Worrall Moss Martin News

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Expert advice and solutions

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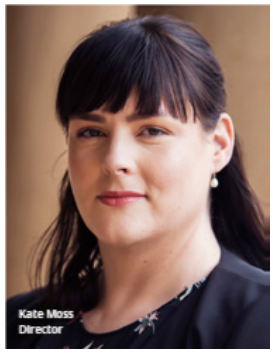
Can a Text Message and Video Recording Really be Accepted as a Will?



Until recently, the idea of electronic media, including text messages, unprinted documents and video recordings, being admitted to probate was absurd. This notion has changed.

The following cases are examples of circumstances where courts have admitted to probate various digital documents and media as 'informal Wills'.

Video Recordings: In *Radford v White* [2018] QSC 306 a video recording in which the deceased jokingly expresses his wishes about the distribution of his estate, was admitted to probate. In this case, the Court held that:

- the video recording constituted a 'document';
- despite its jovial tone, the video recording stated the deceased's testamentary intentions;
- the deceased intended the video recording to operate as his last Will; and
- despite evidence about the deceased's capacity at the date of his death, the deceased had the requisite capability on the day he made the video recording.

Text Messages: In *Nichol v Nichol* [2017] QSC 220 an unsent SMS/text messge, which the deceased typed on his phone before taking his own life was admitted to probate. In this case, the

Court held that:

- the draft SMS constituted a 'document';
- forensic evidence supported the proposition that the deceased had created it on the date of his death;
- the SMS, which contained the words 'My Will', recorded the deceased's testamentary intentions; and
- the deceased's failure to send the SMS was because he did not want to alert his brother of his suicide plans, rather than a lack of intention for the SMS to operate as his Will.

Unprinted Digital Documents: In *Re Yu* [2013] QSC 322 a document created in a word processing program and saved on the deceased's computer, that the deceased created at a time when he was contemplating his imminent death, was admitted to probate. The document did not appear to have ever been printed. The Court held that the document:

- satisfied the definition of a 'document';
- recorded the deceased's testamentary intentions, formally identified the deceased, and appointed an executor;
- authorised the executor to deal with the deceased's affairs in the event of his death; and
- purported to dispose of the whole of the deceased's property.

Sensationalist headlines like: *'Unsent Text Message with a Smiley Face Counted as a Will, Court Rules'* **(1)** and *'Will by Video Ruled Valid in Supreme Court After Challenge by Estranged Wife'* **(2)** can create the impression that digital Wills represent a simple means of expressing testamentary intentions without the expense of retaining a lawyer. This is far from correct.

A brief review of the apparent success of informal documents being admitted to probate in the above cases masks the complexity, expense and time taken to resolve the litigation. This is particularly the case in Tasmania where, unlike all other Australian jurisdictions which require the court to be satisfied on 'the balance of probabilities', the *Wills Act 2008* (Tasmania) requires that the court be satisfied 'beyond reasonable doubt' that the deceased intended the document to constitute their Will or an alteration or revocations of their Will.

Although the dispensing powers are important and useful tools, they are only intended as a 'back-up' mechanism to ensure that a deceased person's wishes and intentions are carried out where there is no valid Will reflecting their more recent testamentary intention. These provisions should not be relied on, either by practitioners or clients, to support the use of digital Wills as a primary and conventional form of estate planning.

Worrall Moss Martin Lawyers have specialist skills and experience in estate planning and estate litigation. We can assist clients with completing proper estate planning, including urgent estate planning documents where a person is terminally ill. We can also assist in circumstances where an 'informal Will' is found after a person has died. Please contact Kate Moss or Kimberley Martin if you have any questions about the matters set out in this article.

(1) https://www.smh.com.au/national/unsent-text-message-with-a-smiley-face-counted-as-a-will-court-rules-20171010-gyxzsf.html

(2) https://www.abc.net.au/news/2018-12-19/mans-videotaped-will-deemed-valid-supreme-court/10634994

Recent Will Challenges in Tasmania

Two recent cases heard by the Supreme Court of Tasmania highlight the circumstances that will be taken into account in a claim for

provision under *the Testator's Family Maintenance Act 1912* (Tasmania) ("**the Act**").

