explained, to the deceased, by his son, Issa (as to which Hassna gave evidence)."

The affidavit evidence of Hassna (fourth plaintiff) included the following (set out at paragraph [78] of his Honour's Judgment):

> "…
>
> 12. Once Issa and I got back to my father's home, Issa told him words to the effect '*We got the will'*, the deceased replied with words to the effect '*Congratulations, what does it say'*. My nephew, Issa, was there. He read out and translated the will to the deceased in Arabic. The deceased then said '*Are you happy now, you got the will, I want you all to be the same*', My brother Issa then said to him words to the effect 'this just needs to be signed'. The deceased gave him a scared look and said to him to the effect '*Issa, God look after you, I don't want trouble, I want everyone to be here when I sign'*.
>
> …
>
> 15. On many of these occasions, my siblings and I would ask the deceased to sign the will. Buddy, Joseph and Victor would say to us words to the effect 'my mother made the will and this is the will that will go, we don't care what father has to say, it will never work'. The deceased would get so upset and say words to the effect ' please leave me, I am sick, I will sign later, the solicitor knows what I want'. Buddy would also say words to the effect *'the girls specially would not get anything*'. The deceased would reply '*the girls before the boys*'.
>
> 16. This happened on many occasions. My father would say to us '*don't worry, you are all the same to me. You will all get the same*'.

However, Hassna's gave different evidence in cross-examination (set out at paragraphs [79] and [86] of his Honour's Judgment):

> "Q. Ms Bechara, can you help me please. On how many occasions that you were present was there any discussion about your father signing a will?
>
> A. INTERPRETER: Not even once he said that he will sign it.
>
> Q. I'm sorry? What was the answer?

A. INTERPRETER: He never said, or there was no occasion that he said he would sign it. Nobody spoke about the will, nobody.

Q. No-one spoke about the will. Is that what you've just said?

A. INTERPRETER: We didn't speak anything about signing or not signing. No one said anything."

…

Q. Your father never said, "Are you happy now you got the will? I want you all to be the same." Your father never said those words in Arabic, presumably?

A. INTERPRETER: My dad said, "I want you all to be happy in your heart, all, like, equal to each other."

In re-examination, Hassna's evidence changed again (set out at paragraph [80] of his Honour's Judgment):

"Q. Ma'am, at para 15 of your affidavit, you depose as follows: "On many of these occasions, my siblings and I would ask the deceased to sign the will."

INTERPRETER: Sorry, can you repeat the last sentence please.

AHMED

Q. "On many of these occasions my siblings and I would ask the deceased to sign the will."

A. INTERPRETER: Yes, after he's been released from hospital, yes. I been present twice, and we ask him, "When you going to sign the will?" and he said - that's always that he's in charge and he knows what to do."

In respect of Hassna's evidence, his Honour said:

"[81] Hassna's nephew, Issa, did not swear an affidavit in the proceedings. All that the Court knows about him is that, currently, he lives at home with his parents, that he is 20 or 21 years of age, and that he is studying law. The failure to call Issa, the nephew, was not explained.

[82] Bearing in mind Hassna's inability to read written English, the vagueness of the assertion in Paragraph 12 of her affidavit, her different evidence regarding "the will", the failure by Issa, the Plaintiff, to refer to the event in his affidavit, and the failure to call Issa, Hassna's nephew, about whose ability to translate some of the legal terms contained in the 2012 document is not disclosed, I find her evidence that the 2012 document was read out, and translated, to the deceased to be unconvincing."

The evidence of Baddoui (first defendant) included the following (set out at paragraph [105] of his Honour's Judgment):

"…

7. On a date I cannot recall but during the deceased's admission to Canterbury Hospital I visited the deceased. Present were Issa, Hassna and possibly Melhem. We were all sitting around the deceased in the canteen. A conversation took place in which words to the following effect were said:

Issa: "If you don't sign the will I won't spend time with you here in the hospital anymore."

Deceased: "No."

Issa then walked off and I yelled out after him “Come. Come back Sam (Issa)”. I then turned to the deceased and said to him “Don’t worry, he’s only pissed off, he’ll come back”.

8. On many occasions before the deceased passed away there were discussions that took place in my presence between the deceased and Hassna in which words to the following effect were said:

> Deceased: (To Hassna) “If you’re going to come here and talk about the will and money then don’t come here anymore.”

9. On many occasion [sic] I heard Melham say in my presence to Hassna:

> Melhem: (To Hassna) “If you’re going to come here and see your khityour (“old man” – term of endearment) don’t come here if all you’re going to do is whinge.”

