

RECOGNISED WILL DOCUMENTS

- **Estate of Slavinskyji (1988) 53 SASR 221**- Wrote testamentary wishes on the wall. Photo taken of the wall and the Court accepted the photos as a will under s8
- **Kathleen Torr [2005] SASC 49**- Photographs
- **Tracey v Edwards (2000) 4 NSWLR 739**- Audiotape
- **Yazbek v Yazbek [2012] NSWSC 594**- Harddrive
- **Re Estate of Wai Fun Chan, Deceased [2015] NSWSC 1107**- Video disc was taken into account
- **Whitely v Clune (No 2) NSW SC 193 (unrep.)**- Lost will (told friend will left taped to the underside of a table; will not located); on the basis of the oral evidence of the friend, the Court was set out there was a document; set out wishes of the estate; carried with it an intention to make a will; granted probate



Hodson v Barnes (1926) 43 TLR 71- DOCUMENT; SETS OUT WISHES FOR PROPERTY AFTER DEATH; FINALISED AND EXPRESS FINAL INTENTIONS (INITIALISED)

RATIO

- Testator chose to write his will on an egg shell
- Pilot on the Manchester ship canal
- Widow (mag) found the will on top of a wardrobe in his bedroom amongst her late husband's belongings on an eggshell



Must set out the Deceased's Testamentary Intention - (Intent Issue)

- Document must set out the testator's "settled intention"
- must be finality of purpose
- not merely deliberative
- Intention that the document, without more, operate as a will
- Finality of intention is usually signified by signing, (but is not essential).
- If document is provisional i.e. a draft or may be changed, less likely to be final intention so would usually exclude
 - instructions written by a third person, or
 - an unseen draft document, or contemplation of a further document
- Testator needs to see and adopt the document.
- If that can be proved after the document is made, will be sufficient-

Hatsatouris v Hatsatouris [2001] NSWCA 408 at par 56

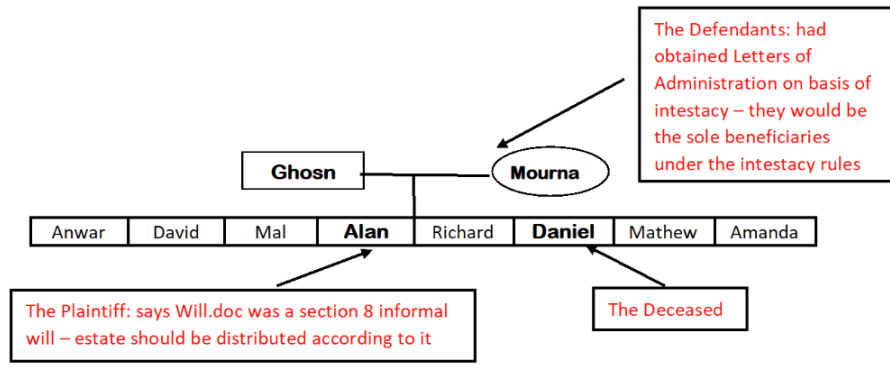
Intention that this document operates as the will without more (time issue)

- Not sufficient if merely a draft or a letter as to what will be included in a will
- Not sufficient if written out by someone else (setting out their interpretation of deceased's wishes) unless adopted by the deceased.- **Re Brown Estate Springfield (1991) 23 NSWLR 535**
- Must intend that the document is "presently operative and operative as a will".

- Testator must intend this document to cause his wishes to be given effect-
Estate of Masters : Hill v Plumber (1994) 33 NSWLR446

Yazbec v Yazbec [2012] NSWSC 59- WILL MADE ON A LAPTOP= INFORMAL WILL

FACTS



- Daniel Yazbec was 39 and single when he died in 2010, apparently due to suicide. His parents were both living and he was one of eight children
- Daniel was a successful restaurateur. He had interests in properties in Surry Hills and Queens Park (next to Centennial Park) with a brother and was the sole registered proprietor of a property at Blakehurst. There was also cash in bank accounts and vehicles
- Daniel's parents initially claimed that David died intestate.
- On that basis they applied for 'Letters of Administration' (which authorised them to administer the intestate estate) which were granted on 7 April 2011. They were the beneficiaries of the intestate estate.
- **Brother Alan subsequently found the will.doc after the assets were distributed to the parents**
- He made an application to the Court seeking an order that the grant of Letters of Administration granted to the parents be set aside; order for probate in solemn form be made for a will constituted by a saved document found on the deceased's computer after his death
- **Typed at the end of will.doc was "Daniel Yazbec".**

The law

- The document could not be a "valid will" as it did not conform with the section 6 requirements.
- It had not been signed, at least in the conventional sense. It was not witnessed, and witnesses had not attested and signed it.

