INFORMAL WILLS AND TESTAMENTARY CAPACITY

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Introduction

1. It is important for wills and estates practitioners to properly understand the law relating to informal wills, as well as associated issues such as the standard of proof imposed on such applications. There is also an important intersection between informal wills and the law relating to testamentary capacity which needs to be properly understood.

2. There have been a number of recent decisions published by the Supreme Court of Victoria arising out of applications for admission of informal wills, codicils and other documents, to probate. This paper discusses the applicable law – and some relevant issues relating to informal wills and testamentary capacity – by reference to those recently decided cases.

3. All of the recently published decisions in Victoria (i.e. in the last 2-3 years) provide examples of unsuccessful applications. This may tend to indicate that having an informal document admitted to probate is difficult. It may also reflect the fact that the clearer cases of informal documents being admitted to probate are processed without the need for a contested hearing, either because the application is consented to by all persons having an interest in the matter, or the Court or the Registrar of Probates decide the matter "on the papers" (*Wills Act* 1997, s 9(5)). Whatever the case may be, the authorities serve as a useful compass for wills and estates practitioners, pointing us in the right direction and showing us how to properly marshal evidence and confront relevant issues to which the Court will have regard, ideally <u>well before</u> the application is made.

Applicable Law – Informal Wills

4. The cases discussed in the body of the paper will cover the applicable legal principles by reference to their particular factual scenarios, but it is nevertheless convenient to collect them at the outset.

5. Section 7 of the *Wills Act* 1997 (Vic) provides as follows:

> **7 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 with the testator's intention of executing a will, whether or not the signature appears at the foot of the will; and
> (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
> (d) at least two of the witnesses attest and sign the will in the presence of the testator but not necessarily in the presence of each other.

(2) A statement in a will that the will has been executed in accordance with this section is not necessary for the will to be valid.

6. Section 9 provides that the Court may dispense with the formal requirements for execution of a will.

> **9 When may the Court dispense with requirements for execution or revocation?**
> (1) The Supreme Court may admit to probate as the will of a deceased person—
> (a) a document which has not been executed in the manner in which a will is required to be executed by this Act; or
> (b) a document, an alteration to which has not been executed in the manner in which an alteration to a will is required to be executed by this Act—
> if the Court is satisfied that that person intended the document to be his or her will.
> (2) The Supreme Court may 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 this Act, if the Court is satisfied that the testator intended to revoke the will by that writing.
> (3) In making a decision under subsection (1) or (2) the Court may have regard to—
> (a) any evidence relating to the manner in which the document was executed; and
> (b) any evidence of the testamentary intentions of the testator, including evidence of statements made by the testator.
> (4) This section applies to a document whether it came into existence within or outside the State.
> (5) The Registrar may exercise the powers of the Court under this section—
> (a) where the Court has authorised the Registrar to exercise the Court's powers under this section; and
> (b) where—
> (i) all persons who would be affected by a decision under this section so consent; or
> (ii) if consent is not given, the value of the estate does not exceed the limit set for the purposes of this section by the Court.
> (6) In this section ***document*** has the same meaning as in the **Interpretation of Legislation Act 1984**.

7. It is well settled that the Court needs to be satisfied the following three criteria have been established on the balance of probabilities before admitting an informal document to probate:

(a) *first*, there must be a document;

(b) *second*, the document must purport to embody the testamentary intentions of the deceased; and

(c) *third*, the document must have been intended by the deceased to be his or her will.[1]

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[1] See, for example: *Fast v Rockman* [2013] VSC 18 (7 February 2013) [46] (Habersberger J); *Rowe v Storer* [2013] VSC 385 (2 August 2013) [32] (McMillan J). See also, *Re Masters; Hill v Plummer* (1994) 33 NSWLR 446, 449 (Kirby P), 455 (Mahoney JA), 466 (Priestley JA); *Hatsatouris v Hatsatouris* [2001] NSWCA 408 (30 November 2001) [56] (Powell JA, with whom Priestley and Stein JJA agreed); *Oreski v Ikac* [2008] WASCA 220 (31 October 2008) [52]–[53] (Newnes AJA, with whom Martin CJ and McLure JA agreed); *Re Trethewey* (2002) 4 VR 406, 408 (Beach J); *Equity Trustees v Levin* [2004] VSC 203 (26 May 2004) [15] (Whelan J); *Prucha v Standing* [2011] VSC 90 (22 March 2011) [6] (Beach J); *In the Will and Estate of Brian Bateman* [2011] VSC 277 (24 June 2011) [42] (J Forrest J); *Re Sanders* [2016] VSC

8. There are similar provisions enacted in all Australian states and territories. The remedial nature of the dispensing provision in Section 9 and the attendant liberal construction of the statutory language are well established. King CJ, said, in the *Estate of Williams (deceased)* (of the South Australian equivalent provision)[2]:

> [the dispensing power] is a remedial provision designed to avoid failure of testamentary purpose caused by non-compliance with the formalities … arising out of ignorance or advertence. There is no reason to suppose that Parliament intended to limit the circumstances in which the remedial provision would operate and no reason for the court to construe the [section] other than in accordance with the natural meaning of the words used.

9. However, it would be a mistake to get carried away with the 'remedial' nature of the provision, for the formalities may tend to get unduly relegated in importance.[3] It is important to recall that, when an informal document is to be admitted over a formally executed will, the case of *Briginshaw v Briginshaw*[4] applies; it dictates that great care must be taken by the Court in the evaluation of the available evidence and the reasonable satisfaction of the Court should not be attained by inexact proofs, indefinite testimony or indirect references.

10. It is also important to bear in mind that, whilst other cases can provide a guide to the types of situations in which s 9 can operate, each case will ultimately depend on its own facts.[5]

The First Requirement - There Must be a 'Document'

11. 'Document' is construed very broadly. Section 9(6) of the *Wills Act* refers us to s 38 of the *Interpretation of Legislation Act* 1984, which provides the following definition:

> ***document*** includes, in addition to a document in writing—
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> (a) any book, map, plan, graph or drawing;
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> (b) any photograph;
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> (c) any label, marking or other writing which identifies or describes anything of which it forms part, or to which it is attached by any means whatsoever;
>
> (d) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom;

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694 (18 November 2016) *Re Kelsall* [2016] VSC 724 (30 November 2016) [14] (McMillan J); *Re Lynch* [2016] VSC 758 (9 December 2016) [13] (McMillan J); *Re Tang* [2017] VSC 59 (24 February 2017) [39] (McMillan J).

