INFORMAL WILLS IN NEW SOUTH WALES

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In the vast majority of estates, the deceased person leaves a validly executed will that is a document in writing which has been signed by the testator (or some other person in the presence of and at the direction of the testator) before two persons who witness the testator signing the will. (see **Section 6 of the Succession Act 2006)**

However, there are a small number of estates where the deceased's relatives need to deal with an informal document that the deceased may, or may not have intended, to be their last will. Alternatively, this informal document may have been intended to amend a previous will that was validly executed.

Examples of informal wills can include the following:

1. Wills prepared by the deceased's solicitor but not signed before the death of the deceased- see **case studies 1 and 6**.
2. Unsigned testamentary documents left on the deceased's computer- **case studies 2, 3**;
3. Videos, DVD's, tape recordings, or messages left on other electronic devices of the deceased setting out their testamentary intentions-**case study 4**;
4. Handwritten or typed notes signed or unsigned by the deceased- **case study 7**;
5. Prior wills of the deceased which have handwritten amendments initialled and dated by the deceased **case study 5**;

A "document" can include one that is only an electronic version.

Under **Section 8(2) of the *Succession Act* 2006** the Court can order that an informal document that purports to state the testamentary intentions of the deceased, is the will (or codicil) of the deceased, provided it is satisfied that the deceased intended it to be his or her will or codicil.

The relevant questions in considering an application under section 8 are generally accepted as having been set out by Powell JA when he was dealing with the precursor to Section 8 being Section 18A of the Probate and Administration Act in **Hatsatouris v Hatsatouris [2001] NSWSC CA 408** being as follows:

a. Was there a document?
b. Did that document purport to embody the testamentary intentions of the relevant deceased?
c. Did the evidence satisfy the court that, either, at the time of the subject document being brought into being, or, at some later time, the relevant deceased, by some act or words, demonstrated that it was her, or his, then intention that the subject document should, without more on her or his part, operate as her, or his, will?"

In relation to this third question it should be emphasised that it is not enough that the document expressed the testator's testamentary intentions. It is necessary that the testator intended the document should have a present operation as his or her will. Instructions given to prepare a will in anticipation of the future execution of that will, or the preparation of a draft will is not to be equated with a present intention that a particular document is to operate as his or her will. Evidence needs to be provided that the testator intended that document to have a present operation as his or her will.

The burden of proof of all of these issues is on the party propounding the informal document and is to be determined on the balance of probabilities.

Factors to be taken into account by the Court

Section 8(2) states that in addition to considering the informal document the Court will have regard to:

(a) Any evidence relating to the manner in which the document or part of the document was executed;

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

Notwithstanding the above, the Court can have regard to any other matters it considers relevant.

A further hurdle – benefit of presumptions lost

A party who is propounding an informal will has the additional hurdle that informal wills do not attract the normal presumptions that are accorded to formal wills (unless otherwise challenged) that the deceased had testamentary capacity or that the deceased knew and approved the terms of the will that was signed.

In the February 2020 decision of Rodny v Weisbord the NSW Court of Appeal set out the relevant principles to be followed in dealing with applications in respect of informal testamentary documents at paragraphs 15-24 of that judgement. In this paper I will address that decision in detail and in brief a range of other decisions made by single judges over the past few years.

Case study 1 - a solicitor sends a draft will to his client but it is not known whether it was ever executed. The deceased apparently made statements to her daughter and daughter's husband at about this time that indicated her belief that she had made a new will and identified the changes to her last will.

Rodny v Weisbord [2020] NSWCA 22 (27 February 2020)

In this case Mrs Rodny, a widow, died on 24 August 2014 and was survived by her daughter Jeanette aged 66 and her son Laurence aged 62. Mrs Rodny's estate was worth about $11.5M and was comprised by her home at Bellevue Hill ($4M), a block of apartments in Rose Bay ($5.1M), shares in a company that owned another apartment block at Lakemba ($1.5M), and an interest in another estate worth $541,000. In the proceedings it was argued that Laurence was holding a further $1.5M in shares in the company that owned the Lakemba property on trust for his mother.

Laurence was granted probate of her formal Will dated 19 December 1997 under which Jeanette received the deceased's house, Laurence received the block of apartments and her shares in the company that owned the Lakemba property, and the residue of the estate was then to be shared equally between the two siblings. There was also a gift to Jeanette's four children of a property at Carramar, but this property had been sold in the 2003 year for $1.25m and the gift adeemed.

