

Thomas Gray QC*

SUCCESSION LAW: REFLECTIONS AND DIRECTIONS

I INTRODUCTION

Succession law impacts the lives of all Australians. The transfer of property from one generation to the next is a rite of passage,¹ and the making of a will is considered a ‘social norm’.²

It is estimated that almost 60% of adult Australians have a will.³ Moreover, 54% of those that do not have a will, intend to make one.⁴ The likelihood of having a will increases with age and the accumulation of assets;⁵ 93% of Australians over the age of 70 have a will.⁶

This enthusiasm of Australians to be testate implies that will-making is treated as important. It suggests that Australians wish to exercise their testamentary freedom. The studies reveal that these will-makers act responsibly; they wish to provide for their families,⁷ and overwhelmingly, they wish to make their intentions clear about what is to happen with their estate.

* LLB (Hons) (Adel); Retired Justice of the Supreme Court of South Australia. The author acknowledges the assistance of Madeleine Thompson LLB (Hons) (Adel), BA, in the preparation of this article.

¹ Jane Needham, ‘Beyond Bleak House: Wills and Estates in Literature’ [2017] (Spring) *Bar News* 49, 49.

² Cheryl Tilse et al, *Having the Last Word? Will Making and Contestation in Australia* (Report, March 2015) 9 <<https://nmsw.uq.edu.au/files/3618/Having%20the%20last%20word%20Print%20version.pdf>>.

³ *Ibid* 8.

⁴ *Ibid*.

⁵ *Ibid*.

⁶ *Ibid*.

⁷ See the 2006 study of Victorian probate records explored in Christopher Baker and Michael Gilding, ‘Inheritance in Australia: Family and Charitable Distributions from Personal Estates’ (2011) 46(3) *Australian Journal of Social Issues* 273, 274.

II REFLECTIONS

A *The Foundation of Testamentary Freedom*

The *Wills Act 1837*, 7 Wm 4 and 1 Vict, c 26 ('*Wills Act 1837*') is a lynchpin of modern succession law. The premise of the legislation is testamentary freedom.⁸

Section 3 of the *Wills Act 1837* provided

[t]hat it shall be lawful for every Person to devise, bequeath, or dispose of, by his Will executed in manner herein-after required, all Real Estate and all Personal Estate which he shall be entitled to, either in Law or in Equity, at the Time of his Death ...

This provision established testamentary freedom subject only to the requirement of due execution. Due execution was dealt with in s 9. Section 7 limited testamentary freedom to a person over the age of 21 years. Section 8 provided that 'no Will made by any Married Woman shall be valid, except such a Will as might have been made by a Married Woman before the passing of this Act'. The Act provided by s 15 that any gift to an attesting witness was void.

The *Wills Act 1837* has been substantially re-enacted throughout the common law world.⁹ It forms the basis of succession law in every State and Territory of Australia.¹⁰

B *Statutory Developments*

There have been statutory developments since 1837. Some have advanced testamentary freedom and others have eroded that freedom. Legislation has addressed changing societal attitudes and needs as has the judicial interpretation and application of statutory discretions.

One important development relates to the formalities of will-making. Formalities for the witnessing of wills were first required by the *Statute of Frauds 1677*,

⁸ For an analysis that demonstrates the great lengths to which some people go in the pursuit of testamentary freedom, see HAJ Ford, 'Arrangements *Inter Vivos* as Substitutes for Wills' (1964) 2(2) *Adelaide Law Review* 176.

⁹ New South Wales Law Reform Commission, *Community Law Reform Program: Wills — Execution and Revocation* (Report No 47, March 1986) 65. See generally GE Dal Pont and KF Mackie, *Law of Succession* (LexisNexis Butterworths, 2nd ed, 2017) 715; Ken Mackie, *Principles of Australian Succession Law* (LexisNexis Butterworths, 2nd ed, 2013) 7.

¹⁰ *Wills Act 1968* (ACT); *Succession Act 2006* (NSW); *Wills Act 2000* (NT); *Succession Act 1981* (Qld); *Wills Act 1936* (SA); *Wills Act 2008* (Tas); *Wills Act 1997* (Vic); *Wills Act 1970* (WA).