2 (1984) 36 SASR 423 at 425. See also *Re Masters; Hill v Plummer* (1994) 33 NSWLR 446, 452 (Kirby P); Dal Pont & Mackie, *Law of Succession* (2013), para 4.33, p103.

3 *Re: Estate of Brock* (2007) 1 ASTLR 127; [2007] VSC 415 at [20] per Hollingworth J.

4 (1938) 60 CLR 336, 362-363 (Dixon J).

5 *Re: Estate of Brock* [2007] VSC 415, [19], [20], [23] (Hollingworth J).

(e) any film (including microfilm), negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and

(f) anything whatsoever on which is marked any words, figures, letters or symbols which are capable of carrying a definite meaning to persons conversant with them.

12. With the introduction of smartphones and social media platforms, the possible applications of the informal will provisions are limited only by one's imagination (and, of course, by the rulings of the Court).

The Second and Third Requirements: Focus on the Testator's Intention

13. The second and third elements overlap. They each involve a question of fact. As explained by Kirby P in *Re Masters; Hill v Plummer*:[6]

> …by the requirement that the document which … embodies the testamentary intentions of a deceased person, should be described as constituting 'his or her will', the legislature plainly drew a distinction between those documents of testamentary intentions which constituted the deceased's will and those which did not. I regard the distinction thus made as one which, although falling short on formalities, sufficiently evidences the fact that by it the deceased intended to govern the disposition of his property after death.

14. Proof of the third requirement is not premised on showing that the testator has attempted to comply with the formalities or s 9, as any need to show such an attempt lacks foundation in the statutory language. The greater the departure from the statutory language, though, the more difficult it is for the court to reach the required standard of satisfaction in respect of both the second and third requirements.[7]

The Third Requirement - Was the Document Intended by the Deceased to be their Will?

15. The third requirement has been the subject of the bulk of the case law and most of the decided cases discussed below focus on this requirement. The third element is a difficult thing to prove to the requisite standard of proof; there are many footholds for the exercise of judicial discretion to refuse an application.

16. It has been said that the third requirement targets the "immediacy of intention" of the deceased.[8] There is a need, therefore to distinguish between a document which merely sets out what a person wishes or intends as to the way his or her property shall pass on death

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6 *Re Masters; Hill v Plummer* (1994) 33 NSWLR 446, 452.

7 Dal Pont & Mackie, *Law of Succession* (2013), para 4.37, p106.

8 Ibid, para 4.38, page 106, citing P Vines, "The Quality and Proof of Intention in the Dispensing Power: Lessons from a Short History" (2002) 9 APLJ 264 at 270-4.

from one which, setting out those things, is intended to cause that to come about, that is, to operate as his or her will.[9]

17. Documents containing instructions for a will or a draft will may, without more, therefore lead to a conclusion that a formal document was to be prepared in the future and thus an application may fail at the third hurdle. Statements of a contrary intention to those in a draft document may, if not explained, also provide a basis for the refusal of an application. The third requirement will be discussed in detail by reference to the decided cases below.

18. Some relevant questions to ask, in relation to the third requirement, are as follows:

    (a) What was the cause of death? Was it sudden and unforeseen? Planned (i.e. suicide)?

    (b) What was the state of the deceased's knowledge of the requirement for formalities of execution of a will? If there was an omission in following formalities, was there a reason for it?

    (c) How did the deceased treat the document? What was done with it? Where was it left (i.e. with other important papers)? Who was it given to? What was said (if anything) in respect of it?

    (d) How much time elapsed between the preparation of the document and the death of the deceased? Had the deceased seen the document before death? If not, why? Was the document the product of instructions? What were those instructions and when were they given by reference to the time of death?

    (e) Were there any statements made by the deceased after the preparation of the document which are consistent/inconsistent with it? Even though the relevant time for assessing intention is the date of making the document, subsequent statements are admissible to show the necessary intent.

    (f) What was the reason for the informality of the document? Was it impossible or impractical for a formal will to be created in the circumstances? For instance, was the document created quickly before an emergency medical procedure? Was it intended to be a "stopgap" will?

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9 Dal Pont & Mackie, *Law of Succession* (2013), para 4.37, p106.

Applicable Law – Testamentary Capacity

19. As affirmed by Judd J in *Foster v Meller*[10], a person making a valid will must have a "sound and disposing" mind[11] which means that he or she must understand the nature of the act of making a will and its effects, the nature and extent of the property disposed of under the will, the persons who will benefit and the manner in which the property is distributed between them. A testator must also comprehend and appreciate the claims to which they ought to give effect.

20. The party propounding a will bears the onus of proving that the will is that of a free and capable testator. Whenever the evidence throws doubt upon the competency of the person making a will, the court must be satisfied affirmatively that he or she was of sound mind, memory and understanding when the will was made. In *Bull v Fulton*, Williams J said, concerning proof of testamentary capacity:

> Usually the evidence is such that the question upon whom the onus of proof lies is immaterial, but it is clear to my mind that, although proof that the will was properly executed is prima facie evidence of testamentary capacity, where the evidence as a whole is sufficient to throw a doubt upon the testator's competency, then the court must decide against the validity of the will unless it is satisfied affirmatively that he was of sound mind, memory and understanding when he executed it.[12]

21. The decision in *Banks v Goodfellow*[13] has been described as the foundation stone of the law of testamentary capacity, although the tests set out in that case have been adapted to modern conditions. In that case the testator had been confined to a lunatic asylum in 1841. While suffering from delusions which he experienced throughout the remainder of his life until his death, he was only confined for a relatively short time. He was unmarried at the time of his death. By a will made in 1863, the testator left his estate to his niece, Margaret Goodfellow, the daughter of his sister who was then dead. He also had a half-brother, Jacob Banks, who was also dead but who had a son, the plaintiff in the proceeding. The testator died in 1865. In 1867 Margaret Goodfellow died. The defendant was her half-brother and heir to her estate.

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10 [2008] VSC 350 at [22].

11 *Banks v Goodfellow* (1870) LR 5 QB 549; *Bailey v Bailey* (1924) 34 CLR 558; *Waters v Waters* (1848) 2 DeG & Sm 591; 64 ER 263; *Boughton v Knight* (1873) LR 3P&D 64; *Timbury v Coffee* (1941) 66 CLR 277; *Norris v Tuppen* [1999] VSC 228; *Trust Company of Australia Ltd v Daulizio & Ors* [2003] VSC 358.

12 *Bull v Fulton* (1942) 66 CLR 295, 343.

13 (1870) LR 5 QB 549.