Prior wills

Mrs Rodny's December 1997 will was generally consistent with her prior wills in 1990 and June 1997 where she tried to divide her estate equally between her two children to take account of the fact that her son would have a CGT liability on the block of apartments and there was a mortgage debt on the block of apartments. The gift to the grandchildren of the Carramar property first emerged in the June 1997 will. All of these wills had been prepared by her solicitor Mr Lipton.

Claim by Jeanette and her children to revoke the grant

Jeanette and two of her children sought orders to revoke the grant of probate and to propound a will prepared by another solicitor in August 2008. This will was not located in Mrs Rodny's records and it was not clear if it was ever executed. In the alternative Jeanette and two of her children sought additional provision from the estate.

In seeking to propound the 2008 document it was claimed that this document expressed the deceased's final testamentary intentions and without changing those intentions she was prevented from formally executing the will because of practical restrictions caused by her declining health and her son's control of her finances, and collection and reading of her mail.

The will prepared by Mr Lloyd and meeting on 15 August 2008

On 15 August 2008 Mrs Rodny met with Mr Lloyd who was a solicitor recommended by a close friend. The draft will that was prepared by Mr Lloyd in advance of this meeting differed from the December 1997 will as Mrs Rodny gifted the block of apartments at Rose Bay to her four grandchildren rather than to her son. The draft was incomplete in that it made no reference to the deceased's shares in the Lakemba property and had an incomplete clause dealing with capital gains tax liability. The draft will was pre-dated and had the names of the witnesses typed in as being Mr Lloyd and one of his staff.

Either during the 15 August 2008 meeting with Mrs Rodny or shortly thereafter on the same day Mr Lloyd made a handwritten amendment to the draft will to add the gift to Laurence of her shares in the Lakemba property.

The will was not signed at this initial meeting and Mr Lloyd claimed that he told Mrs Rodny at the conclusion of their meeting that he would send her a copy of the will. The draft will was subsequently amended to include the handwritten change and the date of 15 August 2008 was removed. The clause in relation to capital gains tax remained incomplete.

Mr Lloyd's file had a file copy of a covering letter to Mrs Rodny dated 15 August 2008 enclosing this draft will for her review stating "Please peruse the will and advise whether it meets with your approval". However it was not clear whether this letter was ever sent to Mrs Rodny as it was not recorded as having been sent in Mr Lloyd's outgoing correspondence register.

The only document that was signed at this initial meeting was an appointment of Mrs Rodny's two children as her enduring guardians.

Mr Lloyd's file notes of this initial meeting were very limited and the only file note simply detailed the names and contact details of Mrs Rodny's children and grandchildren, the ages of the grandchildren, the addresses of the properties, reference to the deceased's accountant, and instructions for a power of attorney. The instructions as to the changes to her will were written by Mr Lloyd on a copy of the December 1997 will provided to Mr Lloyd by Mrs Rodny. The markings made by Mr Lloyd on this will were not clear.

Mr Lloyd gave evidence that Mrs Rodny said to him at this initial meeting "I want to change my Will. My son's got enough and one of the properties has been sold". She told Mr Lloyd that she wanted to substitute another property by way of gift to her grandchildren for the property that had been sold. She also said to Mr Lloyd that she did not want Mr Lipton to know about the new Will.

Mrs Rodny hospitalised 19 August 2008

Mrs Rodny was hospitalised with serious hip and pelvis pain from 19 to 28 August 2008 but possibly met with Mr Lloyd on 3 September 2008. Mr Lloyd could not recall whether this meeting which was recorded in his diary actually occurred, but on 2 September 2008 he did an ASIC search in respect of the company in which Mrs Rodny owned shares and he also prepared a power of attorney to appoint Laurence as Mrs Rodny's attorney on 4 September 2008. This work suggested he had some communications with Mrs Rodny in early September 2008, notwithstanding that the power of attorney was never executed.

Mrs Rodny was admitted to hospital from 16 September to 2 October, 26 November, 10 – 13 December, and 17 December 2008 to 12 January 2009. She continued to be unwell with a range of medical problems in early 2009. It was not until September 2009 that she was diagnosed with the onset of dementia.