29 Car 2, c 3.¹¹ By the 1970s, John Langbein was writing on the ‘harsh and relentless formalism’ of the law of wills and agitating for change in the United States.¹² At about the same time, legislation was enacted in South Australia empowering the court to excuse harmless errors.¹³ This allowed the Supreme Court of South Australia to admit to probate and thereby enforce a will that was conceded to be exercised in partial violation of the formal requirements of the *Wills Act 1936* (SA). Langbein recently wrote in the *Adelaide Law Review* that this development made South Australia ‘the epicentre of a notable development in the law of wills’.¹⁴ Legislation in the other Australian States soon followed, although the precise wording of the enactments contains significant differences to the terms of the South Australian enactment.¹⁵ The power has been used extensively since that time.¹⁶

C Family Maintenance Legislation

While the change to the formality requirements was indeed notable, its significance pales in comparison to the rise of family maintenance legislation.

The agitation for women’s rights which led to the enactment of modern family provision legislation ‘grew out of the humanitarian and democratic ideas which emanated from the French Revolution of 1789’.¹⁷ Norris asserts that

the French Revolution lit up the horizon for the suffrage movement, and it was Mary Wollstonecraft — a voice crying in the wilderness — who began what

¹¹ John H Langbein, ‘Substantial Compliance with the Wills Act’ (1975) 88(3) *Harvard Law Review* 489, 490. However, witnessing and other formalities applied to wills even in Ancient Rome: Suzanne Dixon, ‘Breaking the Law to Do the Right Thing: The Gradual Erosion of the Voconian Law in Ancient Rome’ (1985) 9(4) *Adelaide Law Review* 519, 523.

¹² Langbein (n 11) 489.

¹³ *Wills Act Amendment Act (No 2) 1975* (SA) s 9, amending *Wills Act 1936* (SA) s 12(2).

¹⁴ John H Langbein, ‘Absorbing South Australia’s Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion’ (2017) 38(1) *Adelaide Law Review* 1, 1.

¹⁵ See *Wills Act 1968* (ACT) s 11A; *Succession Act 2006* (NSW) s 8; *Wills Act 2000* (NT) s 10; *Succession Act 1981* (Qld) s 18; *Wills Act 2008* (Tas) s 10; *Wills Act 1997* (Vic) s 9; *Wills Act 1970* (WA) s 32. The power has also found its way into some jurisdictions in the United States: *ibid* 6.

¹⁶ See, eg, *Re Roberts* (1985) 38 SASR 324; *Re Richardson* (1986) 40 SASR 594; *Re TLB* (2005) 94 SASR 450; *Re Frame* (2007) 248 LSJS 341; *Re Gall* [2008] SASC 349; *Re Hennekam* (2009) 104 SASR 289; *Tsagouris v Bellairs* [2010] SASC 147; *Re Gholam* [2011] SASC 125; *Re Davis* [2011] SASC 143; *Re Wilden* (2015) 121 SASR 516; *Re Michael* (2016) 126 SASR 299; *Re Kunnen* [2019] SASC 53.

¹⁷ Rosalind Frances Atherton, ‘“Family” and “Property”: A History of Testamentary Freedom in New South Wales with Particular Reference to Widows and Children’ (PhD Thesis, University of New South Wales, 1993) 132. However, legal tensions between testamentary freedom and family maintenance can be traced back to the Voconian Law in Ancient Rome: see, eg, Dixon (n 11).

became known as the Women's Movement, with the publication in 1792 of the *Vindication of the Rights of Woman* as a direct challenge to the French Declaration of the Rights of Man.¹⁸

As a matter of historical interest, the push for family maintenance legislation is less novel than it might seem. For example, succession law in ancient Rome contained sophisticated principles that constrained testamentary freedom and sought to protect the rights of family members. Contemplating the 'evils' of unlimited testamentary freedom (at the expense of familial relations) in an early issue of the *Adelaide Law Review*, John Bray notes the broader historical context of the relatively recent developments:

The evils which this [Roman] system was designed to remedy, for long left unredressed by the [English] common law, have now been met by statutes in various jurisdictions such as our Testators Family Maintenance Act.¹⁹