22. *Banks* (and subsequent authorities) makes it plain that unsoundness of mind and insane delusions do not disqualify a person from making a valid will unless the unsoundness, insanity, delusions or mental frailty had an influence on the testamentary disposition.[14]

23. It is also important to keep in mind that the world has changed significantly since 1870. In *Kerr v Badran*[15] Windeyer J said:

> In dealing with the *Banks v Goodfellow* test it is, I think, necessary to bear in mind the differences between life in 1870 and life in 1995. The average expectation of life for reasonably affluent people in England in 1870 was probably less than 60 years and for others less well-off under 50 years: the average life expectation of males in Australia in 1995 was 75 years. Younger people can be expected to have a more accurate understanding of the value of money than older people. Younger people are less likely to suffer memory loss. When there were fewer deaths at advanced age, problems which arise with age, such as dementia, were less common. In England in 1870, if you had property it was likely to be land or bonds or shares in railway companies or government backed enterprises. Investment in ordinary companies was far less common than now. Older people living today may well be aware that they own substantial shareholdings or substantial real estate, but yet may not have an accurate understanding of the value of those assets, nor for that matter, the addresses of the real estate or the particular shareholdings which they have. Many people have handed over management of share portfolios and even real estate investments to advisers. They may be quite comfortable with what they have; they may understand that they have assets which can provide an acceptable income for them, but at the same time they may not have a proper understanding of the value of the assets which provide the income. They may however be well able to distribute those assets by will. I think that this needs to be kept in mind in 2004 when the requirement of knowing "the extent" of the estate is considered. This does not necessarily mean knowledge of each particular asset or knowledge of the value of that asset, or even a particular class of assets particularly when shares in private companies are part of the estate. What is required is the bringing of the principle to bear on existing circumstances in modern life.

24. A recent application of the principles enunciated in *Banks v Goodfellow* is found in *Norris v Norris* where Ashley J said:[16]

> To have testamentary capacity a testatrix must:
> 1. be aware of and appreciate the significance of the act which she is embarking upon;
> 2. be aware in general terms of character, extent, and value of the estate with which she is dealing;
> 3. be aware of those who might reasonably be thought to have claims upon her bounty; and the basis for and nature of those claims;
> 4. have the ability to evaluate and discriminate between the respective strengths of those claims.
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> The burden of establishing the competency of the testatrix lies upon the propounder. The question is to be determined upon all the evidence. The burden

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14 *Banks v Goodfellow* at p 561; *Bailey v Bailey* (1924) 34 CLR 558, 570; *Szabo v Battye* [2006] NSWSC 1351.

15 [2004] NSWSC 735 at [49].

16 [1999] VSC 228, [330] and [337].

> is the civil standard, notwithstanding references by courts to vigilant examination of the whole of the evidence in the event of doubt.
> …
> Expert (medical) evidence may be important in determining competency. But it does not decide the issue, any more than does the mere fact of the age of the testatrix when the will was made, or the opinions of the attesting witnesses that the testatrix was competent.

25. It is important to draw a distinction between the intention to make a will and the intention for a particular document to have testamentary effect. A propounding party must establish that the deceased intended the document to have testamentary effect. That is, the court must be satisfied on the balance of probabilities that the deceased had decided this particular document would govern how his estate was to be distributed after his death.

26. As the following cases demonstrate, it is certainly not easy to have an informal will admitted to probate, particularly where issues of testamentary capacity arise. The application needs to be supported by proper evidence. All too often in the cases there are statements by the judges to the effect that the plaintiff did not provide evidence to support a particular aspect of the application or that a critical element of the application remained unexplained. In some cases, that might be because no such evidence exists or there is no proper explanation. There needs to be a proper and fulsome investigation into the application and the facts and circumstances which underpin it (before the application is made) in order to give the application the best possible chance of success. This includes gathering all available medical evidence, evidence from around the time of creation of the document and evidence from the deceased's solicitors, from his or her friends, neighbours and so on as the circumstances of the case dictate. Practitioners need to anticipate the questions which will arise and be ready to answer them. If no answer can be found, then that is perhaps an indication that the application is not on strong footing.

Recent Cases on Informal Wills and Testamentary Capacity

27. The following cases provide a useful illustration of the application of the legal and evidentiary principles set out above.

***Fast v Rockman* [2013] VSC 18 – Habersberger J**

28. **Point of principle**: The fact that a testator has not seen the document sought to be propounded does not present an insurmountable difficulty for the invocation of the powers of the Court under s 9. The fact that a testator knows a will has to be executed in order to

be formalised will not prevent that document being admitted to probate if circumstances show that he intended that document to operate as his will and untimely death intervened.

29. **Facts:** The plaintiffs were the executors the deceased's last executed will, being a will executed on 1 April 2010. The deceased's solicitors had prepared two other unexecuted wills, one in mid-August 2010 and one later in August 2010. Mr Irvin's April will gifted his residual estate to his two youngest children from his third marriage to Lynette Rockman. In June 2010, the deceased gave instructions to one of his executors, Mr Fast to make a number of changes to his will, including removing the gift of his residual estate, making provision of his dog and minor changes to gift in his will. Soon after these instructions, Mr Fast met with the deceased on two separate occasions to discuss further changes. On 6 August 2010, Mr Fast sent an email to the deceased's solicitor enclosing a marked up copy of the deceased's new will. That document added a new executor, made changes to the pecuniary gifts to his children, made provision for his dog, left the residuary of his estate to the 1965 Irvin Peter Rockman Trust, as opposed to his two youngest children, and included a specific clause explaining why he was not making any provision for his third wife. After showing the will to the deceased, he considered that the will to be finalised, though he could not sign it until his divorce with Lynette Rockman was finalised. Following this conversation, there was some concern about the will's provisions regarding a deadlock of executors. Mr Brown (another executor of the deceased will) visited the deceased on 24 August 2010 in hospital, he went through the unexecuted will again, and Mr Brown asked him about the deadlock provisions in the will. The deceased said he was happy for Mr Fast and Mr Brown decide. The will was then amended again to include a clause providing for majority decisions. The deceased did not see the updated will, and passed away on 30 August 2010. The first to fourth defendants, being the elder children of the deceased sought to have the second unexecuted will admitted to probate under s 9 of the Act. Mrs Rockman (on behalf of her two children) argued that neither unexecuted wills should be admitted as they were not intended by the deceased to be his will.

The Court Held:

30. Habersberger J outlined the criteria which must be established under s 9 of the Act in order for an informal will to be admitted into probate:

    (a) there must be "a document";

(b) the document must express or record the testamentary intentions of a deceased; and

(c) that document must have been intended by the deceased to be his or her will.

