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# Wills on iPhones and DVDs

The approach of the Australian courts to electronic wills.

## Abstract


- As the population becomes more tech savvy, wills are being made in an electronic format, using devices such as personal computers, iPhones and DVDs. Such wills do not usually satisfy the formal requirements for validity.
- There is legislation in Australia that provides a judicial ‘dispensing power’ to admit a will to probate where the formal requirements are not met.
- In various recent cases, the dispensing power has been exercised in respect of wills made in an electronic format. Clear principles have emerged as to the exercise of this discretion.


## Formal requirements

In Australia, the modern requirements for the formal validity of wills can be broadly summarised as follows:

- A will must be in writing.
- The testator must sign the will, personally or by some other person acting at their direction, with the intention of executing it as a will.
- The testator must sign or attest the will in the presence of at least two witnesses, who must also sign, but not necessarily in the presence of each other.

All of the Australian states and territories have legislative provisions to this effect.1 Reference should be made to the specific requirements under the applicable legislation.

## Informal wills: statutory provisions

Notwithstanding these requirements for the formal validity of wills, legislative provisions confer on the Supreme Courts in each state and territory the power to dispense with such requirements and to declare that the particular document has testamentary effect.2 This legislation contemplates three types of testamentary act: making a will, altering a will or revoking a will (in whole or part). The legislation is not uniform across the states and territories. For instance, the Tasmanian provision requires the court to be satisfied beyond reasonable doubt that the deceased intended the document purporting to express their testamentary intentions to constitute their will. Some caution is therefore required on the part of practitioners when having regard to cases decided in another state or territory.

### The basic elements

These statutory provisions distil down to three basic elements:

- a document must exist;
- the document must express the testamentary intention of the deceased person; and
- the deceased person must have intended that document to form their will.

Where perhaps the greatest divergence of the authorities arises is in connection with the third element. Each of the elements nevertheless requires consideration.

### Existence of a document

As technology advances, the meaning of 'document' is likely to be extended. The Queensland statutory definition of 'document', in s36 Acts Interpretation Act 1954 (Qld), is as follows:

'**document** includes –

(a) any paper or other material on which thereis writing; and
(b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; and
(c) any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device).'

This concept is reasonably well understood as regards pieces of paper, but more examples are now being encountered that involve sub-paragraph (c) of the definition.

Two cases in New South Wales are of interest. The first of these dates back some nearly 14 years. In Treacey v Edwards,[3] the deceased had made a will partly in written form and partly by audio tape. The written part contained the following provision: 'I direct my executors to dispose of all of property [sic] both real and personal in accordance with the audio tape recorded list which accompanies this will.'

Austin J was satisfied that, although it was a rambling presentation, the contents of the tape were sufficiently certain to dispose of the deceased's assets. He was satisfied that the audio tape fell within the scope of the statutory definition of 'document', and was prepared to exercise the NSW dispensing power.

More recently, in Yazbek v Yazbek,[4] Slattery J considered a Microsoft Word document found on the deceased's laptop computer at home after his death, styled 'Will.doc' and prepared as a traditional will (i.e. an electronic version of a traditional paper document). He found that this fell within the

definition of ‘document’ under the equivalent NSW statutory interpretation provision, and that such a conclusion was consistent with decisions in Victoria and Queensland.

The Victorian case referred to was Re Trethewey,[5] in which the deceased had told his de facto partner that his will was on his computer, and the relevant computer file was duly located after his death. Beach J found the document on the computer file fell within the definition of ‘document’ under the Victorian Act.[6]

The Queensland case referred to was Mahlo v Hehir.[7] This concerned an electronic version of the will of the deceased, Dr Mahlo, which was on her computer and was in the format of a traditionally prepared will. The judge dealt with the issue simply by noting that the s36 definition of ‘document’ included not only a paper document but also any document in electronic form. The document that was the subject of the claim, the judge said, was in electronic form. It was a Microsoft Word document entitled ‘This is the last will and testament of Karen Lee Mahlo.docx’, which was created on 8 May 2008 and subsequently modified on 15 May 2008.

More recently, two cases in Queensland, both decided in November 2013, have involved the admission to probate of electronic documents contained in modern forms of media.