Justice Robb made findings that it was not clear that Mr Lloyd's 15 August 2008 letter enclosing the draft will was ever posted to the deceased or that Mrs Rodny had ever received it. He also commented that it seemed unlikely that Mr Lloyd would not have discussed the draft will at their second meeting.

Mr Lloyd does not appear to have contacted or written to Mrs Rodny after their communications or meeting in early September 2008 up until he closed his file on 17 October 2010. The explanation for his lack of contact was unclear. There was also no indication whether Mrs Rodny received or replied in any manner to the letter dated 15 August 2008 enclosing the draft will.

No copy of the August 2008 draft will prepared by Mr Lloyd or any executed version of this will was ever located in Mrs Rodny's records. Justice Robb noted that where Mrs Rodny kept her records anyone could have had access to these records.

Evidence that the August 2008 will expressed the deceased's final testamentary intentions

Jeanette claimed in her initial affidavit evidence that Mrs Rodny's friend Ms Parker had told her that she had taken the deceased to her solicitor John Lloyd to update her will and that when Mr Lloyd did some searches on her properties she was upset to see that her son had taken out a mortgage on one of her properties. This evidence did not confirm that a will had been prepared or executed and the timing of this meeting was said to be shortly after the Carramar property was sold which was in 2003 and not in 2008.

In subsequent affidavit evidence Jeanette claimed that the deceased had specifically told her and her husband in August 2008 that she had made a new will and wanted to give her apartment block to her grandchildren. Justice Robb noted that this evidence mirrored her husband's evidence and that the evolution of her evidence raised questions as to the weight to be given to that evidence.

Jeanette's husband Avi gave evidence that in mid-August 2008 he and Jeanette were invited to Mrs Rodny's home and that Mrs Parker was also in attendance when Mrs Rodny said "Recently I went to a different lawyer named John Lloyd and made a new will. I want to give the block across the road to your children. I don't want Laurence to know please do not tell him".

Justice Robb was not satisfied that Avi's evidence was completely reliable in relation to the timing of the events and what was said and by whom.

Jeanette's children also gave evidence that Mrs Rodny had told them that they would be receiving the apartment block.

Mr Price, a former business colleague of Laurence, gave evidence that Laurence complained to him on a number of occasions over a 12 month period from late 2008 that he considered it unfair that his mother had given his sister more than half of her estate in her Will. Further that he said "She told me I don't need the money, and that she has grandchildren who need to be looked after. I think this is totally unfair. At the very least I should get 50% if not more". After Mr Price suggested that he could understand why she might want to look after her grandchildren he said "I am still discussing it with my mum. We'll see"

Laurence denied having these conversations with Mr Price and claimed that this evidence was unreliable as they had had a falling out and Mr Price had a grudge against him. Two other witnesses were called by Laurence to establish the extent of the animosity between himself and Mr Price and to dispute one of the alleged conversations.

The submissions made by Laurence's counsel were essentially that there was no evidence that Mrs Rodny adopted or even saw or read the document that was prepared by Mr Lloyd after she left their meeting on 15 August 2008. Further that Mrs Rodny could have contacted Mr Lloyd after their first meeting and made arrangements for the execution of the draft will but did not do so. Further there was no evidence that she signed the draft will at any point after the draft will was sent to her.

Decision of Justice Robb grants probate of the informal will- 6 December 2018

In Justice Robb's decision he accepted the evidence of Jeanette and her husband that Mrs Rodny did say to them in 2008 that she had made a new will leaving her apartment block to their four children. He also accepted the evidence of Mr Price that conversations had taken place where Laurence had indicated that he believed his mother had executed a will in 2008 whereby she had left her block of apartments to her grandchildren.

In identifying the informal document Robb J determined that the document that Mrs Rodny was referring to in her conversations with her daughter and son-in-law was the will that had been prepared by Mr Lloyd on 15 August 2008.

Robb J determined that Mrs Rodny had formed the actual intention that the 15 August 2008 will would operate as her will and that the testamentary intentions contained in that document were in fact her testamentary intentions. In arriving at this determination he noted that there was no evidence that she had changed her instructions after the statement she made to her daughter and son-in-law, and that the bequest made in this will to her grandchildren was consistent with the statements she made to her solicitor and to the other witnesses at that time that she intended to gift her apartment block to her grandchildren as they were in need of assistance and her son had no need for these monies.