31. Further, his Honour explained that the person seeking to propound the informal will must establish all three criteria on the balance of probabilities and the Court must be satisfied in accordance with the principles in *Briginshaw v Briginshaw*.

32. His Honour first looked at the second unexecuted will and held that it satisfied the first two requirements. The main issue was whether the deceased intended the document to be his will.

33. Habersberger J held that in this case, it did not matter that the deceased had not seen the updated will. After discussing a number of authorities both for and against the proposition, his Honour noted that there was no absolute rule that a document must have been seen or read to a person before the Court could be satisfied that the person intended the document to be their will. It will depend on the state of the evidence.

34. On that basis, Habersberger J was satisfied that, while the deceased did not see the document, he still intended for it to be his will. His Honour stated (at [68]):

> This is not a case where the deceased had given instructions for his will to be prepared, and before a draft was seen by him, death intervened. Rather, it is a case where he had originally evinced an intention to sign a document which he had seen and approved and that intention subsequently altered to sign a document which was to be in a form where one clause might be amended to take one of two forms, both of which he would have accepted.

35. His Honour then went on to address the main submission advanced by Mrs Rockman, that the Court could not be satisfied of the third criteria, because read in light of the authorities, it must be shown that the document must have been intended by the deceased, **without more**, to be their will. Mrs Rockman argued that because the deceased knew that the will had to be signed and witnessed to be formal and operative, it was not a document he intended, without more, to be his will.

36. His Honour provided a lengthy summary of the authorities in New South Wales, Western Australia and Victoria. He accepted that the deceased's awareness of the formalities required in executing a will may bear on the court's assessment as to whether they intended for the document to be his will.

37. His Honour held that the term "without more' is simply a way of emphasising that the court must be satisfied that the deceased intended that the terms of the document should operate without alteration or reservation.

38. His Honour rejected Mrs Rockman's argument that, if a deceased knew a document needed to be signed in order to be formalised, but did not sign it meant that the informal will could not be admitted to probate, noting that it would result in a rigid reading of the provision, which ignored the remedial nature of the provision.

39. In this case, his Honour held that the deceased knew that the document to be signed, but it did not follow that it could not be admitted to probate. There was no evidence that the deceased wanted to think further about the dispositive clauses, nor that he did not disclose by acts or words that he adopted the document as his intended will. In those circumstances, his Honour admitted the second unexecuted will into probate.

40. His Honour held that he would not have admitted the first unexecuted will into probate as the evidence did not support the suggestion that it was intended to be his final will.

***Re Stuckey* [2014] VSC 221 – McMillan J**

41. **Point of principle:** In order to have an informal codicil or will admitted into probate, the moving party must show more than a recognition of the document by the deceased.

42. **Facts:** Mareijte Elizabeth Stuckey, the deceased, died on 16 January 2013. She had executed a will on 23 February 2012 which provided for a right of occupation for one unit and the right to purchase the other unit for fair market value. The residue of the estate was divided between her sons and grandchildren. Following her diagnosis with cancer in February 2012, the deceased had chemotherapy and radiotherapy treatment which affected her motor kills, especially her right arm and hand which meant she lost the ability to write. There was no suggestion that her mental function was affected. Her sister, Ms Brown gave evidence that the deceased decided before Christmas 2012 to alter her will by giving the plaintiff one of the units on the property. The deceased or Ms Brown did not contact the solicitor at that time. In early January 2013, Ms Brown said that the deceased asked her to contact her solicitor to amend her will. Ms Brown did so, and was told that the amendments could be attended to the following week. The next day Ms Brown attended the hospital in order to makes some kind of record of the testamentary wishes of the deceased as her health was deteriorating and was soon to be administered morphine. Ms

Brown wrote out the following: "My wish is that Unit 1, No 2 Darebin be left to my sister Jeanette Carmel Scholte. Executor of my will. Jeanette Scholte as per her wish to be removed as executor. I also would like to make my solicitor the executor of my will". The document was not signed. Ms Brown also made a video of the deceased reading out her will.

The Court Held:

43. McMillan J first dealt with the standard of proof required in applications under s 9 of the Act, confirming the approach of Habersberger J in *Fast v Rockman*.

44. Further, McMillan J noted that where a will has not been validly executed, it may not be admitted under s 9 where the testator lacked testamentary capacity, did not know and approve of the will, or was affected by undue influence.

45. In relation to the circumstances of this case, her Honour did not need to make a decision as to the testamentary capacity of the deceased, she was not satisfied that the document truly recorded the testamentary intentions of the deceased or that the deceased intended the document to be her will or codicil.

46. McMillan J made a number of points in dismissing the application.

    (a) *First*, she held that the effect of the codicil was substantial and removed a substantial asset from the residual beneficiaries. While her Honour accepted that the video indicated the deceased knew of the document, it did not provide any context for the decision or indicate her approval of it.

    (b) *Secondly*, her Honour held that while Ms Brown and the doctor indicated that she had mental competency, there was not sufficient evidence to support that position. Her Honour was particularly concerned that Ms Brown did not depose that she told the deceased's solicitor of the deceased deterioration, or the fact that she did ask any people on the ward to be a witness to either the codicil or the video.

    (c) *Thirdly*, her Honour noted that while the deceased could not use her right hand, she did not indicate an acceptance my signing or initialling the document with her other hand.

    (d) *Finally*, her Honour stated (at [52]):

> The circumstances of the deceased's grave illness raise real doubts as to the circumstances of the creation of the informal codicil. It was created six days before the deceased died when the deceased was about to commence morphine treatment. There is no explanation as to why the informal codicil would not have been created in the couple of months before Christmas 2012 when it was said the deceased expressed her wish to Rosemarie Brown that she wanted to alter her will.

Jageurs v Downing **[2015] VSC 432 – McMillan J**

47. **Point of principle:** Where a document is not rational on its face or in the circumstances, the Court may find that the deceased did not have testamentary capacity. Such a finding may also be supported in circumstances where the deceased did not understand the nature of his interests and his limited ability to dispose of certain assets.