In the first, Re Yu,[8] Peter Lyons J considered whether a document created by the deceased on his iPhone shortly before he committed suicide could be admitted to probate. His Honour said:

‘The first condition is the existence of a document. In the present case, what is relied upon is something created and stored on an iPhone. Section 5 of the Succession Act defines a document for the purposes of s18 of the Act, specifically, as something so defined in s36 of the Acts Interpretation Act 1954 (Qld). Section 36 of the Acts Interpretation Act defines a document to include any disc, tape or other article, or any material from which writings are capable of being produced or reproduced, with or without the aid of another article or device.’

The second case was Mellino v Wnuk,[9] in which Dalton J considered a recording made on a DVD shortly before the maker committed suicide. She was satisfied the material on the DVD was a ‘document’ within the meaning of s18 (the Queensland ‘dispensing power’). Both of these cases are considered further below.

Generally, there is unlikely to be significant dispute over whether there is a document. Given that the expanded statutory definition evidently includes documents made on electronic media, a range of media that can be reproduced is capable of being found to be a document for the purposes of s18. This potentially places a heavy onus on practitioners to be very careful in their dealings, first, with their estate-planning files if electronic drafts are sent to clients and, second, with estate administration matters and dealing with computer records of the deceased.

## The document expresses testamentary intentions

In Estate of Masters,[10] Mahoney JA dealt with this aspect as follows:

'… the document must state the deceased's "testamentary intentions", that is, his wishes or intentions as to how, voluntarily, his property is to pass or be disposed of after his death.'

In Yazbek v Yazbek,[11] Slattery J considered the relevant authorities and elaborated on this, as follows:

'Testamentary intentions are an expression of what a person wants to happen to his or her property upon death: Re Trethewey [2002] VSC 83 at [16] per Beach J. In the context of informal wills "a document in which a person says what that person intends shall be done with that person's property upon death seems... to be a document which embodies the testamentary intentions of that person": Re Estate of Masters (1994) 33 NSWLR 446 at 469 per Priestly JA.'

The question of whether a particular document purports to express a person's testamentary intentions will usually be capable of determination without significant difficulty. If something as brief as 'All for mother' can be held effectively to dispose of a person's estate,[12] then not a great deal of difficulty need arise in identifying whether a document is the expression of a person's testamentary intentions.

A further aspect, which ties in with the third element discussed below, is that the particular words need to be final, as it were, in the testator's mind. If the words are a draft version or something that is awaiting confirmed instructions from the testator, it may be possible to argue that there is doubt as to whether the words do in fact express the testator's testamentary intentions.

## The document is intended to be the deceased's will

This third element has produced the greatest amount of litigation. The clearest description of this element (and indeed of the dispensing provision as a whole) is found in Hatsatouris v Hatsatouris,[13] where Powell JA expressed it in these terms:

'It is, and has long been, my view that the questions arising on applications raising a question as to the applicability of s18A are essentially questions of fact, the particular questions of fact to be answered being:

(a) was there a document,
(b) did that document purport to embody the testamentary intentions of the relevant deceased?
(c) did the evidence satisfy the Court that, either at the time of the subject document being brought into being or at some later time, the relevant deceased, by some act or words, demonstrated that it was her, or his, then intention that the subject document should, without more on her, or his, part operate as her, or his, Will?' (Original emphasis.)

In Re Trethewey, the deceased had told his de facto partner that his will was on his computer, with the computer file located after the deceased's death. In Treacey v Edwards, a deceased had made a will partly in written form and partly on audio tape. In both instances, because the respective testator had

specifically pointed out to friends and family that their will was on the computer or the audio tape, this was taken as sufficient intention on their part that the electronic document was intended to form their will. This was sufficient to fulfil the third element.

## Electronic documents

Having considered the three elements, the facts and outcomes of several of the cases already referred to can now be explored in context.