Court of Appeal -overturns decision of Justice Robb – 27 February 2020

The Court of Appeal ruled that neither the evidence, the facts as found by the primary Judge or his analysis of the evidence, were sufficient to support a conclusion that the deceased intended the second draft of the 15 August 2008 will to operate as her will.

In Justice Meagher's judgement he focused on the primary Judge's conclusion that he could not be satisfied on the balance of probabilities as to the happening of any particular chain of events after the preparation of the first draft of the 15 August 2008 will. Meagher JA states:

"*his Honour's observation and findings as to what Mrs Rodny understood could be no more than speculation as to the possibilities*"

"the finding that Mrs Rodny believed that she had made a will leaves unanswered questions as to whether there was any particular document which was the subject of her belief and, if so, whether that document was a will which accorded with her instructions; as well as questions to how and when she came to have that belief ".

In Justice White's judgment he stated:

"*it is not sufficient for the respondent to establish that the final draft of the 2008 will expressed Mrs Rodny's testamentary intentions. It is necessary that she intended the final draft of the 2008 will operate as her testamentary act*".

Justice White in addressing the question as to whether Mrs Rodny "adopted" the draft will as her testamentary act stated:

"On 15 August Mr Lloyd or his assistant who prepared the letter of that date described the document prepared on that date as being a draft will for Mrs Rodny's approval. The likely inference is that at that time Mrs Rodny would intend the document to form her will if she approved of it and indicated that approval by signing it. There is no evidence that she ever did sign it or see it."

"it does not follow from the fact that Mrs Rodny believed that she had made her will and that there was only one document which could be the subject of her belief, that she intended that the document to be prepared by Mr Lloyd would, when prepared, be operative as her will if it accorded with her instructions. The evidence of Jeanette, and Avi, and Laurence's admissions to Mr Price, do not establish that Mrs Rodny intended that any specific document, either already created or to be created, would form her will."

White JA concluded; "On balance I do not think that the evidence rises above a choice between speculative possibilities. It does not establish on the balance of probabilities the deceased intended a particular document to form her will".

Case Study 2 - unsigned document left by the deceased on his or her computer.

***Estate of Roger Christopher Currie* [2015] NSWSC1098, Bergin CJ**

In this case, Mr Currie died without leaving any formal will. However, three months before his death he told his cousin Ms Gray (with whom he had a close relationship over many years) that he had made a will and that it was encrypted. He then motioned to an area of the room to suggest where it might be found and told her the password to access this document. She thereafter failed to remember this password.

After the deceased's death, Ms Gray together with the deceased's former girlfriend, Ms Perey and the deceased's friend, Mr Darvell, searched the deceased's apartment for his will but no document was located.

Ms Perey then found two USB sticks in a drawer of the deceased. On these USB sticks was a document titled "Last Will and testament" in which Mr Currie appointed Mr Darvall as executor, left his principal asset being his property at Balmain to Ms Gray's daughter Ms Shepherd, made various other gifts to other persons, and divided the residue of his estate between all of the beneficiaries.

The deceased's brother sought letters of administration on an intestacy basis. Ms Gray's daughter, Ms Shepherd sought probate of the informal will on the deceased's USB sticks.

The independent computer expert who gave evidence in these proceedings found a number of identical copies of the deceased's will document on the USB sticks and also a very similar document dated five years earlier.

In arriving at the conclusion that the deceased intended the document on the USB sticks to operate as his will Bergin CJ noted that:

i. the conversation that took place between the deceased and Ms Gray was in circumstances where the deceased was in deteriorating health and was concerned about his forthcoming heart surgery;

ii. the deceased was aware that an informal document could be admitted for Probate as this had occurred with his mother's informal will.

iii. the deceased trusted Ms Gray, and had previously informed Ms Perey in about 2003 that he had decided to give his Balmain house to Ms Gray. It was in later years that he changed his mind and decided to leave the house to Ms Gray's daughter, Ms Shepherd.

iv. the last time that the deceased had accessed the document on his computer was a little over two weeks after his conversation with Ms Gray.

v. the language used in the electronic document was clearly language of testamentary intention. The document was referred to as his last will and testament, it appointed an executor, and dealt with all of the deceased's property including the residuary estate.

vi. the deceased was also careful to provide reasons why his siblings and his nephew were not named as beneficiaries in the document.