48. **Facts:** The deceased died on 16 September 2010. He was survived by his four adult children, Michael (the plaintiff/executor), Patricia, John and Annette. At the time of his death, the deceased had interests in a number of properties, including an interest as a joint tenant in common in two neighbouring properties, 31 and 33 Kireep Road, Balwyn. Before the deceased's death, Patricia inherited her mother's interest in the property at 33 Kireep Road, and Michael inherited his mother's interest in the property at 31 Kireep Road. The deceased made a formal will in 2007, arranged through his lawyer, Mr Watkins. Patricia lived next door to the deceased at number 21 Kireep Road and took care of him. He had told Patricia that he was giving her his interest in the property at 33 Kireep Road in recognition of her assistance. During the last year of his life, the deceased became increasingly paranoid and believed that Patricia may have been stealing from him. In around May 2010, Michael gave evidence that the deceased told him that he wanted to give back 100 feet of the back of the property to John. Both John and Michael held an interest in the adjoining property at the rear of 33 Kireep Road. Following these conversations, the deceased wrote out a document while at Michael's work. The informal codicil appeared to set out that he wished the back 100 feet of the property at 33 Kireep Road to be given to John. The document was written by the deceased, and signed by one of Michael's employees, Mr Beninga. In late June, John visited the deceased from London, where John alleged that the deceased informed him of his wishes and provided him with two sketches indicating the changes. The deceased initially did not wish the document to be formalised, but Michael claims that he was asked to contact Mr Watkins to arrange for the changes to occur. On 2 July 2010, Mr Watkins visited the deceased, who had recently been in hospital. Mr Watkins noted that the deceased was very alert, but hard

of hearing. The deceased knew of his interest in three of the properties, though was vague as to the nature his interest in a fourth property in Northcote. He informed Mr Watkins of his intention, though Mr Watkins informed him that it may not be possible considering the extent of the deceased's interest. Mr Watkins left the deceased's house with a number of items to pursue including following up on any grant of probate for the deceased's wife estate. Before Mr Watkins could obtain further information, the deceased died. Michael sought to have the inform codicil admitted to probate under s 9 of the Act. Patricia opposed the grant.

The Court Held:

49. McMillan J summarised the position when granting probate to informal wills or codicils, noting that the provision should be given a broad construction, though the legislature should not be taken to have relegated the importance of the formalities in executing such documents. Further, McMillan J held that, in coming to a conclusion on the intention of the deceased, the Court was not restricted to the document itself, but could have regard to what the deceased did and said.

50. In assessing the codicil, McMillan J noted that the hand written note was a document. The real issues before the Court were the second and third requirements of the 'test, namely whether the document expressed the testamentary intentions of the deceased, and whether the deceased intended it to be a codicil or will.

51. McMillan J first assessed the testamentary capacity of the deceased, noting that because the codicil was informal, the Court had to look at whether the document was rational on its face and in the circumstances of the particular case. McMillan J held that the deceased was knowledgeable about his affairs and, while he was a man of limited formal education, he was relatively successful in his financial affairs.

52. McMillan J held that the codicil was not rational on its face. The Court noted that the deceased was the owner of the 33 Kireep Road in common with Patricia and, as such, he was not entitled to give away part of the property to John. Further, McMillan J noted that the direction directly contradicted both what the deceased said to Patricia in 2009 and the common understanding between the children that the deceased would leaving his share of the property to Patricia.

53. McMillan J held that the creation of the codicil was not rational in the circumstances and noted a number of concerns regarding its creation.

    (a) *First*, the change in the deceased disposition would have assisted both Michael and John as it would give their adjoining property a substantially increased landholding.

    (b) *Secondly*, it would be a substantial detriment to Patricia who would be receiving less in circumstances where she had provided significant assistance to her father.

    (c) *Thirdly*, the evidence surrounding the creation of the codicil at Michael's workplace was contradictory and suspicious. Michael and Mr Beninga gave conflicting evidence, and McMillan J was concerned that the deceased initially appeared not to want his solicitor to look over the document considering the deceased would have been familiar with the formal requirements for signing a will.

54. McMillan J also doubted that the deceased had testamentary capacity when he made the informal codicil. McMillan J noted that he had paranoid delusions, was in his 90s and was in poor health. While McMillan J accepted that Mr Watkins believed that the deceased appeared to be alert, her Honour noted that he did not inform Mr Watkins of the informal codicil or the interest of John and Michael in the property adjoining 33 Kireep Road.

55. Finally, McMillan J held that she could not dismiss the possibility that the informal codicil was the product of influence over the deceased. She noted that both Michael and John would benefit from the change, that the informal codicil was never given to Mr Watkins, and that it was kept secret from Patricia for a very long time.

56. McMillan J thus rejected the application under s 9 of the Act.

***Robinson v Jones* [2015] VSC 222 – McMillan J**

57. **Point of principle:** A person who commits suicide can have testamentary capacity, however the fact that someone commits suicide may undermine the argument about the finality of their intentions, as the death is planned as opposed to accidental.

58. **Facts:** The deceased committed suicide on 8 March 2013. He had a will dated 26 June 2016 which left 20% of his estate to Ms Jones, his former partner. That document was executed and named Mr Robinson, a solicitor, as an executor. The remaining estate was left to another former partner Mrs Parker, her daughter Mrs Ridgwell and Ms Parker's granddaughter, Ms Talbot. The deceased had been in a long-term relationship with Mrs

Parker who was much older than him. Both of them were alcoholics. As Mrs Parker got older and developed dementia, the deceased moved into a property next door. While volunteering at the Victorian Animal Aid Trust (VAAT), he met Ms Jones and started a relationship with her in 2010. The deceased purchased Ms Jones a property and made a number of gifts to her and her family. For some time, the deceased had been under the care of Dr Varma and suffered chronic depression. He had made two previous suicide attempts, including one soon after he had executed his will in August 2012. Around 20 February 2013, Ms Jones and the deceased separated, which lead to the deceased having a breakdown and being admitted to Delmont Private Hospital. On 26 February 2013, the deceased called Mr Robinson to tell him of his intention to remove the gift made to Ms Jones and to replace it with a gift of $500,000 to Ms Jones' son and the rest of the 20% to go to VAAT. On the following day, Mr Robinson sent the deceased a copy of the June 2012 will and the updated will. The letter contained instructions to "read the new will carefully" and to contact Mr Robinson if he had any queries. It also noted that once it is in order, Mr Robinson would make arrangements for him to sign it. On 1 March 2013, Mr Robinson deposed that the deceased verbally approved the will. On 7 March the deceased called Ms Talbot on three occasions, on the final two he seemed drunk and upset. The next morning the deceased was found dead. He had left a suicide note and a note to Ms Jones, neither mentioned the updated informal will. Mr Robinson also deposed that the copy of the 2012 provided to the deceased had the clause regarding Ms Jones struck out and initialled. The court was tasked with either admitted the 2012 will or the unsigned updated will into probate.

The Court Held:

59. McMillan J first set out a number of important factors in cases regarding informal wills (that have been set out above).