10. On numerous occasions I saw and overheard Issa in the presence of Hassna attempt to convince the deceased to sign a document. I overheard Issa saying to the deceased “Are you going to sign the will for us?”. The deceased generally ignored the both of them. However occasionally he would angrily answer “No”.’

13. During these visits many of my brothers and sisters, but mostly Issa and Hassna, would try and convince the deceased to sign the draft will. I regularly saw Issa and Hassna try to get the deceased to sign a document. Anytime anyone mentioned the draft will the deceased would become angry and start waiving his walking stick in the air and yelling at them words to the effect:

> Deceased: “Get out of my house. I don’t want you here. All you want is money.” and
>
> Deceased: “I’m not signing it. When I die you will all find out what I’ve done.” and
>
> Deceased “You don’t come to visit me. You come for me to sign the will. Get out.” and
>
> Deceased: “I want no one here if you’re coming here for trouble.” and
>
> Deceased: “Fuck off and leave me alone.”

**Outcome**

His Honour’s determination in respect of the two documents is set out in paragraph

> “[49]… it is clear that the instructions reflected in the diary note were not intended to form the last will of the deceased, but that the deceased envisaged the preparation of a formal document giving effect to the instructions.
>
> (as the alternative application in respect of the file note was made during the course of the hearing, his Honour considered the merits of the claim in deciding not to allow the amendment)
>
> …
>
> [134] It is in dispute that the 2012 document purports to state the testamentary intentions of the deceased. However, I am satisfied that in giving instructions to Mr Alphonse on 10 October 2012, to prepare the 2012 document, that document, so far as its terms are reflected by the terms of the diary note of 10 October 2012, purports to state the testamentary intentions of the deceased. In other respects, I am not so satisfied.
>
> [135] However, the partial finding is not enough for the Plaintiffs to succeed. For the 2012 document to be admitted to probate, the Plaintiffs must also establish, on the

balance of probabilities, that deceased intended that it operate as his Will, or an alteration to the 1999 Will, or a full or partial revocation of the 1999 Will. In other words, that the 2012 document was intended by him to govern the disposition of his property after his death.

[136] I am far from satisfied that the deceased did so intend. In particular, taking the Plaintiffs' evidence at its highest, there were a number of occasions, after 13 November 2012, that one, or more, of the Plaintiffs, encouraged (using a neutral term) the deceased to sign the 2012 document but he deferred doing so. He had many opportunities to authenticate the 2012 document as his Will, or as an alteration to the 1999 Will, or as a full or partial revocation of the 1999 Will, by signing it. He chose not to.

[137] In my view, that the 2012 document was left unsigned between mid-November 2012 and the date of the deceased's death in April 2014, leaves the status of the deceased's intentions as to that document forming his Will, an alteration to the 1999 Will, or a full or partial revocation of the 1999 Will in real doubt. There is no suggestion that throughout that period, the deceased suffered from ill health such that he was prevented from signing the 2012 document if he had chosen to do so. It is not a case of intervening circumstances preventing the act of execution. In my view, if the deceased had wished to do so, he could, and would, have signed the 2012 document. No plausible reason for not signing it has been advanced.

[138] Furthermore, the fact that the parties refer to many heated arguments in the presence of the deceased, about the 2012 document and whether he would sign it, is of some concern and suggests that, perhaps, its terms reflected what Issa and Hassna, and perhaps the other Plaintiffs who participated, rather than the deceased, wanted to happen in the distribution of the deceased's estate.

[139] That Issa did not give the 2012 document to the deceased is also important. This suggests, to my mind, that he may have considered that there was little point in doing so, as the deceased was unlikely to sign it. There is no evidence that the deceased requested Issa to retain it.

[140] In addition, there is no satisfactory evidence that the deceased believed that he had made a will in the terms of the 2012 document. Simply saying "the solicitor knows what I want" does not establish any such belief. In this regard, it is to be remembered that the deceased had signed the 1999 Will, so he must have had some knowledge of the need for him to sign the 2012 document. Even if he did not, the requests made by one or other of the Plaintiffs after November 2012, makes the significance of there being no signature of the deceased on the 2012 document obvious.

[141] Finally, bearing in mind the Plaintiffs' failure to call Issa, the nephew, who is said to have read over the terms of the 2012 document to the deceased, it is impossible to know what was done by Issa. As I have written earlier, the 2012 document is a sophisticated document. It uses legal terminology. Without having heard from Issa, the nephew, as to the steps he took to translate the terms to the deceased, assuming he could do so, it is difficult to accept Hassna's evidence on the translation of the 2012 document to the deceased."

