

Welcome to Piper Alderman's Wills Watch, which aims to provide accessible and informative summaries of current succession law and estate administration issues.

February 2015



**The case of the hidden "Will"**  
*Burge v Burge [2014] NSWSC 1772*



**Never too old to claim**  
*Weekes v Barlow [2014] NSWSC 1776*



**A DVD can be a Will Document**  
*In the Estate of Wilden (Deceased) [2015] SASC 9*

# The case of the hidden “Will”

## *Burge v Burge [2014] NSWSC 1772*

The plaintiff, Mrs Burge, was the widow of the late Mr Rupert Burge (deceased) who died on 5 January 2013, aged 93. The deceased and the plaintiff had been married for more than 58 years and had two children.

The plaintiff sought an order that probate in solemn form be granted in respect of a will made by the deceased dated 15 March 1983 (1983 Will). The 1983 Will named the plaintiff as the sole executor and beneficiary. There was no question as to the due execution of the 1983 Will.

Mrs Burge commenced the action because of the uncertainty created by a series of notes and letters retained by Mr Burge since 1983. These included a clean copy of the 1983 Will upon which the deceased had subsequently written on about 10 June 2007 (2007 document). Upon the 2007 document the deceased had made the following handwritten alterations which he initialled and/or signed:

- His daughter, Susanne’s name and address were crossed out and the defendant’s address was added as the executor in the event that the plaintiff predeceased the deceased or died within one month of his death.
- The sole beneficiary of the estate was changed from the plaintiff to the defendant.
- The guardian of infant children was changed from plaintiff to the defendant, but then struck through and “CANCELLED AS INAPPLICABLE” inserted.

The deceased had also inserted the date, 10 June 2007, at the foot of the third page of the 2007 document and in the space provided on the cover page of the document. The deceased also signed his name on the fourth page of the document next to the attestation clause. There were no witnesses and he had told nobody about what he had done.

The defendant was Mr Conrad Burge, the son of the plaintiff and the deceased. He commenced a cross-claim claiming that the 2007 document revoked all former testamentary documents and appointed the defendant as sole beneficiary. The defendant sought an order that letters of administration with the will annexed be granted to him in regard to the 2007 document.

The defendant relied on section 8 of the *Succession Act 2006* (NSW) (the Act). Section 8 applies to documents or parts of documents that purport to state the testamentary intentions of a deceased person but have not been executed in accordance with the Act.

The critical question in this case was whether the Court was satisfied that the deceased intended the 2007 document to form his will (see s 8(2)(a) of the Act).

The 1983 Will was found by Susanne while looking through the deceased's papers in his house the day after he died. It was found within an envelope marked "WILLS" in an obvious place on a bookshelf with an earlier will and a letter of wishes composed by the deceased. About a week later the 2007 document was found by Susanne in what she described as a "cubby" hole within the deceased's desk upon a subsequent search of the deceased's papers .

### Outcome

Justice Darke considered this "as a borderline case". Ultimately, the Court was not satisfied that the deceased intended the 2007 document to form his will.

The Court ordered that the defendant's Amended Cross Claim be dismissed and that probate of the will of the late deceased dated 15 March 1983 be granted in solemn form to the plaintiff.

### Reasons

The following reasons were given for the decision:

- Having had the 1983 Will professionally prepared, the deceased was aware of the requirement for two attesting witnesses. Therefore, the Court considered it unlikely that the deceased would have considered that the 2007 document was itself capable of operating as a valid will.
- If the deceased had intended the 2007 document to operate as his will, it is likely that he would have placed it with the 1983 Will and the other documents in the envelope marked "WILLS".
- Even if he considered his wife to be financially comfortable, it would be a big step to entirely disinherit her, without explanation.

While the deceased plainly contemplated making a will in terms of the 2007 document the Court was not satisfied on the evidence that he intended that the document form, and operate as, his will, including by revoking any previous will.

### Comment

It is not uncommon in our experience for willmakers to make handwritten alterations on a will. Invariably, the extensive evidence that is required to be put before the court to establish the deceased's state of mind or intentions is extremely costly. Other professional advisors are encouraged to recommend that clients do not attempt this and have the will redrafted by a legal practitioner.



