When is an Unsigned Will not a Will?

A recent case shows that the Court may not accept an unsigned Will to be the last Will of a person. While the community has got used to different types of documents being accepted as Wills (text messages and documents on computers), lawyers who understand this area know there are still legalistic rules that apply.

In the case of the Estate of Bradley Scott Lyons [2021] NSWSC 197, the man who died sought legal advice from Bartier Perry solicitors about setting up a testamentary trust for his wife and three young children.

Unfortunately, the case shows the difficulties that arise when a person leaves it too late and is so sick that they are unable to attend meetings or sign documents.

The Court found that the deceased delayed engaging Bartier Perry until they agreed to cap their fees at a certain level.

Four days after meeting the clients, the lawyers sent documents with "Draft" endorsed and suggested "We will go through the documents with you in more detail at our meeting." The meeting never took place and the widow applied to Court saying the deceased had approved the documents and she wanted the Court to accept that the document was his last Will.

The Court carefully reviewed the evidence. We set out below the exact words from the judgment which is full of good prompts for lawyers and their clients:

"1. The draft Will was prepared by a solicitor, Mr Basha, in anticipation of execution of another document, in the same, or similar, form, once approved, in accordance with the formal requirements of s 6 of the Act. The email sent to the deceased and the Plaintiff made this clear. It also made clear that Mr Basha wished to "go through the documents with you in more detail at our meeting".

2. The draft Will had the word "Draft" imprinted on every single page. The deceased, if he had read it, must have observed this.

3. Following the 4 February 2020 meeting with Mr Basha, the deceased and the Plaintiff had discussed, making "an appointment with him so we can sign them straight away". At the hospital, following him looking through the draft Wills, the deceased said to the Plaintiff "We need to get the Wills signed".

4. The Plaintiff said that "we needed to get the will signed … before he passed away so it would be a legal document." and that the deceased "definitely" knew that: Tcpt, 24 February 2021, p 5(27-31).

5. There is no evidence of Mr Basha being contacted, at any time, after 24 February 2020, and being told that the deceased had approved the draft Will. Nor was there evidence of the deceased, or anyone on his behalf, having contacted Mr Basha, to

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instruct him to prepare a Will, in the same terms as the draft Will, without the word "Draft" imprinted on every page.

6. The 2016 Will had been a formal Will and one that had been duly executed by him.

7. This is not a case where a lack of familiarity by the deceased with the formal requirements of a will could allow the Court to more readily infer that the deceased intended the draft Will to form his Will.

8. There is no direct evidence that the deceased intended the draft Will, in its then form, and notwithstanding that it had not been signed, to operate, with immediate effect. To the contrary, the deceased realised that it needed to be signed.

9. There is nothing on the draft Will that suggests that the deceased adopted, or authenticated, it as his Will. To the contrary, it seems that a Will, in the form of the draft Will, or with appropriate amendments, would be signed later after further discussion with Mr Basha as evidenced by Ex A1.

10. Nor is there evidence of inadvertence or mistake by the deceased.

11. There is no evidence to lead to the conclusion that the deceased came to believe that he had implemented his intention to make a will, even though it was not signed and for this reason did not proceed further.

12. The Plaintiff did not give any evidence that an appointment had not been organised, with Mr Basha, for the deceased to sign a will in the form of the draft Will, or otherwise sign the draft Will, because the deceased believed that there was an operative Will in the form of the draft Will that he had orally "approved", and, therefore, believed he did not have to sign it.

13. There was no evidence that the deceased described the draft Will as his Will to the Plaintiff or to any third party. Nor did he say anything to anybody, including the Plaintiff, about having made a will."

The Court was not satisfied that the deceased intended the draft Will to have a present operation. He allowed all of Bartier Perry's costs to be paid out of the estate and a previous Will, without the tax advantages of a testamentary trust, was to be approved.

The deceased was diagnosed with liver cancer three years before he died but this was not enough time for him to execute a Will setting up a testamentary trust. He met a lawyer more than 12 months after an initial appointment was made and finally met the lawyer one month before he died but his condition had deteriorated rapidly. The wife said she felt bad that she misunderstood the urgency of his situation.

The lesson from this sad case is to take advice early and act on it.

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