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

**Deceased's family circumstances**

The deceased's family circumstances were described by his Honour as follows (appearing at paragraph [35] of his Honour's Judgment):

> "[35] Wai Fun CHAN, also known as CHAN Wai Fun (a widow, aged 85 years, born in China, but resident in Australia for 23 years) died, in Sydney, possessed of property in NSW and overseas (with an estate with an estimated value of about $930,000) on 27 June 2012, leaving: (a) a formal will dated 6 March 2012, prepared by her solicitor, expressed in the English language, endorsed by one of the attesting witnesses (also a solicitor) with a notation that he had explained the contents of the Will in the Cantonese Dialect of the Chinese language to the testatrix who stated that she understood and agreed to the contents of the Will before she signed it; (b) a DVD recording of a supplementary statement of the testatrix's testamentary intentions recorded, in Cantonese, on 8 March 2012 in the presence of one of her children (the second plaintiff) and that child's spouse; and (c) eight adult children scattered around the world, variously resident in NSW, Hong Kong, mainland China and the United States of America."

**Application**

The plaintiffs applied for a grant of probate of the formal will, together with the video will as a codicil, as the executrices named in the formal will. Their application was accompanied by a transcription of the video will in the original Chinese, and an English translation of that transcription, certified by a translator registered with NAATI (National Accreditation Authority for Translators and Interpreters Limited). By amended summons, the plaintiffs also sought a declaration in accordance with section 10 (3)(c) of the *Succession Act* 2006

**Description of video**

His Honour described the video as follows:

> "[63] As manifested by the English translation of the transcription of the DVD, the testatrix commenced her statement by recording the date it was made (8 March 2012) and an express claim to be "of a clear and sound mind".
>
> [64] That opening declaration was followed by a series of short, and apparently well-considered, disciplined statements of intent (coupled with motherly exhortations in passing) that stand neatly with the will as an alteration of the primary document.
>
> …
>
> [66] The only person visible, or audible, on the DVD is the testatrix, face to camera in the setting of a domestic kitchen. She twice glances to the side as if communicating with one or the other of the two persons (one a beneficiary) who, we know from their affidavit evidence, witnessed, and recorded, the making of her statement. She also glances down, from time to time, as if prompted by notes. However her presentation is calm, measured and at ease with the surroundings. …"

**Attitude of affected persons**

Referring to the usual requirement for service of notice to affected persons, his Honour said:

> "[51] On the whole, the testatrix's children manifested an indifference towards the plaintiffs' application for probate, one or two even preferring to make themselves unavailable for the service of formal notice of the proceedings."

**Referral to Probate List Judge**

Although the application was not contested, Senior Deputy Registrar Studdert referred the application to the Probate List Judge. This was the first admission of a video will to probate in New South Wales, and there were novel aspects to the application including the requirement that section 10 of the Succession Act 2006 (the provision dealing with interested witnesses) be dealt with in addition to section 8.

**Practice points regarding admission to Probate of a video Will**

His Honour said:

> "[25] Where a video will is admitted to probate the Court will ordinarily require that a verified transcript of the will-maker's statement be produced to the Court for incorporation in the instrument recording the Court's grant of probate or administration.
>
> [26] In such a case, the grant should ordinarily include an express recital to the effect that the will-maker's testamentary statement takes the form of a video recording, a transcript of which forms the grant or (as the case may be) part thereof.
>
> …
>
> [28] Where a video will, admitted to probate, is recorded in a language other than English, the Court will ordinarily require that there be produced to the Court both a transcript of the will-maker's statement as made and an English translation of the statement, both verified.
>
> [29] Verification of such a translation should ordinarily be by a person (such as an official translator or solicitor) upon whose expertise and integrity the Court (and, through the Court, the community) can rely.
>
> …
>
> [32] Ordinarily, where a grant is made on the basis that it include a transcript of a video (or audio) will (and, where necessary, an English translation of the transcript) the identity and qualifications of the person or persons who made the transcript (and, where applicable, prepared the translation) should be disclosed on the face of the grant or documentation incorporated in it. If questions arise as to the accuracy of the transcript or translation, those persons should be readily identifiable so that they can be called to account if necessary."

**Outcome**

The declarations sought by the Plaintiffs were made, and a grant of Probate of the Will and Codicil was ordered to be made to the Plaintiffs. The basis for grant was said to be:

> "Probate of Will and Codicil. Executors appointed under the Will and Codicil. The Codicil is in the form of a video recording in the Cantonese Dialect of the Chinese Language. A transcript of the recording, and an English translation of it, are annexed".