Case Study 3 - Yazbek v Yazbek [2012] NSWSC 594, Slattery J

Daniel Yazbek who operated a number of restaurants in Sydney with his brothers died in September 2010 without leaving a formal will. However, prior to leaving on an overseas trip in July 2009 Daniel told his general manager, Mr Gurgis "If anything happens to me, there is a will on my computer and also at my home in a drawer".

One of Daniel's brothers gave evidence that about two weeks prior to the deceased's death he had heard the Daniel state to one of his other brothers "You know I have a will".

Daniel's parents opposed the propounding of this informal will arguing that the document:

i. only operated as an interim will prior to their son's overseas trip;

ii. it was only a draft will; and

iii. that as the printed copy of this document had not been located in the Daniel's records and no longer existed, that he no longer intended this document to reflect his current testamentary intentions.

The document on Daniel's computer was prepared 14 months before his death and was given the reference "will.doc" on his computer. The document read as a fond letter to his family members and some friends but in the process dealt with most of his assets with the exception of the residue of his estate and the appointment of an executor.

A computer expert provided evidence as to when the will was created and subsequently modified by Daniel over the three days after it was created. The expert could not determine what the changes were to the draft document and could not say conclusively whether the will had ever been printed.

In dealing with the argument that the document only operated as an interim will, Justice Slattery was of the view that there was nothing in the document or the evidence from the witnesses to indicate that the document was only to have effect until Daniel returned from his overseas trip. Further, Daniel had never deleted or altered the document on his computer after his return from this trip. His Honour also noted that the expert concluded that Daniel accessed this document about two weeks before his death but did not delete or alter the document.

Justice Slattery rejected the submission that the document was only a draft and not intended to have any present operation. In deciding to grant Probate of this document, Slattery J noted that:

i. the document stated the deceased's testamentary intentions and dealt with significant parts of the deceased's estate;

ii. the document represented a well considered survey of the deceased's assets and disposed of many of the assets to persons who had an existing connection to those assets;

iii. the document dealt with the expected principal claims on the deceased's bounty.

iv. the deceased saved the document with the reference *"will.doc"*.

Case Study 4- testamentary instructions left on unsent text (SMS) message of testator's mobile phone

***Nichol v Nichol & Anor* [2017] QSC 220 (16 June 2017) Brown J**

In this unusual Queensland decision, Justice Brown dealt with an application by the deceased's brother that an unsent text message on the deceased's mobile phone be treated as his will pursuant to Section 18 of the *Succession Act* 1981 (QLD).

The deceased created a text message on his mobile phone shortly before he took his own life. This text message, which was addressed to his brother David, set out his testamentary intentions. It was saved by some person pressing the back arrow in the message editing views of the mobile phone.

At the time of the deceased's suicide his assets included an unencumbered house, superannuation, household effects, and a small amount of cash. He was estranged from his wife Julie who had moved out of his home and had taken their child. They had been married for a period of one year and had been in a relationship for 3 years and 7 months.

The deceased's mobile phone was found by the deceased's widow on a work bench in the shed where the deceased's body was found after his suicide. On the following day a friend of the deceased's widow, at her request, accessed the deceased's mobile phone to look through the contact list to determine who should be informed of the deceased's death. This friend informed the deceased's widow she had found an unsent text message. The deceased's widow then informed the deceased's brother and nephew of this text message.

The effect of the text message was that the deceased left all of his estate to his brother David and his nephew, Jack. At the conclusion of the message the deceased had written "My will".

The deceased's widow opposed the propounding of this document by the deceased's brother on the basis that the Court could not be satisfied that:

i. The deceased by some act or words, demonstrated that it was his then intention that the text message, should, without more on his part, operate as his will; or

ii. That the deceased had testamentary capacity at the time he created the text message.

In support of this argument the deceased's widow pointed to the fact that the deceased did not send the text message to his brother, which she contended was consistent with the deceased not having made up his mind in relation to his testamentary intentions.

The deceased's brother position was that:

i. the document was described as "My will" and clearly dealt with the majority of the deceased's assets in circumstances where the deceased was about to commit suicide;

ii. the text was not sent because if it had been sent, before the deceased took his own life, then his brother would have invariably attempted to take steps to try and stop the deceased from committing suicide;

iii. there was no indication that the deceased lacked testamentary capacity but simply that the deceased had a history of depression and had previously attempted suicide.