Modern testator's family maintenance legislation was first introduced in New Zealand.²⁰ The enactment coincided with the growth of the women's movement and the increased popularity of a more interventionist style of government. The enactment of the *Testator's Family Maintenance Act 1900* (NZ) was soon followed in Australia.²¹ Family provision legislation has been enacted in every Australian jurisdiction.²²

Chief Justice Gleeson relevantly observed in *Vigolo v Bostin* that

[t]he general structure of the [*Inheritance (Family and Dependants Provision) Act 1972* (WA)] follows a form familiar in all Australian States, and pioneered in New Zealand ... The power of a court to make an order under the Act is enlivened by the formation of an opinion that the disposition of the deceased's estate effected by will, or the law relating to intestacy, is not such as to make *adequate* provision from his estate for the *proper* maintenance, support, education or advancement in life of a person mentioned in s 7. The court is empowered, at its discretion, to order that such provision as the court thinks *fit* is made out of the estate of the deceased for that purpose.²³

¹⁸ Ada Norris, *Champions of the Impossible: A History of the National Council of Women of Victoria 1902–1977* (Hawthorn Press, 1978) 1.

¹⁹ John J Bray, 'Possible Guidance from Roman Law' (1968) 3(2) *Adelaide Law Review* 145, 153.

²⁰ Atherton (n 17) 132.

²¹ *Ibid* 135.

²² *Family Provision Act 1969* (ACT); *Succession Act 2006* (NSW); *Family Provision Act 1970* (NT); *Succession Act 1981* (Qld); *Inheritance (Family Provision) Act 1972* (SA); *Testator's Family Maintenance Act 1912* (Tas); *Administration and Probate Act 1958* (Vic); *Family Provision Act 1972* (WA).

²³ (2005) 221 CLR 191, 196–7.

Chief Justice Gleeson also referred to the historical development of the *Testator's Family Maintenance Act 1900* (NZ), noting that

[t]he statute did not confer new rights of succession. It did not respond to the mischief identified by re-instating a right akin to dower, or otherwise by creating legal rights of inheritance. It preserved freedom of testamentary disposition, but subjected that freedom to a new qualification. The statute gave courts a discretionary power to make orders which would have the legal effect of altering the provisions of wills.²⁴

As the High Court has observed, the application of testator's family maintenance legislation has varied to meet the needs of our changing society.²⁵ There has been an increasing use of this legislation over time. A number of factors are in play, in particular the increase in the wealth of our community and the changing nature of family relationships. Yet some are now calling for reform on the grounds that family maintenance legislation is being used opportunistically and is curtailing testamentary freedom too significantly.²⁶

D *The Probate Jurisdiction, Rectification and Judicial Discretion*

Another place where judicial discretion is exercised is in the probate jurisdiction. This jurisdiction raises interesting and challenging questions of fact and law. Cases involve people; everyday people who find themselves in court without ever expecting to be there. Generally, they are there through an act of a 'benefactor'. It is a jurisdiction in which it is important to bring matters to a just resolution in a sensible, speedy and low-cost manner.

The probate jurisdiction of the Supreme Court of South Australia is a busy jurisdiction addressing many and varied aspects of probate and succession law. The Court addresses a wide range of issues including problems associated with will kits and the interpretation of home-drawn wills;²⁷ the interpretation of complex wills;²⁸ disputes about capacity;²⁹ issues under the family inheritance jurisdiction;³⁰ forfeiture where the testator or intestate dies unlawfully;³¹ the exercise of the jurisdiction to order

²⁴ Ibid 199.

²⁵ Ibid 201–202, quoting *Tataryn v Tataryn* [1994] 2 SCR 807, 820–1.

²⁶ Sylvia Villios and Natalie Williams, 'Family Provision, Adult Children and the Age of Entitlement' (2018) 39(2) *Adelaide Law Review* 249.

²⁷ *Re Czerny* [2015] SASC 111.

²⁸ *Re Hassan* (2008) 100 SASR 464.

²⁹ *Re TLB* (2005) 94 SASR 450; *Spoehr v Health Services Charitable Gifts Board* (2014) 121 SASR 174.

³⁰ *Pizimolas v Pizimolas* (2010) 108 SASR 153.