**The Estate of Roger Christopher Currie, late of Balmain [2015] NSWSC 1098, Bergin CJ in Eq**

Roger Christopher Currie (the deceased) died aged 52 years between 25 and 26 July 2012. He had never married, and he had no children. The deceased's relationship with the parties and some of the beneficiaries is described in paragraphs [5] to [17] of her Honour's Judgment.

Her Honour described the affidavit evidence of Ms Gray as follows:

> "[22] (…) Ms Gray's affidavit evidence was that the deceased said:
>
> If anything happens to me I have made a will. It's encrypted.
>
> [23] At the time that he said this, the deceased gestured over his left shoulder. Ms Gray's affidavit evidence was as follows:
>
> There were such piles of equipment in the room (maybe 12 record players and amplifiers stacked up for fixing) and what looked like boxes that could contain computers or sound systems that I didn't register where he meant. His room and office were upstairs and his gesture could have meant upstairs or right there behind him.
>
> [24] Ms Gray's affidavit evidence continued:
>
> Roger then said words to the effect: '*the password is xxxx'*.
>
> I cannot remember the password he told me."

Her Honour described the finding of the Will as follows:

> "[32] Ms Perey found two USB sticks in a drawer in the Balmain house. She took them to two computer experts who were unable to "break the code" to get into their contents. She then took the USB sticks to George Raicevich, a friend of hers. Mr Raicevich was able to get past the password and discovered the Computer Document.
>
> [33] The USB sticks were then provided to Mr Darvall and a computer expert, Nick Klein, was jointly engaged by the parties. The forensic analysis completed by Mr Klein establishes that the Computer Document was last modified on 1 April 2009. It was last accessed on 13 May 2012. It is in the following terms:
>
> **LAST WILL**
>
> **& TESTAMENT**
>
> 1. This is the last will and testament of Roger Christopher Currie of Balmain in the state of New South Wales and revokes all former wills and testaments as of this day Wednesday, 1 April 2009. I am of sound mind and I am not under any pressure or duress in writing this document.
>
> 2. I appoint Chulmondely Darvall, banker of 3a Gordon Ave, Waverley, New South Wales to be sole Executor and Trustee of my estate.
>
> 3. I bequeath my Real Estate including land and house at no.8 Duke Street, Balmain, New South Wales to my cousin Kate Shepherd of Bulli, New South Wales. Included in the said Real Estate shall be all fixtures and fittings that can be ascertained to be part of the house, such as the red cedar & kauri pine staircase, light fittings and three in situ marble fireplaces, but not including removable furniture or chattels.
>
> 4. To my cousin Truda Gray, University student of Bulli, New South Wales. I leave my collection of letters, books, magazines and other papers, which will contain information that she may wish to research. Additionally two items of furniture, chosen with precedence over others from my estate, excepting specific pieces otherwise mentioned in this will.
>
> 5. To my long standing friend Eleanor Jane Leleu of Hobart, Tasmania I leave the contents of my work shed including tools, unfinished tables, broken chairs and all hardware, cedar and other timbers, so that she may have a head start in becoming a world renowned cabinetmaker.

6. To my first love Fiona Wrobel, performer, formerly of Wooloomooloo, New South Wales I leave a collection of fine artwork, including paintings, printed photographs, negatives and transparencies, the product of myself or others.

7. To my mate Melissa Docker, dancer, last residing in London, England I leave a unique Regency period lap-desk made of a hardwood, possibly mahogany, with brass and ebony trimming in original condition and still containing all of its secret compartments, the cover of which has a brass plaque inscribed with the name L.Goodyar, origin unknown.

8. To my respected confidant and most intelligent ally Sabine Thea Altenkirch nee. Seipenbusch, psychiatrist last known at Heerstr 7, Berlin 19, Germany I leave an Istfahan prayer rug approximately 1.5m x 1.2m dimension with various red and yellow patterns on a blue and cream field. Sabine is also to have all of the letters that she has sent to me over the years returned to her.

9. To my adored love Caroline Mary O'Connell nee. Parr, actress of Melbourne, Victoria I leave three items of furniture; Firstly a Victorian flamed mahogany veneered 5' circular tilt top Breakfast Table on splayed cedar base; Also a Victorian mahogany veneered pine Bookcase the top section fully glazed and with detachable pediment and; Finally a Victorian full cedar Chest of Drawers.

10. To Caroline's daughter Sasha May O'Connell I bequeath a rose gold Rolex wrist watch circa 1920's which is the provenance of Margaret (Peg) Burch late of New Zealand.

