

## Article Information

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## DIY Electronic Wills - Are we moving to a new normal?

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*Two recent decisions of the Supreme Court of New South Wales confirm this apparent trend and the admissibility to probate of informal digitally recorded documents.*

### **The Estate of Roger Christopher Currie, late of Balmain [2015] NSWSC 1098 (5 August 2015)**

This recent case of the Supreme Court of New South Wales considered whether a computer document created by the deceased was intended to operate as his will.

#### **Facts**

Roger Currie (**deceased**) died aged 52 in July 2012. The deceased's brother David Currie brought proceedings seeking letters of administration in respect of his late brother's estate. A Cross-Claim was also filed by a "distant cousin" Kate Shepherd seeking an order pursuant to Section 8 the *Succession Act 2006* that probate be granted in respect of an informal will document found on the deceased's computer after his death (**the Computer Document**).

The deceased never married, nor did he have children. Kate and her mother, Truda Gray often spent time with the deceased prior to his death. Under the Computer Document, the deceased gave his real estate including his house in Balmain to Kate.

Prior to his death, the deceased had been in poor health for some time. He resisted surgery that was recommended for his heart condition for many years. In 2012, his health deteriorated to such a point that he agreed to have surgery.

Before his admission to hospital, the deceased arranged a party at his home to which he invited his close friends including Ms Gray. Significantly, it was during this party that Ms Gray alleged that the deceased told her that, "If anything happens to me I have made a will. It's encrypted" and then told her the password for the encryption (which she later could not recall). In her evidence, Ms Gray said that she did not take much notice what the deceased was saying as he often spoke of the possibility of his sudden death and she had tried to change the subject to something more positive. Ms Gray did not disclose this conversation to anyone else at the time.

The deceased was admitted to hospital on 10 July 2012. After having surgery, he was discharged on approximately 21 July 2012 and was subsequently found deceased in his bed on 26 July 2012. Following the deceased's death, extensive searches of his house by friends failed to locate a "paper will". During these searches, a friend of the deceased found two USB sticks in a drawer. The Computer Document was found on the USB sticks which were encrypted. A forensic analysis of the USBs established that the Computer Document was last modified on 1 April 2009 and was last accessed on 13 May 2012. Subsequently a number of identical documents were also found on the computer of the deceased.

The Computer Document was a typed document that began, "This is the last will and testament of Roger Christopher Currie...". It appointed a friend of the deceased, Cholmondeley Darvall as the sole executor, made several detailed specific bequests to friends and relatives and gave the residuary estate equally between those named in the will. The document

stated that it was “signed” by the deceased on 1 April 2009. Notably, the deceased also stated that he was making no provision for his siblings and nephew as they had been adequately catered for by the estate of his late parents.

### Outcome

Kate relied on the context of the Computer Document and deceased’s conversation with Ms Gray to submit that the deceased intended the Computer Document to be his last will.

In the circumstances, the court was satisfied that the deceased intended the Computer Document to be his last will. Factors that supported this decision included:

1. The deceased’s conversation with Ms Gray at his party.
2. He knew an informal will could be admitted to probate as a result of a dispute of his own mother’s informal will.
3. The fact that the language used in the Computer Documents was “clearly language of testamentary intention”.
4. That he had provided that the document was “signed” by him.

The court declared that the Computer Document was the will of the deceased and granted probate of the will in common form to Mr Duvall as the sole executor.

### The Estate of Wai Fun Chan, Deceased [2015] NSWSC 1107 (7 August 2015)

This recent case of the Supreme Court of New South Wales considered whether a DVD recording was intended by the deceased to be a codicil to a will.

### Facts

Wai Fun Chan also known as Chan Wai Fun (**deceased**) died in Sydney aged 85 on 27 June 2012. A widow, who was born in China, the deceased possessed property both in New South Wales and overseas estimated at about \$930,000. The deceased was survived by eight children who resided in New South Wales, Hong Kong, Mainland China and the United States.

The deceased left a formal will dated 6 March 2012 prepared by her solicitor in the English language (**Formal Will**), which complied with the formal requirements under the Succession Act 2006 (**Act**). She also left a DVD recording of a short supplementary oral statement of her testamentary intentions recorded in Cantonese on 8 March 2012 (**Video Will**).

The Video Will was recorded in the presence of one of her children (**the second plaintiff**) who was also a beneficiary of the Video Will and that child’s spouse. The deceased commenced her statement on the Video Will by stating the date on which it was made and an express claim that she was “of a clear and sound mind”. The only person audible on the Video Will was the deceased and her presentation in the video will was calm and measured. It was apparent that she wanted to “speak” to her children.

In the Video Will the deceased provided for a special legacy for two of her children (beyond the provision made for her children generally in the Formal Will) being the first and second plaintiffs, to whom she felt especially indebted. The deceased had been dissatisfied with her Formal Will after being dissuaded from making this legacy in her Formal Will by the first plaintiff (acting against self-interest).

The plaintiffs applied for a grant of probate of the Formal Will together with the Video Will as a codicil as the executors named in the Formal Will. The application was accompanied by a transcription of the Video Will in Cantonese and an English translation. The plaintiffs’ application was referred to a Judge by the Senior Deputy Registrar due to the novel aspects of the case.

### Outcome

The court found that the deceased’s oral statements coupled with the extrinsic evidence as to the circumstances and manner in which the Video Will was made left no doubt about her knowledge and approval of the recorded dispositions freely and voluntarily made.

The court was satisfied that:

1. The Formal Will met the formal requirements for a will under the Act.
2. The Video Will satisfied the requirements under section 8 of the Act for admission to probate as a codicil to the Formal Will, in that the deceased “intended it to form an alteration to... her will”.
3. The deceased knew and approved the dispositions made by her in the Video Will and those dispositions were given freely and voluntarily by her.

4. Any suspicious circumstances in relation to the making of the video because the second plaintiff was a witness and a beneficiary were adequately explained.

As such, the court ordered that both the Formal Will and the Video Will be admitted to probate and probate was granted to the plaintiffs.

#### **Comment**

Justice Lindsay noted that a New South Wales Court had not previously admitted a DVD to probate. He also noted the costs and unnecessary burden on the Willmaker's estate that may occur as a result of a "video will". It demonstrates that proving video wills can often be time consuming, expensive, problematic and may lead to a heightened risk of litigation.

Compliance with the formal legislative requirements for making a will is preferred for this reason alone. In times of easy access to technology, we feel that this will increasingly not be the case.