1 December 1970	Daniel Yazbec born
11 to 14 July 2009	"Will.doc" prepared by Daniel – saved on laptop
July 2009	Daniel says to manager Mr Girgis "there is a will on my computer" – then leaves for holiday in Greece
18 or 19 September 2010	Death of Daniel Yazbec , aged 39
19 September 2010	Daniel's body found by mother Mouna - police called -police remove Daniel's laptop from his home
7 April 2011	Defendants (parents) granted Letters of Administration (i.e. on basis of Daniel died intestate) - they inherit whole estate
26 July 2011	Alan files Summons seeking orders: 1. Grant of Letters of Administration be revoked 2. Alan be granted probate of Will.doc He wants estate to be distributed as per will.
16 September 2011	Parents applied for family provision order from Daniel's estate (if Will.doc is recognised as a will)

ISSUES

1. Is 'will.doc' a document – (Pars 79 to 81)

	2. Does 'will.doc' state Daniel's intentions (Pars 82 - 90) 3. Did Daniel intend 'will.doc' to form his final will (Pars 91-102) or was it just intended to be an interim will (Pars 103 to 109) or even a draft (Pars 110 – 112) until he made a formal will.
RATIO	HELD: 1. He named it 'will' in the default file- act of naming it supports s8 that his intention is to create a will 2. Daniel told people he had a will; accepted that he told Mr Girgis he 'made' a will- 'there is a will on my computer' 3. In 2009 Daniel's imminent international travel was a reason for him to prepare an instrument which would operate, without more, upon his death, namely a will. I infer from the technical evidence and Mr Girgis' evidence that Will.doc was created just before Daniel's trip to Mykonos 4. Daniel typed his name on the second page of the electronic document after the final salutation. That represents a degree of adoption of Will.doc as operative 5. whenever Daniel referred to the existence of his will, he referred to it as being, at least, on his computer and Will.doc was found undeleted on Daniel's password protected computer 6. Daniel opened Will.doc just over a fortnight before his death, supporting the inference that he then reviewed and was prepared to leave Will.doc in the place that he had told others that his will was. He did not delete it on this occasion, nor change its testamentary elements. He reaffirmed it as his current will by telling Matthew at about the same time that he had a will. OVERALL: I find that Daniel intended Will.doc to form his will. Consequently, because Will.doc was (1) a document, (2) expressing Daniel's testamentary intentions, (3) which Daniel intended to operate as his will, the Court may exercise power under Succession Act, s8 to dispense with the requirements for the execution of wills.

TESTAMENTARY CAPACITY

MINOR- **Interpretation Act s21**- below 18 years

5 Minimum age for making a will

1. A will made by a minor is not valid.

2. Despite subsection (1):

- a) **a minor may make a will in contemplation of marriage** (and may alter or revoke such a will) but the will is of no effect if the marriage contemplated does not take place, and
 - b) a minor who is married may make, alter or revoke a will, and
 - c) a minor who has been married may revoke the whole or any part of a will made while the minor was married or in contemplation of that marriage.
3. **Subsection (1) does not apply to a will made by an order under section 16** (Court may authorise minor to make, alter or revoke a will).

AKA: Can make will at 16 in contemplation of a marriage; will invalid if person does not end up getting married / a minor who is already married can make a will

COURT APPROVED WILLS FOR MINORS – S 16

1. The Court may make an order authorising a minor:
 - a. to make or alter a will in the specific terms approved by Court, or
 - b. to revoke a will or part of a will.
2. An order under this section may be made on the application of a minor or by a person on behalf of the minor.
3. The Court may impose such conditions on the authorisation as the Court thinks fit.
4. Before making an order under this section, the Court must be satisfied that:
 - a. the **minor understands the nature and effect of the proposed will** or alteration or revocation of the will or part of the will and the extent of the property disposed of by it, and
 - b. the proposed will or alteration or revocation of the will or part of the will **accurately reflects the intentions of the minor**, and
 - c. it is **reasonable in all the circumstances that the order should be made.**
5. A will is not validly made, altered or revoked, in whole or in part, as authorised by an order under this section unless:

...

c. in addition to the requirements of Part 2.1, **one of the witnesses to the making or alteration of the will under this section is the Registrar**, and

6. A will that is authorised to be made, altered or revoked in part by an order under this section must be deposited with the Registrar under Part 2.5.

APPROVED WILLS FOR PERSONS WITHOUT TESTAMENTARY CAPACITY (S18)-
EXCEPTION FOR ADULTS (S16 IS EXCEPTION FOR CHILDREN)

ULTIMATE TEST: Did the delusion have a material effect on the will executed?

- **A delusion is only material if it affected the testator's dispositions in the will**

CONSEQUENCE- If a delusion is proved that is affected the testator's dispositions in the will

- a. **There can be no severance of part of the will,**
 - b. **The whole will is invalid**
- If testamentary capacity is doubtful; get the person to sign the will at the time
 - Better to get them to sign the will and it is later deemed invalid; then to later find in Court that the person DID have capacity and you refused to draft will
 - Ask the right questions as a solicitor- Why am I here? What is a will? what is your property disposing? Who will you be disposing to?
 - Recommend that the person make an application under **s18** for the Court to approve a will for them

TESTAMENTARY CAPACITY: Capacity of the testator needed to make a will legally valid