11. To Alison Margaret O'Brien, nurse, of Earlwood, New South Wales I leave all tableware Manchester, Cloisonné vases, copper cooking pots and an item of furniture to be chosen from my Estate.

12. To Fiona Elizabeth Reardon, seamstress, of Wagga Wagga, New South Wales I leave a collection of vintage Pucci dresses and an item of furniture to be chosen from my Estate.

13. To Adrian Lee, IT professional, of Glebe, New South Wales, I leave my collection of recorded music on vinyl, compact disc and other media, including all electronic audio equipment.

14. To Lou Francis Grech, artist, of Coogee, I leave an early Victorian Cedar and Blackwood sideboard of small proportions of Tasmanian origin containing two enclosed plinths and a central drawer additional to a large Kauri pine press on two drawers.

15. The residual of my Estate, after debts have been settled, including furniture, jewellery held in safe keeping at ANZ Bank Balmain, and tribal rugs held in chest within shed, is to be divided equally, by agreed market value, amongst all of the above named beneficiaries of this will. A beneficiary may choose an item or items that is/are deemed to be of a value more than his or her share, if and only if, she/he provides the shortfall in cash at time of distribution. If any items, in this method of choice, are disputed, then such item(s) shall go to the beneficiary demonstrating the greatest financial need. This condition allows for beneficiaries to receive an inheritance as keepsake but without any debate over value. Under no circumstance is anything from the Estate to be liquidated without consensus of all beneficiaries.

16. I acknowledge that my sister Eve Trefely nee. Michelle Eve Currie of Clovelly, New South Wales, brother David Roger Currie of Bronte, New South Wales and nephew Luke Gerzina of Darlinghurst, New South Wales, and any member of their respective families, should be satisfied that they were catered

for adequately by the estates of my late parents and therefore should not be entitled to lay claim upon my Estate.

17. Signed by the writer Roger Christopher Currie on this day Wednesday, 1 April 2009."

**Outcome**

A declaration was made pursuant to section 8 of the Succession Act 2006 and a grant of Probate ordered to be made to the Executor.

For another example of a Microsoft Word document admitted as a Will, see Yazbek v Yazbek [2012] NSWSC 594.

**Wilden (deceased) [2015] SASC 9, Gray J**

The testator died a bachelor with no issue. His parents predeceased. He had a net estate valued at $197,578.32. The testator appeared on a DVD and made the following statement:

"...this is ah somewhat of an official last will and testament as I don't have a written document anywhere at this stage. This is just um a fail safe until such time as I do get something like that done. Um. Um. My will is that everything that I own goes to my younger sister Sandra Carpenter and her husband Michael Carpenter and my two nephews Lachlan and Jacob. Um I don't have a wife or any children or anything like that at this stage so if anything should happen to me now or in the next few years or whatever um this is just so there is some kind of an official record of how things should be distributed. I don't want the rest of my family ie my other brothers and sisters to get anything... so um sell all my stuff, um um thousands of dollars worth of audio equipment um that should easily be sold off to go see my employer [name] he will probably buy it all off you...Um yeh keep what you want Sandra, sell what you want, enjoy, keep the money..."

There was also a signed but not witnessed document which provided as follows:

*LAST WILL AND TESTEMENT [sic] WAYNE GREGORY WILDEN.*
*THIS IS AN OFFICIAL LAST WILL AND TESTEMENT [sic] FOR MYSELF, WAYNE WILDEN.* ***THIS IS TO ADD TO MY VIDEO OF MY LAST WILL AND TESTEMENT [sic] RECORDED ON 11.5.05.***
*I WOULD LIKE TO OFFICIALLY RECORD THAT MY WILL IS THAT EVERYTHING I OWN GOES TO MY YOUNGER SISTER SANDRA CARPENTER AND HER HUSBAND MICHAEL CARPENTER AND MY TWO NEPHEWS [J] and [S].*
*THIS INCLUDES MY PROPERTY AT [address], ALL POSSESSIONS,*

*ALL MONEY IN BANK ACCOUNTS AND ALL*
*SUPERANNUATION PAYMENTS AS MY NEXT OF KIN.*
*I DO NOT WANT MY OTHER BROTHERS AND SISTERS OR*
*THEIR FAMILIES TO RECEIVE ANYTHING.*
*[Signed.]*
*[Emphasis added.]*

Gray J of the Supreme Court of South Australia had little difficulty admitting the DVD and informal document to Probate. The Judgment also contains an interesting discussion on the appointment of an executor according to the tenor of the Will.

Craig Birtles
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27 March 2017