60. Her Honour stated that the main issues in the case were:

    (a) the 'third criteria' in admitting an informal will to probate, that is whether the document was intended by the deceased to be his or her last will; and

    (b) whether the deceased had testamentary capacity at the time he gave instructions for the unsigned will to be prepared.

61. Interestingly, when analysing the case law regarding testamentary capacity, McMillan J referred to the decision of Gray J in *In the Estate of TLB* ([2005] SASC 469) where his Honour held that suicide does not give rise to a presumption that the deceased lacked the requisite testamentary capacity. It is only a consideration in making that determination.

62. Before setting out her decision, McMillan J was critical of the way the evidence was presented in the case. Her Honour was particularly critical of the affidavits, noting that they included conclusions and opinions without any underlying facts set out by the deponent.

63. McMillan J first looked at the alleged handwritten changes to the will noting that there was little evidence to support the conclusion that the initials were the deceased. Further, McMillan J noted that the document was with the deceased from 1 March 2013 and during that time he was in a poor mental state, depressed and drinking every day. McMillan J also noted that the deceased was clearly aware of the requirements to execute a will, and he had been informed by Mr Robinson that he would need to sign an original of the updated will. Therefore, her Honour did not consider the handwritten changes as evidence of an informal will capable of being admitted into probate.

64. As to the draft updated will, McMillan J was not satisfied that it represented the final testamentary wishes of the deceased. Her Honour appeared to not accept the evidence of Mr Robinson on a number of matters, especially because he did not keep a file note of important conversations, such as the phone call regarding the instructions to update the will and the verbal approval.

65. Her Honour said there was no evidence that the deceased intended to sign the document, and no appointment had been made with solicitors to sign it, nor did the deceased actually sign the document. Further, her Honour noted that the deceased would have been aware with the formal requirements of signing a will. She stated (at [112]):

> A consequence of having a will drawn by a solicitor is that there is an obvious intention on the part of the intending testator that the document be properly executed and that it take effect once it is properly executed.

66. McMillan J also held that this was not a case where the deceased failed to sign the original will because of matters beyond his control. He committed suicide; therefore his death was not a sudden event that prevented him from executing a new will.

67. While McMillan J accepted that the deceased may have told a number of people about his intended changes, she noted that he did not tell Ms Jones, nor had he told anyone that he had finalised his will to remove Ms Jones.

68. Finally, McMillan J was not satisfied that the deceased had testamentary capacity. She noted that while his treating doctor and solicitor had set out that they thought he had such capacity, they did not indicate the reasons why they held such a belief. Further, her Honour noted that there was significant lay evidence from witnesses that supported the conclusion that the deceased was erratic and mentally unstable immediately before his instructions to Mr Robinson and his alleged confirmation of his wishes.

69. McMillan J thus rejected the application under s 9 of the Act and admitted the 2012 will into probate.

Re Hancock; Rennie v The Whippet Association of Victoria Inc **[2016] VSC 496 – McMillan J**

70. **Point of principle:** A set of will instructions could not be accepted as representing the intention of the deceased that the document be his will. Where a document does not fully represent the testamentary wishes of the deceased as ascertained by the evidence, the document should not be admitted into probate.

71. **Facts:** The deceased died in April 2015. He had a formal will executed on 4 February 2009 which left his whole estate to the Australian Whippet Association of Victoria. Following the death of his mother and the granting of probate by Mr Chaplin-Burch of Hicks Oakley Chessell Williams, the deceased spoke to Mr Chaplin-Burch about a new will. After rescheduling the appointment on a number of occasions he attended the office and Mr Chaplin-Burch typed up a set of will instructions. Those instructions fundamentally changed the nature of the dispositions, including that the estate would be divided between five beneficiaries, although only 4 were listed in the specific section regarding beneficiaries. The list was seen as a mistake and the deceased informed that his wife should also be listed as beneficiary. There were other vague references in the document such as the listing of the plaintiff's wife and daughter as alternative executors which was seen by Mr Chaplin Burch as appointing the deceased wife as the first alternative and the daughter as the second. The deceased also did not give a final indication regarding whether he wanted to be cremated or buried. He did not sign the final will that was to be amended according to his instructions. A new will was sent to him in

draft form and appointments were made to with Mr Chaplin Burch to sign it, but he did not attend. The plaintiff sought admission into probate of the informal will under s 9 of the Act.

The Court Held:

72. McMillan J outlined the relevant principles. Importantly, her Honour relied on the decision of the New South Wales Court of Appeal in *Hatsatouris v Hatsatouris* ([2001] NSWCA 408) to indicate that in order to assess the requisite intention under the third category of admitting an informal will, the intention must exist either at the time the subject document was brought into existence or at some later time. Such a finding is particularly relevant in this case in ascertaining when the relevant intention arose.

73. McMillan J was satisfied that the informal will was a document and that it recorded the deceased testamentary wishes. The issue was whether he intended the document will to be his will. Her Honour stated (at [42]):

> In considering the principles to be applied on this application, it is important to draw a distinction between the intention to make a will and the intention for a particular document to have testamentary effect.

74. In this case, McMillan J was not satisfied that the will instructions were intended to be the will of the deceased, for five reasons:

    (a) *First*, McMillan J held that the handwritten instructions set out his wishes in respect to certain assets and the specific beneficiaries. The document was important to him and indicated that the will instructions sheet could not be seen on its own to be considered the specific document that he intended to be his will.

    (b) *Secondly*, the will sheet included only two of the groups of his personal possessions and failed to properly indicate his intention regarding a gift over to the plaintiff's wife and daughter in the event that the plaintiff pre-deceased him. The fact that Mr Chaplin-Burh deposed of that intention does not assist the plaintiff as they were not clear from the written words of the informal will.

    (c) *Thirdly*, the informal will included the five groups of personal possession, a different residuary clause and no gift over for the gift to the plaintiff. In effect, the instructions do not appear to have been adhered to.

(d) *Fourthly*, the deceased had not given final instructions about his affairs. He did not sign the document, he cancelled on a number of his appointments and he had not yet decided as to whether he would be cremated or buried.

(e) *Fifthly*, to the issue of his signature, McMillan J dismissed the claim by Mr Chaplin-Burch that he told the deceased he should sign the document and it should be witnessed by him in the event that he died before a new will could be drawn up as it would count as an informal will. Her Honour noted that he did not give an explanation as to that advice. Her Honour held that whatever the motivation of the deceased signing the document, he signed at the bottom of page 1, it did not represent an acceptance of the whole document as a will. Further her Honour noted that whatever Mr Chaplin-Burch thought were the deceased motivations were irrelevant and inadmissible in ascertaining whether the deceased intended the document to be his final will.