In this case there was no evidence of any other will although the deceased had in prior years indicated to both his widow and to his mother that he had made a will using a will kit at some point prior to the death of his first wife, and subsequently he had written some testamentary document in early 2015 and put it behind a china cabinet. No such documents were ever found.

Evidence was given by the deceased's brother that in conversations with him about 6 months prior to his death, the deceased had told him that if anything was to happen he wanted all of his possessions, including his house and superannuation, to go to David and Jack. He apparently further stated that "Julie is to have nothing".

Justice Brown was satisfied that the SMS text message did state the deceased's testamentary intentions as the document was stated as being "My will" and that it dealt with the deceased's principal assets. The fact that the text did not deal with the appointment of an executor did not preclude the document being admitted to probate.

Justice Brown noted in relation to the question of testamentary capacity that the deceased had clearly been depressed for some time and had attempted to commit suicide some four months before his death. However, there was no medical evidence to indicate that he did not have capacity and the evidence of his interactions with his siblings and his widow demonstrated that he was able to function and think normally.

In determining that the SMS message did encapsulate the deceased's testamentary intentions and that he did intend that the text message would operate as his final will. Justice Brown noted:

i. That the message was created about the time the deceased was contemplating death;

ii. That the deceased's mobile phone was with him in the shed where he died;

iii. That the deceased's addressed how he wished to dispose of his assets and expressly provided that he did not wish to leave his widow anything;

iv. The level of detail in the message, including the direction as to where his cash was to be found and his PIN number; and

v. The deceased had not expressed any contrary wishes or intentions in relation to his estate and its disposition to that contained in the text message.

Justice Brown dispensed with the formal requirements for the execution of a testamentary document in respect of this unsent SMS text and this document was admitted to probate

Case Study 5- formal will versus informal will

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

In this case Rupert Burge died at the age of 93 leaving a wife to whom he had been married since 1948 and two children.

Mr Burge left a formal will dated 15 March 1983 which left all of his estate to his wife and also appointed her as his executor.

After Mr Burge's death, Mr Burge's daughter searched his desk and adjoining bookcase which had a number of cardboard accordion files, alphabetically marked. On the "W" divider the word "will" was written and within this cardboard divider was the deceased's formal will executed in 1983 and a previous will executed in 1960.

About a week after Mr Burge's death, his daughter conducted a further search of her father's papers because her brother suggested there might be another will. She then found, behind Mr Burge's desk, another cardboard accordion file sitting on a flat wooden cross piece in a cubby hole. In this file was a copy of an executed version of the 1983 formal will with handwritten amendments apparently made by Mr Burge on 10 June 2007.

The effect of the handwritten changes to the executed version of the deceased's will was to leave his entire estate to his son and appoint him as executor.

In this case, Mr Burge's wife applied for probate of the deceased's formal will made in 1983 and her son propounded the informal document said to have been made on 10 June 2007. Counsel for Mr Burge's son asserted that the changes to the formal will were explicable given that the deceased believed that his wife and daughter were living in relatively comfortable financial circumstances, where there had been some friction between the deceased and his daughter in 2006, and that his son was under some financial strain.

Mrs Burge's counsel submitted that:

i. Mr Burge would have been aware of the formal requirements for the execution of a valid will having previously executed formal wills;

ii. it is unlikely that he would have trusted the administration of his substantial property to a purely informal document;

iii. 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;

iv. Mr Burge retained the formally prepared and executed will of 15 March 1983 and had kept it in an envelope bearing the word "Wills" which was placed in a location where it would be easily found after his death;

v. it is highly unlikely that Mr Burge would have wanted to take the step of entirely disinheriting his wife with whom he had been happily married for more than 58 years.

Justice Darke did not accept that Mr Burge intended the informal June 2007 document to form his will but in doing so regarded it as a borderline case. The fact that the changes to the formal will were all signed or initialled by the deceased in His Honour's view provided considerable support for the view that he intended this document to form his will.

However Justice Darke considered that as Mr Burge had executed two prior formal wills he would have been aware of the need for two attesting witnesses and would have known that this document was not capable of operating as a valid will. Further, had he 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". The mere fact that he retained this informal document did not mean that he intended that it would operate as his will as he had a habit of retaining documents even if they were of no continuing importance. Further, even if he considered his wife to be financially comfortable, it would be a big step to entirely disinherit her without explanation.

Case Study 6 - will prepared by a solicitor shortly before the testator's death but unsigned due the testator's sudden demise.