# A DVD can be a Will Document

## *In the Estate of Wilden (Deceased) [2015] SASC 9*

On 30 January 2015 Justice Gray of the Supreme Court of South Australia held that a DVD may be a document for the purposes of section 12(2) of the *Wills Act 1936 (SA)* and granted probate of a transcript of that recording.

### Background

The deceased died on 22 January 2014. He did not leave a will executed in accordance with section 8 of the *Wills Act 1936 (SA)*. Instead, he left a DVD and a typed document dated 16 February 2011.

The DVD contained video footage of the deceased which appears to have been made on 11 May 2005. In that DVD the deceased recorded himself stating that it was “somewhat of an official last will and testament as I don’t have a written document anywhere at this stage” and that it was “some kind of an official record of how things should be distributed”. He went on to state that he wanted everything to go to his younger sister Sandra, her husband Michael and their two children and that Sandra could keep what she wanted, sell what she wanted and enjoy and keep the money.

Subsequently, the deceased also provided directions in a document dated 16 February 2011 as to his burial and stated “This is an official last will and testament (sic) for myself Wayne Wilden. This is to add to my video of my last will and testament (sic) recorded on 11.5.05.”

He also went on to state that “I would like to officially record that my will is that everything I own goes to my younger sister Sandra Carpenter and her husband Michael Carpenter and my two nephews (J) and (S)”.

Sandra sought orders for the admission to probate of the typed document and the written transcript of the words recorded in the DVD pursuant to section 12(2) of the *Wills Act*. The applicant submitted that the deceased intended that the typed document and the DVD would jointly comprise his last will.

The deceased died a bachelor without any children and his parents had pre-deceased him. He was survived by nine siblings who would equally be entitled to an interest in his estate if it was administered in accordance with the laws of intestacy. Apart from Sandra, each sibling provided a written consent to Sandra’s application.

Justice Gray was guided by the *Acts Interpretation Act 1915 (SA)* which defined a “document” to include “any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device”. As there was no contrary intention in the *Wills Act* that would prevent this general definition of “document” it was held that the DVD was a document for the purposes of the *Wills Act* which was consistent with a liberal construction that is to be accorded to remedial legislation such as section 12(2) of the *Wills Act*. He was therefore satisfied that both documents expressed the deceased’s testamentary intentions and he intended them together to constitute his will and that they ought to be admitted to probate.

### Comment

In a previous *Wills Watch* article of “My iPhone Will” we drew attention to a will documented on an iPhone as a document capable of being admitted to probate. It is unclear from this decision whether any evidence was given that the deceased made the DVD recording free of any coercion as was the case in “My iPhone Will” but it is a further example of the Courts in Australia being prepared to admit to probate unconventional testamentary documents.



# Never too old to claim

## *Weekes v Barlow [2014] NSWSC 1776*

### Facts

The New South Wales Supreme Court recently heard an application for family provision pursuant to section 59 of the Succession Act 2006 (NSW) (Act). Mr Dallas John Rhodes Nunn (deceased) died on 2 May 2013, aged 89 years old. His estate was worth approximately \$680,000. The deceased had four daughters and four step daughters.

The defendant was one of the daughters of the deceased, (Judy). Judy and the plaintiff were the two executors to whom Probate of the deceased's will dated 3 July 2003 (Will), was granted. The plaintiff, Ms Joy Weekes, was the de-facto partner (of about 23 years) of the deceased and was 92 years of age. By agreed life expectancy tables it was agreed that the plaintiff had a life expectancy of some four years.

Under the Will the plaintiff was to receive a \$50,000 legacy, any motor vehicle or caravan and all personal and household effects of the deceased. A legacy of \$30,000 was provided for Judy.

The Will also provided for a "Fund" to be established, which was to be held on trust for the plaintiff for her life. The Fund consisted of the deceased's residence, a sum of \$20,000, "a sum sufficient to cover debts charged on, or owing with respect to, the assets placed in the Fund" and any assets added to the Fund or proceeds from the disposal of any assets of the Fund. The Fund was to pay all rates, taxes, insurance premiums and other outgoings payable in relation to assets of the Fund (e.g the home). The Trustees of the Trust (being the plaintiff and Judy) were given discretion to distribute income of the trust to the plaintiff or the residue of the estate in such amounts and proportions as they saw fit.

