

Informal video will declared valid



with Christine Smyth

As we make our way through the new year, we tend to reflect on old conversations and experiences with a mind to see how they might shape our approach to the year ahead.

The decision of *Radford v White* [2018] QSC 306, handed down late last year, had me reflecting in a similar manner.

Many years ago my children had a great music teacher, who also had a recording studio. In 2006 Queensland introduced amendments to the *Succession Act 1981*, implementing the informal will provision through s18.

About that time, I got a call from him. He had been approached with a proposal for a possible new venture. The idea was that people could hire his recording studio to make videos about what their wills meant. I didn't say much, other than, to query if he was keen to be a witness in a will dispute? Of course, I went on to explain the impact of s18. Since then there have been numerous s18 applications seeking the court's imprimatur to all manner of documents that constitute informal wills, with some unusual documents being deemed to be a final valid will.¹

Sadly, for Katrina Radford, she had a moment of looking to the future that saw her dealing with the death of her partner and a complex application to the court for a determination as to whether a video he had made satisfied the elements of s18 of the *Succession Act 1981* sufficient for it to constitute his final will.

On 21 November, 2016 Ms Radford's partner, Mr Schwer, bought and then rode, for the first time, his new motorcycle. Before going for that ride, Ms Radford urged him to make a will. Heeding her concern, but in his own words being "too lazy"² to make a formal will, he instead made a video recording on his computer. He then rode the bike, had an accident and suffered serious head injuries.³

Just over a year later, on 24 January 2018, he died⁴, never having formalised his testamentary intentions beyond the video recording. Having suffered the loss of her partner and father of her child (born after the accident), Ms Radford found herself in the Supreme Court seeking a determination as to the validity of the video recording as his last will. A transcript extract of the video appears at paragraph 5 of the judgment. It reveals complex family relationships and property arrangements.

“A good solution applied with vigor now is better than a perfect solution applied ten minutes later.”

– General George Patton

Mr Schwer was still married to his former wife, Ms White, both at the time of making the video and at the time of his death. They also had a child together, Aleena. The video recording went into elaborate detail as to conditions attaching to gifts to his daughter Aleena, as well as intricate details associated with her care and contact with her mother. It also dealt with his three superannuation policies. He was also quite emphatic that his "soon to be ex-wife",⁵ Ms White, was to receive nothing from his estate. (On 15 April, 2015 (prior to the accident) Ms White and Mr Schwer had entered into consent orders in Family Court of Australia by way of final property orders.)⁶

S18 is proscriptive in its elements. In short, the court must be satisfied:

1. There is a document not executed in accordance with the formal requirements.
2. It contains testamentary intentions.
3. It is intended to operate as a final will without anything more.

Here the court was readily satisfied that the video recording fitted the definition of document and that it clearly contained his testamentary intentions. The focus was on the question of whether it was intended to operate as a will without anything more. Central to that question was a statement by the deceased, that he would "fill out the damn forms later", but continued with the words "but as sound mind and body".⁷

The question being whether the reference to completing forms at a later date meant that he intended to do something more to formalise his testamentary intentions. The court found that the phrase "sound mind and body" denoted formality of language that was "intended to convey that this was his testamentary instrument",⁸ noting that "[t]he starting point is that a will made under Part 2 of the Act is not made so as to operate from some future nominated date or some future nominated event other than death. It is an instrument that disposes of property, in the event of death, that operates upon death

unless revoked sooner."⁹ The court found that the deceased not completing forms at a later date was explained by reference to the head injury he suffered in the accident.¹⁰ As such, the court declared the video recording in the terms of the transcript at paragraph five of the judgment to be the deceased's will.

Ms Radford's foresight, combined with s18, ensured Mr Schwer died with a will. Unfortunately, a close read of the judgment manifests a number of associated issues indicating this application was simply the start for Ms Radford's long and distressing journey.

The document did not appoint an executor, with the court commenting the application for orders might have been better made as an application which included the appointment of an administrator.¹¹ The gifts to his daughter Aleena were subject to various conditions raising issues of construction; the will did not and could not have contemplated the birth of his child with Ms Radford, raising prospects of an FPA, and then there was the question of whether the superannuation funds fell into the estate to be dealt with in the estate and the attendant issues of raising a claim upon those funds.

While s18 provides relief for informal wills, it cannot be, and is not, a substitute for fulsome estate planning advice that covers the issues s18 simply cannot address.

Christine Smyth is a former President of Queensland Law Society, a QLS Accredited Specialist (succession law) – Qld, and Consultant at Robbins Watson Solicitors. She is an Executive Committee member of the Law Council Australia – Legal Practice Section, member of the QLS Specialist Accreditation Board, Proctor Editorial Committee and STEP and an Associate Member of the Tax Institute.

Notes

- ¹ @[13] digital video disc – *Mellino v Whuk I* [2013] QSC 336; audio recordings – *Re Estate of Carrigan* (deceased) [2018] QSC 206; see also unsent text message – *Re Nichol; Nichol v Nichol* [2017] QSC 220.
- ² @[5].
- ³ @[6].
- ⁴ @[2].
- ⁵ @[5].
- ⁶ @[10].
- ⁷ @[16].
- ⁸ @[16].
- ⁹ @[17].
- ¹⁰ @[19].
- ¹¹ @[25].