75. The application was dismissed.

***Re Sanders* [2016] VSC 694 – McMillan J**

76. **Point of principle:** Even where the informal will is relatively consistent with previous iterations, where there is no evidence as to the deceased's testamentary capacity or evidence regarding how the informal document came about, the court did not grant probate.

77. **Facts:** The deceased died on 7 March 2015. She had a number of formal wills which were either destroyed or withdrawn. Those wills were relatively consistent in giving only a small amount to her two sons, but leaving her main asset her property to other beneficiaries. In a 2003 document, the deceased had set out that she did not wish for her property to be given to her two sons on her death. In 2009, the deceased signed an informal will that was signed by two others people, but not in a manner that would make it a formal will. Neither signatories could recall writing their names on other pages of the document, nor could they attest to the date it was signed or whether the deceased affirmed the contents of the document in their presence. The informal will allowed the deceased domestic partner (the second plaintiff) to live in her property until his death and upon his death the residence was gifted over to a friend (the first plaintiff) and then to the first plaintiff's two children. No evidence of the deceased's testamentary capacity was presented at trial, until the Court inquired. A pro forma affidavit was provided following

the hearing by the deceased's treating doctor. The plaintiffs sought to have the informal will admitted to probate.

The Court Held:

78. McMillan J stated that the issue in this case was whether the document was intended to be the deceased's will. In determining whether the requisite intention exists, her Honour noted that the Court may take into account the evidence surrounding the making of the document. Her Honour noted that each case turns on its own facts and circumstances.

79. In considering the grant, McMillan J noted the importance of the process in that a grant of probate binds parties that are not party to the proceeding and the importance of representing the wishes of the deceased.

80. McMillan J noted that there was no contradictor, and the evidence provided to the Court was often not contemporaneous and had a number of inconsistencies. In outlining these issues, her Honour also noted that the standard of proof in these matters requires reasonable satisfaction on the balance of probabilities, which cannot be met by inexact proofs, indefinite testimony or indirect references (i.e. *Briginshaw*).

81. McMillan J accepted that there was some evidence that the informal document was consistent with her testamentary intentions, in that it made little allocation for her sons, and attempted to provide the second plaintiff with some level of security regarding the property.

82. However, her Honour noted that there were a number of differences in the iterations of former wills and a draft 2003 will. This included the nature of the document (i.e. informal to formal) and a change in beneficiaries which meant the removal of the second plaintiff's children.

83. In addition to the changes, her Honour was concerned with the lack of direct evidence regarding the drafting of wills in 2003 and how the 2009 will came about. Her Honour stated (at [85]):

> Despite the inference sought to be drawn that the deceased went to the effort of revising her wills herself in these respects, there is little or no evidence of any discussions between the deceased and the plaintiffs as to her numerous wills in 2003, her testamentary intentions, which is contradicted by Ms Teeuw's evidence of the deceased's intentions in 2006, or the manner of the creation of the informal document. The evidence of both plaintiffs does not refer to the deceased's testamentary intentions in 2009.

84. McMillan J held that there was no direct evidence of how the informal will came into existence, and the evidence given by signatories was unsatisfactory in determining that intention. Further, her Honour noted that this document is a break with the long history of formal wills being prepared. It was stored in her house unlike all her previous wills and it is not clear why she abandoned either practice in creating the new informal will.

85. Her Honour could also not be satisfied as to her testamentary capacity in 2009 or any time afterwards, heavily criticising the affidavit of the deceased treating doctor.

86. In summary, her Honour refused to admit the informal will into probate.

***Re Kelsall* [2016] BSC 724 – McMillan J**

87. **Point of principle:** Where evidence suggests a will is still a work in progress, the draft document cannot be seen as being intended to be the deceased will under s 9 of the Act.

88. **Facts:** The deceased died on 25 January 2015. His last will was dated 2 September 2010. That will left small legacies to a number of people (including the plaintiffs who were his siblings and the executors of the will), he left two properties and $1.5 million and the balance of his superannuation to his wife, the defendant and the residue of his estate (including a large share portfolio) to his five siblings as tenants in common. The deceased had been diagnosed with brain cancer in 2008 and at that time an order was made in the VCAT to appoint the plaintiffs as the deceased's guardians. During this period, the deceased also mode a formal will replacing his previous will dated 20 June 1995, he also made a codicil in May 2010 and another will on 2 September 2010. The main changes of the executed documents dealt with who would receive the residue of the estate. Between the diagnosis and his death, the deceased met with his lawyer, Mr Simpson, a number of times regarding his testamentary intentions (this included wills made after the guardianship appointment). On 24 February 2014, the deceased appeared to have signed a handwritten document setting out changes to his will (informal codicil). The document was witnessed by a Justice of the Peace who gave evidence that the deceased appeared to have testamentary capacity, though he had taken no notes. The main change being that the defendant gifted his personal portfolio of shares to the defendant (his wife), thus drastically reducing the residuary of the estate. The deceased and the defendant attended a meeting with Mr Simpson to formalise the informal codicil. Mr Simpson gave evidence that the deceased was unfamiliar with the terms of the document, and that the defendant was talking on the deceased's behalf. Mr Simpson did not feel comfortable formalising

the codicil at that time as he did not believe the deceased had testamentary capacity. Mr Simpson did not seek any evidence from the deceased's doctor's regarding his capacity. The plaintiffs sought to have the 2010 will admitted into probate, while the defendant relied on the informal codicil.

The Court Held:

89. After outlining the applicable principles, McMillan J held there were two main issues in this proceeding:

    (a) The first was whether the deceased intended the document to be his codicil. That is, whether the deceased had through his actions, intended that without any alteration or reservation, the informal codicil would have effect as part of his will.

    (b) The second issue was whether the deceased had testamentary capacity. This point, her Honour noted, was a discrete issue and independent of other areas of law in which capacity may be an issue.

90. In assessing capacity, her Honour relied on the test expounded by Cockburn J in *Banks*, being that the deceased understood and comprehended:

    (a) the nature of a testamentary disposition and its effects;

    (b) the extent and nature of the assets in the estate;

    (c) the claims to the estate which should be given effect to; and

    (d) that the deceased was free from any disorder of the mind.