On the plaintiff's death the balance of the Fund was to form part of the residue of the estate to be divided equally between the deceased's daughters and step daughters.

There was no dispute that the plaintiff was an eligible person or that she had the status to bring proceedings under section 57(1) of the Act (s 59(1) (a)).

The factors considered under section 60 of the Act included:

- The plaintiff and the deceased had a long happy relationship.
- The deceased partially maintained the plaintiff during their relationship.
- The plaintiff did not have any significant physical, mental or intellectual disability, she had arthritis in her knees and suffered from kidney stones. There was no evidence of any physical, mental, or intellectual disability of any beneficiary.



- The plaintiff had made significant contributions to the estate of the deceased. The plaintiff had in the past paid the net proceeds of sale of a unit (\$94,000) to the deceased, who used the money to improve and acquire other properties where they resided together. She also provided care for the deceased, especially in the last years of his life.

## Outcome

The Court found that the Will did not make adequate or proper provision for the plaintiff and made a family provision order in her favour. Subject to any submissions as to the precise form, the following orders were made:

- The plaintiff to receive a lump sum of \$100,000 absolutely out of the estate, to be paid out of the estate not comprising the Fund.
- The balance of the estate (not consisting of the Fund) after the payment of costs, to be distributed to the residuary beneficiaries in accordance with the terms of the Will.
- The amount comprising the Fund to be retained by the plaintiff and the defendant, as trustees, to provide for the plaintiff's accommodation for her life.
- The income from any part of the Fund that is not used for the purpose of providing such accommodation for the plaintiff should be paid to the plaintiff for her life.
- The capital of the Fund not to be paid to the residuary beneficiaries until after the plaintiff's death.
- The plaintiff's costs (ordinary basis), and the defendant's costs (indemnity basis), to be paid out of the balance of the estate of the deceased.

## Reasons

Justice Hallen noted that the competing claims of the named beneficiaries were important and must not be forgotten or given no weight. However, the Court found that:

- The provision made for the plaintiff, was neither adequate nor proper.
- Taking into account the relevant considerations listed in section 60 of the Act, the Court was satisfied that for the purposes of section 59(1) (c) of the Act, that the deceased did not make adequate provision for the proper maintenance or advancement in life of the plaintiff.

## Comment

It was noted that cases under the Act are fact specific, and earlier authorities provide no more than useful guidance which must be considered with caution. However the case is of note for its thorough analysis of what amounts to "proper" provision and not merely what is "adequate", particularly if one is aged 92 years.

# Piper Alderman Succession and Estates Team



Rod Jones  
Special Counsel  
t +61 8 8205 3474  
rljones@piperalderman.com.au



Donna Bengé  
Special Counsel  
t +61 8 8205 3358  
dbenge@piperalderman.com.au



Rod and Donna are both full members of the Society of Trust & Estate Practitioners (STEP) the leading worldwide professional body for practitioners in the field of trusts, estates and related issues. Donna is also a branch committee member of STEP South Australia.



Alan Jessup  
Partner  
t +61 2 9253 9911  
ajessup@piperalderman.com.au



Angela Burford  
Associate  
t +61 8 8205 3392  
aburford@piperalderman.com.au

## Contact us

### Sydney

Level 23  
Governor Macquarie Tower  
1 Farrer Place  
Sydney NSW 2000  
DX 10216, Sydney Stock Exchange  
t + 61 2 9253 9999  
f + 61 2 9253 9900

### Melbourne

Level 24  
385 Bourke Street  
Melbourne VIC 3000  
GPO Box 2105  
Melbourne VIC 3001  
DX 30829, Collins Street  
t + 61 3 8665 5555  
f + 61 3 8665 5500

### Brisbane

Riverside Centre  
Level 36  
123 Eagle Street  
Brisbane QLD 4000  
GPO Box 3134  
Brisbane QLD 4001  
DX 105, Brisbane  
t + 61 7 3220 7777  
f + 61 7 3220 7700

### Adelaide

Level 16  
70 Franklin Street  
Adelaide SA 5000  
GPO Box 65  
Adelaide SA 5001  
DX 102, Adelaide  
t + 61 8 8205 3333  
f + 61 8 8205 3300

[www.piperalderman.com.au](http://www.piperalderman.com.au)

Follow us on