³¹ *Re Luxton* (2006) 96 SASR 218.

rectification of a will;³² and the exercise of the jurisdiction to make a statutory will for the young or infirm.³³

In the probate jurisdiction, judges are able to apply flexible procedures crafted to suit the particular litigation. The *Probate Rules 2015* (SA) include a dispensation power and where appropriate the court may embark upon a ‘quasi-inquisitorial’ process.³⁴ Flexible procedures enhance the process of a sensible, speedy and cost-effective resolution.

The judicial discretion given by the statutes is now as a matter of practice broadly interpreted and, as a consequence, both the legislation itself and its judicial interpretation have operated as a major restriction on testamentary freedom.

It is to be noted that the High Court has encouraged a uniform approach to interpretation, despite different legislative wording across Australian jurisdictions.³⁵

The Court of Chancery made use of rectification both of documents made inter vivos and of wills. However, after the *Wills Act 1837* it was presumed that the Act did not permit rectification of wills. This remains the position in the United Kingdom and other common law jurisdictions.

Legislation has now been enacted throughout Australia empowering courts to rectify a will. The purpose of rectification is to enable a court to give effect to a testator’s intention in circumstances where an error has been established. The legislation of the Australian States and Territories differs in important respects. Legislation in South Australia and the Australian Capital Territory provides a broad power to rectify a document where the document does not accurately reflect the testamentary intentions of the deceased.³⁶ In the other Australian jurisdictions, the court has a power to rectify a will to carry out the intentions of the testator if the court is satisfied that the will does not carry out the testator’s intention because a clerical error was made or the will does not give effect to the testator’s instructions.³⁷

³² *Re Dawes* (2011) 112 SASR 117.

³³ *Re G, CL* [2015] SASC 80; *Re DJW* (2015) 15 ASTLR 360; *Re Pickles* (2013) 9 ASTLR 295.

³⁴ *Probate Rules 2015* (SA) r 5(8).

³⁵ Rosalind F Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 3rd ed, 2009) 4.

³⁶ *Wills Act 1968* (ACT) s 12A(1); *Wills Act 1936* (SA) s 25AA(1).

³⁷ *Succession Act 2006* (NSW) s 27(1); *Wills Act 2000* (NT) s 27(1); *Succession Act 1981* (Qld) s 33(1); *Wills Act 2008* (Tas) s 42(1); *Wills Act 1997* (Vic) s 31(1); *Wills Act 1970* (WA) s 50(1).

E *Capacity and Statutory Wills*

The Court of Queen's Bench in *Banks v Goodfellow*³⁸ considered the scope of the *Wills Act 1837* and, in particular, the notion of testamentary capacity. It is to be noted that the Act made no reference to capacity apart from the sections addressing infants and married women. The judgment of the Court was delivered by Cockburn CJ. This judgment has been treated as establishing a golden rule concerning testamentary capacity.³⁹

The testamentary capacity test in *Banks v Goodfellow* requires, in summary, that the testator

- understand the nature and effect of a will;
- understand the extent of their property;
- comprehend and appreciate the claims to which they ought to give effect; and
- be suffering from no disorder of the mind or insane delusion that would result in an unwanted disposition.⁴⁰

Kelly Purser has questioned whether the test in *Banks v Goodfellow* is still relevant. In her article,⁴¹ she undertakes a detailed study of the applicability of the test in the modern day. She addresses the growing problem of dementia and discusses whether the test takes into account the 'complexity of modern estate planning and testamentary structures'.⁴² Purser draws attention to a growing 'tension and misunderstanding' between the medical and legal professions in assessing testamentary capacity.⁴³

Purser's conclusion, however, is that the *Banks v Goodfellow* test remains the best test of capacity, notwithstanding the problems that have arisen. She further contends that 'mechanisms need to be established which facilitate the satisfactory assessment of testamentary capacity' and promote 'transparent and substantiated determinations regarding an individual's testamentary capacity or lack thereof with reference to the legal test and standard on which the assessment is based'.⁴⁴ Purser notes that this 'requires an interdisciplinary approach utilising the skills and knowledge of both

³⁸ (1870) LR 5 QB 549.

³⁹ See *Kenward v Adams* [1975] CLY 3591; *Re Simpson* (1977) 121 Sol Jo 224. But see *Romascu v Manolache* [2011] NSWSC 1362, [169]–[170].