In Mahlo v Hehir, the facts were as follows: Dr Karen Mahlo died on 28 May 2008. About two weeks earlier, she had typed on her home computer a document in the form of a will. It provided for the appointment of her brother, Brett Mahlo, as the executor, and for gifts of AUD300,000 to her parents and the residue to her son and daughter. The will on her computer looked like a will that a solicitor might prepare. It contained places for the testator and witnesses to sign at the foot of the first page and contained an attestation clause and places for signature of those persons at the end of the document. There was evidence that Dr Mahlo had made a will with a firm of solicitors on 7 September 2006 and another will privately with the aid of her then partner, Mr Hehir. She had subsequently separated from Mr Hehir. Expert evidence was inconclusive as to whether the May 2008 document was printed but Dr Mahlo's father gave evidence that she had showed him a document she had signed which she had told him was her will. After her death, the hard copy will was not forthcoming.

McMurdo J found that Dr Mahlo did not intend the electronic version (concerning which the s18 application was being made) to form her will, but rather the paper document which was printed. It was found that she knew from previous experience, as well as advice from Mr Hehir, of the formalities for executing a will. McMurdo J further noted that the application was not for probate of the lost will,[14] which would need to address the presumption of revocation of the lost document.

This decision can be contrasted with the NSW case of Yazbek v Yazbek, in which Slattery J found the electronic document on the deceased's computer did satisfy the requirements for the exercise of the NSW dispensing power.[15] Shortly before an overseas trip in 2009, Daniel Yazbek prepared a document on his home computer which he styled 'Will.doc'. He told colleagues that, if anything happened to him when he was away, then his will was on his computer and a copy was in a drawer. Approximately two weeks before Daniel committed suicide, he opened the will document on his computer but closed it without amendment. Once again, the hard copy was not forthcoming after death, and again the expert evidence was inconclusive as to the printing of the document but showed when the document was accessed and amended. Slattery J determined that a copy had been printed. He was satisfied that Daniel intended the electronic document to be his will, for these reasons:

- Daniel had styled the electronic document as 'Will'.
- He told colleagues his will was on his computer.
- His reason for creating it prior to travel was so it would have effect if he died overseas.

- He typed his name at the end of the document, which represents a degree of adoption of the operative nature of the document.
- Whenever he referred to his will, he referred to it being on his computer.
- Just before he died, he opened the document and left it undeleted, suggesting he reviewed it and was happy to leave it as is – something that coincided with the time he told his brother he had a will.

There are considerable similarities between these two cases. In both cases:

- The deceased's will was made on their personal home computer.
- The computer experts were unable to say categorically whether a hard copy was printed.
- The judge found that a copy had been printed.
- The hard copy could not be located after death.

Nevertheless, different results ensued. By printing a copy, signing it and showing it to her father, Dr Mahlo had, in McMurdo J's view, given primacy to that document and thus could not have intended that the electronic version remaining on her computer should be the document that she intended to be her will.

By contrast, Slattery J found that Daniel Yazbek had not given any particular primacy to the written document. This was fortified in Slattery J's mind by Daniel's actions in opening the electronic version approximately two weeks before his death and closing it again without deletion or amendment. This amounted to Daniel approving that electronic version as his will. The evidence that Daniel had told one of his brothers at about that time that he had a will only served to reinforce in the judge's mind Daniel's intention that the electronic version should be his will.

The two recent Queensland cases, Re Yu (a will on an iPhone) and Mellino v Wnuk (a will on a DVD) have been considered above in relation to the first element of s18. In both instances, it was found that the particular electronic record was a will.

In Re Yu, Peter Lyons J (after having found that the record on the iPhone was a document for the purposes of s18) went on to say:16

'The third condition is whether the deceased intended the document to form his will… it is not sufficient that a document state a deceased person's testamentary wishes. To satisfy the requirements of s18 Succession Act, it must also be intended to be legally operative so as to dispose of the person's property upon the person's death…

‘The document for which probate is sought, in my view, plainly satisfies that requirement. The document commenced with the words “This is the last will and testament…” of the deceased, who was then formally identified, together with a reference to his address. The appointment of an executor, again, reflects an intention that the document be operative. The deceased typed his name at the end of the document in a place where on a paper document a signature would appear, followed by the date, and a repetition of his address. All of that, it seems to me, demonstrated an intention that the document be operative. Again, the instructions contained in the document, as well as the dispositions which appear in it, all evidence an intention that it be operative on the deceased’s death. In particular, the circumstance that the document was created shortly after a number of final farewell notes, and in contemplation of the deceased’s imminent death, and the fact that it gave instructions about the distribution of his property, all confirm an intention that the document be operative on his death. I am therefore satisfied that the deceased intended the document which he created on his iPhone to form his will. I am prepared to make the orders sought.’