***Bell v Crewes* [2011] NSWSC 1159 (16 September 2011) White J**

In this case Mr Crewes had formally executed a will prepared by his solicitor in 2004. Mr Crewes' wife claimed that in 2009 her husband raised with her his desire to review the terms of his 2004 will. Mr Crewes then gave instructions to his wife (who was a solicitor) to prepare a new will. The effect of these changes were that his wife received additional provision from his estate and that his children received less. Mrs Crewes also gave evidence that she was to execute a will that would mirror the terms of her husband's new will.

Mrs Crewes gave evidence that after she prepared the will sometime between 4 and 11 October 2009 and provided it to her husband, he said to her *"I have read the new will – that's what we want – that's it"*. She said to her husband words to the effect of *"we will need to have it signed"*. He said *"yes"*. The deceased died suddenly on 17 October 2007 without having executed the new will.

Mrs Crewes in propounding the unsigned will prepared in 2009 submitted that the deceased expressly and unequivocally adopted the unsigned will by his words *"I have read the new will – that's what we want – that's it"*.

Justice White however did not agree with this proposition and did not think that those words indicated that it was Mr Crewes' intention that the new will should be operative as his will from the time that he spoke those words.

Although Justice White accepted that those words indicated that Mr Crewes was happy that the document actually expressed his testamentary intentions, nonetheless he understood that the will would need to be signed and the necessity for its signature. Moreover, the appropriate inference was that the deceased intended to execute his will at the same time as his wife executed her new will.

In his judgment, Justice White states at paragraph 45 *"if the deceased's intention is that the document will form his will only on the occurrence of a future event, and that event does not occur, then it cannot be said that he or she has the requisite intention. That may lead to apparently harsh results in cases where it can be concluded confidently that the deceased wished his or her property to be left in the way provided for in the document. That was the case in Mitchell v Mitchell and is the case here."*

The case of ***Mitchell v Mitchell* [2010] WASC 174** referred to by White J was a Western Australian Supreme Court decision where the deceased had been admitted to hospital and gave instructions to his solicitors to prepare a will. A will was prepared in accordance with those instructions. On the morning of his death, the deceased having apparently expressed his approval of his contents of the draft will, stated that he would execute the document later that morning. He died shortly thereafter without executing the document. The document was not admitted to probate.

Justice White also referred to a judgment of Mahoney JA in the ***Estate of Masters (Deceased)*; *Hill v Plumber* (1994) 33 NSWLR 446** where he relevantly stated:

> *"There is, in principle, a distinction between a document which merely sets out what a person wishes or intends as to the way his property shall pass on his death and a document which, setting out those things, is intended to cause that to come about, that is, to operate as his will. A will, like, for example a contract, a deed, and a sale, is, as it has been said, "an act in law".*
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> *"A person may set down in writing what are his testamentary intentions but not intend that the document be operative as a will. This may occur, for example, in informal circumstances, in a letter or a diary or the like. What is to be determined in respect of a document propounded under Section 18A is whether assuming it to embody the testamentary intentions of the deceased, it was intended by the deceased as his testamentary act in the law, that is to have present operation as a will."*

Case Study 7 – notes dictated by the deceased at hospital to beneficiary with intent to execute a formal will on the following day

Borthwick v Mitchell [2017] NSWSC 1143 – Ward CJ

Mr Crisp who was a widower died on 3 August 2015 leaving no children or any partner. The deceased was survived by the two step children of his wife who had died in 2011.

The deceased left no formal will and on the intestacy basis his estate would have gone to his cousins.

The deceased's stepchildren Ms Borthwick and Mr Jamieson sought to propound an informal will being notes dictated to Ms Borthwick by the deceased on the day of his death at Cooma hospital.

The deceased's two stepchildren had lived with the deceased on his farm when their mother moved to live with the deceased in 2001. They both formed a good relationship with the deceased thereafter and continued to maintain contact with the deceased after their mother died in 2011. When the deceased's health deteriorated in 2015 Ms Borthwick and Mr Jamieson provided support to the deceased up until his death.

Background to the notes made at the hospital

On the day of the deceased's death in August 2015 Ms Borthwick was contacted by the deceased and requested to attend the Cooma hospital. She was advised on arrival that the deceased was seriously ill. The deceased then explained to Ms Borthwick that he had failed to update his will after his wife had died and he then asked her to write down some instructions in his notebook. In doing so he did not indicate that these notes be described as his will.