⁴⁰ *Banks v Goodfellow* (1870) LR 5 QB 549, 565.

⁴¹ Kelly Purser, 'Assessing Testamentary Capacity in the 21st Century: Is *Banks v Goodfellow* Still Relevant?' (2015) 38(3) *University of New South Wales Law Journal* 854.

⁴² *Ibid* 855.

⁴³ *Ibid*.

⁴⁴ *Ibid* 878.

legal and medical professionals’ and that ‘[c]lear assessment processes based on national guidelines and supporting principles will help counter any miscommunication and misunderstanding that can exist between the legal and medical professions, especially with respect to discipline-specific vocabularies’.⁴⁵

The status of the *Banks v Goodfellow* test is important given that the problem of dementia is now profound and commonplace. Society now faces dementia almost as a norm rather than an exception. In 2016, there were an estimated 400,800 Australians living with dementia.⁴⁶ This brings us to the discretion to make a statutory will, which applies in a ‘lost capacity’ case as well as a ‘no capacity’ case.

The historical background of statutory wills can be traced to the English *parens patriae* jurisdiction where the Crown possessed ‘power, and a corresponding duty, to protect the person and property of those unable to do so for themselves, including both minors and persons of unsound mind’.⁴⁷ This doctrine originated in England during medieval times with the lord of the manor having ‘guardianship over the person and property of people with disabilities’.⁴⁸ By the 14th century, this duty was ‘assumed ... by the crown’⁴⁹ which delegated responsibility to the chancellor:

Thus, the chancery courts, with the chancellor acting as the “supreme guardian”, assumed the duty of protecting “all infants, as well as idiots and lunatics; that is, of all such persons as have not discretion enough to manage their own concerns”.⁵⁰

This jurisdiction was addressed by the *Mental Health Act 1959*, 7 & 8 Eliz 2, c 72.

In Australia, legislation was first enacted in South Australia granting a judicial discretion to make a statutory will.⁵¹ That legislation was soon followed in the other States and Territories.⁵²

⁴⁵ Ibid 878–9.

⁴⁶ Laurie Brown, Erick Hansnata and Hai Anh La, *Economic Cost of Dementia in Australia 2016–2056* (Report, February 2017) 6 <<https://www.dementia.org.au/files/NATIONAL/documents/The-economic-cost-of-dementia-in-Australia-2016-to-2056.pdf>>.

⁴⁷ Richard Williams and Sam McCullough, *Statutory Will Applications: A Practical Guide* (LexisNexis Butterworths, 1st ed, 2014) 2.

⁴⁸ Daniel B Griffith, ‘The Best Interests Standard: A Comparison of the State’s *Parens Patriae* Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients’ (1991) 7(3) *Issues in Law & Medicine* 283, 287. See also American Bar Foundation, *The Mentally Disabled and the Law*, ed Samuel J Brakel and Ronald S Rock (University of Chicago Press, rev ed, 1971) 250.

⁴⁹ Griffith (n 48) 287.

⁵⁰ Ibid (citations omitted).

⁵¹ *Wills Act 1936* (SA) s 7, inserted by *Wills (Wills for Persons Lacking Testamentary Capacity) Amendment Act 1996* (SA) s 3.

⁵² Williams and McCullough in their comprehensive work on statutory wills have traced the development of statutory wills legislation in Australia: Williams and McCullough (n 47).

The statutory discretion of a judge to make a statutory will is of recent origin. It is a far-reaching power. Courts are developing precedent and it appears that the making of statutory wills may well be a jurisdiction that is frequently exercised as the advances of medical science extend physical life expectancy but not ongoing mental capacity.

F *Technological Challenges*

Finally, the increasing use of technology by testators will create many challenges for courts considering probate matters in years to come. As testators become technologically astute, courts will be confronted with testamentary dispositions made in non-traditional forms, and by non-traditional methods. This is illustrated by Australian decisions considering the admission to probate of electronic documents.