Similarly, in Mellino v Wnuk, Dalton J was satisfied that, overall, the material on the DVD met the requirements for exercise of the s18 dispensing power. She said:

‘I’m satisfied that the DVD is a document within the meaning of the section, and I’m also satisfied that the document embodies or was meant to embody the testamentary intentions of the deceased man. I think that is clear from the fact that he has written “my will” on the DVD itself and also from the substance of what he says in the video recording on the DVD. It is clearly made in contemplation of death, and the deceased man was found dead, having committed suicide, at some point after the video recording was made. He discusses his intention to suicide in the document. He is at some pains to define what property he owns, and it seems to me quite clear that, although very informal, what the document purports to do is to dispose of that property after death.

‘Further, I am satisfied that the substance of the recording on the DVD demonstrates that the DVD itself without any more formality on the part of the deceased man would operate upon his death as his will. He comes very close to saying that exact thing informally, explaining that he’s no good with paperwork and that he hopes that his recording will be sufficiently legal to operate to dispose of his property.

‘So it seems to me that the three tests which the court traditionally has regard to are satisfied.’

### The will must, apart from the formal requirements, be otherwise valid

It should not be overlooked that, apart from the formal requirements and the possible exercise of the judicial dispensing power, the will that is sought to be admitted to probate must otherwise satisfy the requirements for a valid will, including the relevant mental elements. The testator must therefore:

- have the requisite testamentary capacity when they made the relevant document;

- know and approve the contents of the document; and
- not be the subject of any undue influence, duress or other such vitiating element.[17]

## Conclusion

It can be expected that the occurrence of non-paper wills, such as wills on computers, tablets and in the 'cloud', will increase. The watchwords for Australian practitioners will be 'vigilance' and 'extensive enquiries'. Care must be taken to engage in a thorough search among a deceased's papers, computer, smartphone and cloud documents. Family members and friends, and potentially other advisors, such as solicitors, accountants and financial planners, will need to be consulted, and asked whether such informal documents are likely to be found. Enquiries may then, in such cases, need to be made as to what actions the deceased may have taken and what they may have communicated to other such persons as regards their intentions with respect to the particular document or documents located. This will be particularly so in the sad event of suicide cases. As the cases to date show, there can be a fine line as to whether the court is satisfied that the elements of the dispensing power are met in a particular case. The words and actions of the deceased can decide on which side of the line the decision will fall.

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1. *Succession Act 2006 (NSW), s6; Wills Act 2000 (NT), s8; Succession Act 1981 (Qld), s10; Wills Act 1936 (SA), s8; Wills Act 2008 (Tas), s8; Wills Act 1997 (Vic), s7. Under s9 Wills Act 1968 (ACT) and s8 Wills Act 1970 (WA), the former requirement that the testator must execute the will in the presence of at least two witnesses all being present at the same time is retained*
2. *Wills Act 1968 (ACT), s11A; Succession Act 1981 (Qld), s18; Succession Act 2006 (NSW), s8; Wills Act 2000 (NT), s10; Wills Act 1936 (SA), s12; Wills Act 2008 (Tas), s10; Wills Act 1997 (Vic), s9; Wills Act 1970 (WA), s32*
3. *(2000) 49 NSWLR 739; [2000] NSWSC 846/*
4. *[2012] NSWSC 594*
5. *[2002] VSC 83*
6. *Interpretation of Legislation Act 1984 (Vic), s38*
7. *[2011] QSC 243*
8. *[2013] QSC 322 at [4]*
9. *[2013] QSC 336*
10. *(1994) 33 NSWLR 446 at 455*
11. *At [83]*
12. *Thorn v Dickens [1906] WN 54*
13. *[2001] NSWCA 408 at [56]*
14. *See Re Cardie [2013] QSC 265*
15. *Succession Act 2006 (NSW), s8*
16. *At [8] and [9]*

17 *For example, Dawson v Peters [2007] NSWSC 1329*



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