In *Burdon v Burdon* [2019] TASSC 31: the deceased died leaving a long term spouse, three sons, a daughter, a step-daughter, and numerous grand-children and great grand-children. The deceased's Will directed that his only asset (a large block of land in Marion Bay containing the home which the deceased and his wife had occupied since 1985) was to be subdivided into two parts, and that after the subdivision his spouse was granted a licence to occupy the home and the post subdivision surrounds, provided that she kept the home in good repair and paid the outgoings.

The deceased also made provision that if the house was sold, and a substitute house purchased, his wife would have a licence to occupy the substitute house on the same terms. The balance of the estate was divided amongst one son, the step-daughter and various named grand-children and great grand-children. The spouse made an application to the Court for further provision under **the Act**.

The Court held in favour of the applicant finding that she was left without adequate provision for her proper maintenance and support. There were a number of factors which persuaded the Court to come to this decision.

- First, there was no evidence to suggest that the beneficiaries named in the Will had competing claims, nor had any of them made a claim for provision under **the Act**.

- Second, despite the fact that the deceased and the applicant had both been previously married, the deceased's primary obligation in the circumstances was to the applicant. There was no evidence that he had any obligation to his adult children, his grand-children or his great grand-children.

- Third, the Court considered the comments made by Justice Halen in *Gargano v Coves* [2018] NSWSC 985, where his Honour said that, as a broad general rule, subject to the extent to which estate assets permit, the duty of a deceased to his or her spouse is to ensure that they are secure in the matrimonial home, that they have income sufficient to permit them to live in the style to which they are accustomed, and to provide them with a fund to enable them to meet any unforeseen contingencies.

- Finally, at the time of his death, the applicant's only asset was savings of about $2,000.00, which she had set aside for funeral expenses. Her only income was a Centrelink pension of about $900.00 per fortnight. The Court accepted that the applicant had made a substantial contribution to the accumulation of the estate asset, and, also considered the length of the marriage, and the applicant's dependence on a share of the estate for her future comfort and support.

The Court concluded that a mere licence to occupy the Marion Bay home, or a substituted home, was not adequate provision for the applicant's proper maintenance and support. The making of adequate provision necessitated the applicant being left with the home and a substantial portion of the proceeds of sale of the subdivided building allotments so that she had the means to support herself and would have a fund to give her some ability to cope with any financial vicissitudes of life.

In *Booth v Brooks* [2018] TASSC 35, the deceased died leaving a long-term spouse, two sons and an estranged daughter. The deceased's Will gifted everything to his spouse provided she survived him, and if she did not then his estate was to be held in trust for the benefit of his two sons. The Will made no provision for his daughter. The daughter made an application to the Court for provision under **the Act**.

The Court held in favour of the applicant, finding that she was left without adequate provision for

her proper maintenance and support. There were a number of factors which persuaded the Court to come to this decision.

- First, the estate was large, being valued at approximately $6 million. The Court considered that there was enough money for the father to make provision for his daughter, whilst at the same time, leaving sufficient money for the maintenance and support of his spouse and ultimately his two sons.

- Second, the father had minimal contact with the applicant during his life, demonstrated little affection for her, and provided her with limited financial support throughout her life. The Court considered that this abnegation of parental responsibility increased the deceased's moral responsibility to make adequate provision for her in his Will.

- Finally, at the date of her father's death, the applicant was not in a strong financial position. She was dependant on welfare and her assets totalled approximately $4,500.00.

In deciding what provision should be made the Court took into consideration the applicant's capacity to work, the modest lifestyle that she was accustomed to living, and the size of the estate. The Court reasoned that the amount needed to provide proper maintenance and support was enough money to purchase her own low maintenance home, meet the expenses associated with that, purchase private health insurance and have a little money left over. In making its decision the Court rejected the proposition that it's jurisdiction was limited to ordering provision only to the extent that would provide the applicant with the bare necessities of life.

Ultimately, it was held that $800,000.00 was to be paid to the applicant from the estate.

Worrall Moss Martin Lawyers have specialist skills and experience in estate litigation including claims under **the Act**. If you, or your client, need expert advice and guidance about the eligibility and merits of an actual, anticipated or potential claim under **the Act** please contact Robert Meredith.

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Further Information

Our Website: A wealth of information in relation to estate and commercial matters can be found at our website www.pwl.com.au

Contributions:

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