In these instructions he specifically gifted a car and two bulldozers to various family relations and said that Ms Borthwick and her brother could keep or sell everything else, without specifically referring to his farm property. The deceased also stated that he would either get a solicitor to come to hospital on the following day or if he was moved to a hospital in Canberra he would arrange for Ms Borthwick to bring to him a will kit.

The deceased did not read the notes that were made by Ms Borthwick and he did not sign these notes in his notebook. The deceased died a few hours after this discussion.

Prior statements by the deceased

Ms Borthwick gave evidence that from 2008 to 2011 the deceased had said to her on a number of occasions that "*the farm would be all yours someday*".

Submissions

The deceased's step-children submitted in these proceedings that the notes were intended by the deceased to form a "stop gap" will to take immediate effect and to be used until he could formalise his will.

The respondent in these proceedings argued that the document was not referred to as a will and did not make any reference that it was to take effect on his death. The notes only referred to his chattels and not to his real estate. The notes were not signed by the deceased or even read by the deceased after they were dictated.

Decision of Ward CJ

Justice Ward was satisfied that these notes stated the testamentary intentions of the deceased and that he intended these notes to be his will. She stated that the notes were dictated at a time when it had been impressed upon the deceased that his condition was serious. The instructions recorded in the notes could only be sensibly read as the instructions as to what was to be done after his death and that it was hardly likely that the deceased would dictate the notes to effect the immediate disposition of his assets.

Although there was not any specific reference to the deceased's farm property in these notes a reference to the giving away of particular farm vehicles and then the instruction that the plaintiffs could keep or sell everything else spoke of a disposition of the whole of the estate including the land.

Case study 8 - handwritten will in a notebook, unwitnessed, and no executor.

Estate of Moran; Teasel v Hooke [2014] NSWSC 1839(19 December 2014) Lindsay J

In this estate Ms Moran died on 10 April 2014 at the age of 43 leaving a 23 year old daughter and her de facto partner with whom she had been in a relationship for approximately six years before her death.

Ms Moran owned her residence at Greenacre worth $745,000 and had $245,00 in joint accounts with her de facto partner.

About five months before her death, Ms Moran who was seriously ill with cancer and in contemplation of the possibility of death, handwrote her own will in a notepad signing and paginating each page of this document.

The document began with the words "This is the last will and testament of." and it was explained that it was Ms Moran's intent to make that will with a solicitor but that she felt a sense of urgency at that time. The document then set out her intention to leave her residence at Greenacre, to be held in trust for use by her daughter.

The document did not appoint an executor but stated that she would like to have the property placed into a trust that would be managed by her two brothers. The document did not deal with the residue of her estate.

There was evidence that shortly before her death and whilst in hospital Ms Moran was contacted by the Cancer Council Pro Bono Legal Assistance Service in relation to the preparation of a will and that an instruction sheet had been completed.

Ms Moran's de facto partner contested the application by Ms Moran's daughter for probate of the informal will document contending that Ms Moran died intestate and that under Chapter 4 of the Succession Act he was the principal beneficiary of her estate and ought to be granted administration of the estate.

Ms Moran's de facto partner opposed the application for the probate of this informal will on the basis that:

i. the document was not intended to operate as a will but it was just a draft will or statement of instructions to be given to a solicitor if and when the deceased resolved to make a will;

ii. In the alternative that the document was incomplete or only to operate as a stop-gap will which only served to be her will until the opportunity arose for her to make a further will, with the consequence that when she did not take the opportunity to make a will it was submitted that the deceased ceased to have the intention that the stop-gap will should operate.

In making an order under Section 8 in respect of the handwritten document Justice Lindsay was of the view that:

i. the document spoke forcefully in favour of a present intention that it operate as the deceased's will;

ii. The document read as a whole had a recurrent theme that the deceased was determined that her home was to be held for her daughter and to extricate the deceased's estate from any entanglement with her de facto partner;

iii. The fact that she may have subsequently purchased a will kit and sought the assistance of pro-bono lawyers at the Cancer Council with an intention of making a formal will did not dictate the conclusion that the handwritten document was not intended to be her will;

iv. The fact that the document remained in her notepad and was not separated is not inconsistent with an intention that it operate as a will;

v. The deceased consistently intended that the document operate as her will unless, and until, it was revoked by another or more formal will.