In *Re Trethewey*,⁵³ the Court considered whether an informal electronic document could be admitted to probate. It was reasoned that the electronic file was within the broad definition of ‘document’ for the purposes of the *Interpretation of Legislation Act 1984* (Vic).⁵⁴ The document clearly recorded the testamentary intentions of the deceased.⁵⁵ The Court considered that the typed name at the foot of the document was equivalent to a signature.⁵⁶

In *Mahlo v Hehir*,⁵⁷ the Court considered that a document for the purposes of the *Succession Act 1981* (Qld) included any document in electronic form.⁵⁸ In the particular circumstances the Court could not be satisfied that an electronic word document was intended to be the *final* will as the deceased understood that to make a new will she was required to do more than type and modify a Microsoft Word document.⁵⁹

In *Re Yu*,⁶⁰ the Court admitted to probate one of a series of documents on the ‘Notes’ application created by the deceased on his iPhone shortly before death.⁶¹ The document ‘commenced with the words, “This is the last Will and Testament” of the deceased ...’ and expressed a clear intention that it was to form his will.⁶² The deceased’s name, typed at the end of the document in the place where in a paper document a signature would appear, was followed by the date and his address.

⁵³ (2002) 4 VR 406.

⁵⁴ Ibid 409 [13]–[14].

⁵⁵ Ibid 409 [15].

⁵⁶ Ibid 409 [21].

⁵⁷ (2011) 4 ASTLR 515.

⁵⁸ Ibid 517 [3].

⁵⁹ Ibid 526 [41].

⁶⁰ (2013) 11 ASTLR 490.

⁶¹ Ibid 491 [1].

⁶² Ibid 492 [9].

This, together with the formal identification of the deceased at the start of the document, was held to demonstrate an intention that the document be operative.⁶³

In *Re Wilden*,⁶⁴ a DVD was admitted to probate along with other writings. The Court considered the DVD to be a document for the purposes of the *Wills Act 1936* (SA) as a consequence of the definition of ‘document’ in s 4(1) of the *Acts Interpretation Act 1915* (SA).⁶⁵ As the DVD was an article or material from which sounds and images were capable of being reproduced with the aid of another article or device it was considered to be a document for the purposes of s 12(2) of the *Wills Act 1936* (SA).⁶⁶

These cases demonstrate that the courts are prepared to accept the use of electronic documents as wills in appropriate cases.

III DIRECTIONS

In light of these reflections on the past, we can expect that there will be significant societal changes in the future, indeed perhaps even more dramatic ones. As earlier observed, the law is grappling with the problems of the electronic era and its adaptation and development will continue. It is difficult to predict the changes that will occur.

Societal changes taking place in Australia include recognition of many relationships, the changing definitions of marriage, and the concept of blended families. These changes all create a need for flexibility in succession law. It is of particular significance that in the development of succession law, Parliament has had the confidence to repose trust through wide discretions on the judiciary.

Australia is a multicultural society. Australians come from all parts of the world. They bring with them different traditions and practices in regard to matters of succession. Older generations often cling to the practices of their own culture, however their children quickly adopt the Australian way of life.

Estate planning has been carried out for hundreds of years and remains an important component of succession law practice. Constant changes in legislation addressing taxation, superannuation and trusts make the task of effective estate planning challenging.

Wealth transfer involves a succession lawyer addressing intergenerational issues, often with the involvement of most of the generations concerned. The problems that arise are going to confront succession lawyers.

⁶³ Ibid.

⁶⁴ (2015) 121 SASR 516.

⁶⁵ Ibid 519 [12].

⁶⁶ Ibid.

One of the most significant challenges that will continue to confront succession lawyers is the incidence of dementia. Over the next 20 years it is projected that the number of adults living in Australia with dementia will nearly double to an estimated 760,700 people.⁶⁷ This will significantly impact the estate planning advice that practitioners provide in the future. Succession lawyers will need to advise their clients that in the event of dementia there is the prospect of a judge amending or remaking their will. Developments in elder law are also gaining prominence both at law schools and within the profession.

These observations demonstrate the need for succession law to remain flexible. Judges should retain wide discretions. There is little doubt that succession law will effectively address all of these changes. The core concept of testamentary freedom enshrined by the *Wills Act 1837*, but modified and limited by judicial decision and by legislation, remains an important cornerstone of succession law. And so it should.

⁶⁷ Brown, Hansnata and La (n 46) 6.

