

FOLEY'S | LIST

INFORMAL WILLS

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INFORMAL WILLS

Practitioners should be aware of the flexibility for the Supreme Court to deal with informal wills.

The Supreme Court recently admitted to Probate a “video will” recorded and preserved on a USB stick. This was pursuant to s. 9 of the *Wills Act 1997 (Vic)* which allows the Court to dispose with the strict requirements for execution or revocation of a will in certain circumstances.

The video recording contained the testamentary intentions of the deceased. It was recorded by the deceased’s carer for the deliberate purpose of witnessing the deceased’s statement of testamentary intentions. Obviously, the person making the recording could not benefit from any disposition under the will.

In this instance the deceased was terminally ill and lived in a rural area which made it impossible for him to see a solicitor unless the solicitor came to his bedside. For various reasons this did not occur and the carer recorded a video will at the deceased’s express request to operate until such time as a formal will might be brought into existence. Because of serious decline in the deceased’s health, no formal will ever came into being. The video will was intended to operate as a testamentary disposition until a formal will came into being (which did not ever occur).

The video is regarded as a document under the relevant legislation, s. 9(b) of the *Wills Act 1997*. The carer was required to swear a detailed affidavit attesting to the circumstances of the making of the video. In this instance the testator directed that a person look after his affairs after his death (in other words, act as executor) and also that that person inherit all of his estate both real and personal. The estate was valued at approximately \$2 million.

The carer was not a mere passive onlooker. She was directly and deliberately engaged in the making of the video and actively assisted the deceased to achieve what he wanted. She was required to swear that she was present during the entire time that the deceased person made

his statement of testamentary intentions as recorded in the video and that it was made with the intention of making a video will. She swore as to the accuracy of the typed transcript of the video.

The provisions of the relevant legislation are in sympathy with the perspective of assisting the carrying out of the intentions of the testator. “Document” has a wide meaning under the legislation and includes a video recording on a USB stick, documents on a computer and various other things. “Document” in the *Wills Act* has the same meaning as in the *Interpretation of Legislation Act 1984*.

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. The will in this case was rational on its case and the process of its creation was readily observable and made it clear that the will maker was mentally competent and that he knew and approved the contents of the video will.

The Court required a full transcript of the will maker’s statement verified and sworn by the person who made the video.

In this case there were no other interested parties as the deceased was a widower with no close relatives and no children. The estate was left in its entirety to a close friend who had owned and operated a business next door to the testator’s business for more than 40 years. The Court would usually require that formal notice of an application for probate of an informal will be given to all interested parties, allowing them a reasonable opportunity to oppose the application to probate an informal will should they be minded so to do. In this case the Court determined there were no other interested parties.

The Court must be satisfied that the video recording purports to state the testamentary intentions of the deceased and was intended to be read as a will. A video will does not comply with the formal requirements for a will because it is neither “in writing and signed” by the testator, nor “signed” by any attesting witness.

Prior to 20 July 1998, the failure of a testator to comply with all the requirements for execution or revocation of a will meant that the will was not valid or was not revoked as the case may be. In many cases this frustrated the obvious intentions of the testator and in many situations there was little that could be done to remedy the problems created.

Section 7(1)(b) of the *Wills Act 1997* means that it is no longer necessary that the will be signed at the foot thereof.

Section 9 of the *Wills Act 1997* sets out when the Court may dispense with the requirements for execution or revocation of a will. Section 9(1) provides, inter alia, that the document which has not been executed in the manner in which a will is required to be executed by the *Wills Act* can be admitted to Probate as the will of the deceased person, if the Court is satisfied that the person intended that document to be his or her will.

The Court may also refuse to admit a will to Probate which the testator has purported to revoke by some writing, where the writing has not been executed in the manner in which a will is required to be executed by the fact, if the Court is satisfied that the testator intended to revoke the will by that writing.

In the Will of Mark Edwin Trethewey [2002] VSC 83, Beach J considered the requirements of a valid will in relation to section 9 of the *Wills Act 1997*. Before an informal document will be admitted to Probate:

- (a) there must be a document;
- (b) that document must record intentions which are testamentary intentions; and
- (c) that document must have been intended by the deceased to operate as his will.

In that case, probate of the will comprising a printed copy of the contents of a computer file contained in the hard disk of a computer was admitted to probate.

Although section 11 of the *Wills Act 1997* changed the law so that a witness to a will was no longer disqualified from receiving a benefit under that will, it is not recommended that interested witnesses witness wills because it is highly likely to raise an allegation of undue influence and cause difficulties in administering the estate.

Conclusion

The current operation of the law allows the Court to give effect more readily to the obvious intentions of the testator. There has to be balance struck between the giving of effect to express intention of the testator and preventing fraud and the abuse of a testator's freedom of testation. It is important that practitioners are fully aware of the flexibility now available to

the Court in relation to the Court dispensing with the strict requirements for execution or revocation of warrants.

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