91. In assessing the capacity of the deceased, her Honour noted that there was insufficient evidence to be reasonably satisfied that the deceased had testamentary capacity. Her Honour noted the minimal evidence from the deceased's treating doctor and the treatment notes, but indicated that neither addressed the factors in *Banks v Goodfellow*. Further, her Honour noted the comments from Mr Simpson, a person who dealt with the deceased on multiple occasions, who was aware of the test, and his concerns about the deceased's testamentary capacity. Though her Honour did have reservations about Mr Simpson's

comments as they were inconsistent with his views about the testamentary capacity of the deceased when he signed his will in 2010.

92. McMillan J thus came to the conclusion that not only was she concerned about the deceased's testamentary capacity, but she was not satisfied that he intended the informal codicil to be part of his will. Her Honour noted that because of the deceased's condition, his anxiety to get his affairs in order, and that he intended to consult his lawyer about changing his will after making the codicil that his testamentary affairs indicated that the will was still a "work in progress".

93. Further, her Honour noted that the deceased had a long standing process when making changes to his will, including meetings with Mr Simpson and a formal execution process with Mr Simpson that was not carried out in the present case and that there was no explanation for this not having occurred.

94. In light of her Honour's reasons, the court ordered that the 2010 will be admitted to probate without the codicil.

***Re Tang* [2017] VSC 59 – McMillan J**

95. **Point of principle:** The Court should be wary where an informal document is sought to be admitted to probate in circumstances where the only evidence given is that of the beneficiary to the informal will.

96. **Facts:** The deceased died in China on 26 November 2014. The deceased was a Chinese national who held Australian citizenship. He had lived in Australia for some time, married his wife in Melbourne, and then returned to China in 2003 to work. Soon after returning to China, he and his wife split up. It was unclear on the facts whether the deceased had a child, though his estranged wife had told the deceased's mother, the plaintiff, that they had one child together, though the deceased was not aware of his existence. In early November 2014, the deceased was admitted to hospital in China with chest pains. Medical notes put into evidence suggest that the deceased was suffering from constant heart failure. The plaintiff flew to China to be by his bedside. She gave evidence that she believed the deceased was in good health and recovering. She also gave evidence that on one day during the deceased's time in hospital, she left the deceased in his room and upon returning the deceased showed her a note he had written on an envelope. The note read: "Mama: In Australia, I only have two bank accounts with Westpac… Both account

bankbooks are at your place. Remember the money in both accounts is for your personal use only. Take care". The note was written in Chinese and signed by the deceased, though it was not witnessed. The deceased did not have a formal will. The assets in Australia amounted to $151,000, while around $400,000 of the assets were based in China. The plaintiff had three different approaches: to seek probate under s 9 of the Act, to have the document admitted to probate under s 17 of the Act as a will made in another country; or to declare the expression by the deceased as a *donatio mortis causa*. No party appeared as contradictor to the plaintiff.

The Court Held:

97. Her Honour first looked at the issue of s 9. She set out the main factors in assessing whether to admit an informal will into probate. In this case she noted that while she was satisfied the note was a document, she was unsure whether the document represented the deceased testamentary wishes and that he intended the document to be his will.

98. In rejecting the application under s 9, McMillan J outlined a number of points.

(a) *First*, her Honour doubted the evidence given by the plaintiff in support of the application. She noted that the evidence was often contradictory, self-serving and was unsupported by contemporaneous evidence.

(b) *Secondly*, her Honour noted that there was very little evidence to suggest that the document was intended to be the deceased's will or that it represented his testamentary wishes. The deceased allegedly prepared the note while he was alone, no one witnessed the document and it appears that no one other than the plaintiff knew about the document.

(c) *Thirdly*, her Honour was not satisfied that the deceased had testamentary capacity. She noted that the medical evidence did not provide clear evidence either way, but that he was extremely ill at the time he was in hospital, and suffering heart attacks on an almost daily basis. On the basis of that evidence, her Honour held that the plaintiff had not established to the requisite standard that the deceased had testamentary capacity.

(d) *Fourthly*, her Honour held that the extrinsic evidence did not support the finding that the document was intended to be his will. She stated (at [67]):

> The note purports to deal with less than one quarter of the total value of the deceased's assets and does not deal with all his assets in Victoria… Importantly, it purports to benefit the plaintiff in circumstances where the plaintiff is the only person who has provided the evidence in the application. The note does not consider any other person who may have a claim on the deceased's estate; namely, his father and his allegedly estranged wife.

99. As to the other points raised by the plaintiff, her Honour was critical of the application seeking to have the document admitted as a foreign will as the plaintiff had not put on expert evidence regarding Chinese law. Her Honour was not satisfied the will was validly executed under Chinese law. Further, her Honour noted it was relatively clear that Chinese law would apply in this situation as the deceased was domiciled in China and did not have the requisite intention to return to Australia to fall under Victorian law.

100. Finally, as to the issue of *donatio mortis causa*, her Honour held that while the doctrine may apply in these circumstances, her Honour was not satisfied on the evidence that the deceased had handed over the essential *indicia* or evidence of title, possession or production which entitled the possessor to the money. Therefore, she could not be satisfied a transfer of title actually took place.

Conclusion

101. From the decided cases above, it is clear that the applicant faces a considerable task in having an informal will admitted to probate. Each case will depend on its own facts, and it is important to spend time carefully marshalling the available facts in order to put the Court in the best possible position to ascertain the likely intentions of the deceased in relation to the informal document.

102. In addition to the matters set out in paragraph 18 above, the following is a checklist of questions and issues which practitioners might keep in mind when preparing for an application:

    (a) Was the deceased in the habit of using a solicitor to prepare formal documents, including wills? If so, there needs to be a good explanation as to why the informal document was not prepared in this way.

    (b) Is there evidence about how the document was created / how it "came about"? If not, then this will work against an application to have the document admitted to probate. Having regard to the *Briginshaw* standard, the evidence needs to be clear and cogent.

(c) Is there evidence (or can it be inferred) that the deceased may have wanted to "think more" about the disposition of their assets or the organisation of their affairs? If so, this may tend to indicate that the document is not intended to have final dispositive effect.

(d) Is the informal document rational on its face? Does it "fit with" the other testamentary documents? Does it make sense having regard to the nature and extent of the deceased's assets? If the answer is no, then this may be a powerful factor against the admission of the informal document into probate.

(e) If testamentary capacity has been raised as an issue, is there sufficient medical and other evidence to support a conclusion that the deceased had capacity? If there is not sufficient evidence, then there is a strong possibility that the application will not succeed.

(f) Does the medical evidence available address (directly or indirectly) the "*Banks v Goodfellow*" factors? If not, then the Court may refuse to admit the document to probate on the basis that the deceased lacked the requisite capacity.

Simon Pitt
Ninian Stephen Chambers
28 March 2017