Title: **Conjuring documents: Informal wills**

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In June 1948, Cecil George Harris died following an accident on his Saskatchewan wheat farm, on the flat, isolated and usually-dry prairie lands. He had been trapped underneath his tractor for twelve hours in torrential summer downpour. His wife and neighbours eventually found him during a lightning storm. Despite their best efforts, he died of his injuries.

Two of his curious neighbours went to examine Harris' stricken tractor. Doing so, they found that Harris had scratched a message into the paint on the fender. It read:

In case I die in this mess I leave all to the wife. Cecil Geo. Harris

The neighbours removed the fender after his funeral and conveyed it to a local lawyer. The fender message was later held to be Harris' valid will (*Estate of Harris* [1948] Can. Bar Rev. Vol XXVI, 1242-1244). Because this case is now a quirky landmark of Saskatchewan succession law the fender, and the knife Harris used to carve his message, are now on display in the library of the University of Saskatchewan law school. When Cecil Harris scratched a message into his tractor fender, he created an artefact that had never been previously thought of as either a will or a document. Nevertheless, the fender was admitted to probate: it was held to be his last will and testament.

This chapter examines informal wills – including that inscribed on Harris' fender – and the ways that courts have been challenged by the documentary nature of the will. It explores instances where people created documents that were not wills, or wills that were not documents, and where the courts interpreted them *as documents* and *as wills* regardless.

What is a document?

In Western legal traditions, documents – more than witnesses or physical objects – have become the most important form of evidence. But in the digital age, the distinction between a document, a witness and real evidence is becoming more difficult to perceive, and pointless to sustain. What we understand as a 'document' has expanded to include a potentially limitless range of digital forms and technological devices for the capture and storage of data, compounding the challenges posed by matters of proof and use. These emerging understandings, however, also enable us to see more clearly that the history of documentation has always presented challenges to what a document *is*. In 1951, French librarian and

documentary theorist Suzanne Briet asked 'What is a document?', and distinguished an antelope in the wild (fauna) from an antelope confined in a zoo, or taxidermal in a museum, or captured audiovisually, or described in an encyclopedia (a document) (1951, 10-11). Briet's approach was groundbreaking for tethering documentation to information, and detaching it from the material constraints of writing implement and surface. Following Briet, this chapter traces the longer history of materiality, immateriality and ephemerality in documentation.

For documents, the entanglement of form and function conflates what a document *is* and what a document *does*. The philosopher Barry Smith offers a theory of 'document acts' to expand upon John Searle's work on 'speech acts', which itself draws upon J. L. Austin's theory of performative utterances (2014). For Smith, document acts are performed at two levels. In the first, humans do things with documents to signal that they regard them *as documents* (instead of, for instance, mere paper). Here, Smith includes acts such as signing or stamping documents, depositing them in registries, using them to grant permission, prove identity, or publish rules (2014, 20). In the second, Smith draws upon the work of economist Hernando de Soto, in which documents function within economies and bureaucracies, and in which *documents inaugurate* new states of affairs (2014, 19). By doing things with documents, Smith writes, we can change the world (2012, [5]-[6]). This is both social reality and ontological magic (Smith, 2012, [7]).

Documents are crucial to the construction of systems in which they function: the registries and agencies whose work is propelled by documents; the staff and officials who perform document acts; the channels and processes by which documents move; and ultimately their storage and perhaps their destruction. For Smith, whereas speech acts are "events", documents are "objects", and they endure through time, and have the capability to "float free" from their creators, with the capacity to "live lives of their own" (2014, 24). Furthermore, documents can have multiple creators, and they - and their meaning – are transformed whenever they are stamped, or when somebody adds an entry, or signs it, or appends an annexure (Smith, 2014, 24).

What is a will?

For Smith, wills are part of the category of documents needed by a society which has outgrown what was previously achieved through human memory and face-to-face interactions. Wills, and other documents in this cohort, "create and sustain the sorts of enduring and re-usable deontic powers", necessary for "new and more

complex forms of social order which are characteristic of modern civilization" (Smith, 2012, [26]).

Whereas wills are powerful documents because of what they can do, in law a will isn't ordinarily recognisable as a will until it fulfils the requirements of the documentary form. That is, it needs to be a documentary object in order for it to enact a documentary performance which can have a legal effect. Documents need to *be* in order to *do*. This chapter reveals that, in certain circumstances, courts have conjured documents from performances; document acts sometimes give rise to documentary objects that otherwise did not exist.

A will is a legal instrument which distributes a person's assets, and administers their affairs, after their death. Except in very limited exceptional circumstances, a will is a document. To be a valid will, it must have certain formal requirements: it must be in writing, on paper, signed by the testator, witnessed by other people, and formally executed. Specific formal language is encouraged, to ensure that the testator's wishes can be accurately followed. The best way for testators to ensure their will is valid is to follow the form: formalities distinguish a formal will from an informal one. Informal wills are not necessarily invalid, but they require the court to examine them for evidence that draws analogies between the form and the facts, so that they might be recognised as wills and interpreted as valid.

Succession law give rise to the full spectrum of human conduct: all of the human emotions are revealed in people's last wills and testaments, and in the conduct of their beneficiaries and descendants after death. Grief, generosity, love and consideration; prudence and planning; regret, remorse and missed opportunities; hate, spite, retribution; sometimes eccentricity. Probate courts are required to walk into this emotional minefield, and they do so when the person whose wishes are being enforced has already died. What would they have wanted? The primary evidence of a deceased person's wishes is their last will and testament. And when they haven't left one, or when the one they left is deficient, the court looks for clues, inferences and other tools enabling it to turn artefacts into documents, and documents into wills.

One aim of this chapter is to debunk the perception that the law clings to archaic formalities about documents. In the digital age, serious and careful consideration has been given to reforming the laws relating to wills, so that formal requirements are relaxed where possible, without diminishing the function of wills, and whilst also preserving the principle of testamentary freedom. However, as this chapter will reveal, despite enduring perceptions that the law is rigid and traditional, there is a longer history of courts validating – as documents and as wills – artefacts that are neither, and doing so with considerable tact, creativity and sensitivity.

The United States scholar of law and literature, Cathrine O. Frank, traces the statutory changes brought about by the 1837 Wills Act in the United Kingdom, and how these were reflected in Victorian fiction (2006; 2010). Now a written instrument, the will inaugurated new documentary forms for creating socio-legal entities. Frank writes, "Like the birth and marriage certificate, the written will is a legal register of identity" (2006, 325-6; 2010, 1). Here is a document that gives birth to a new class of legal subjects: testators: crucial operators in the flourishing of capitalism. Strange and hidden wills were a key device in Victorian fiction. Frank writes, "The Victorian novel is littered with wills, tucked away in its bedsteads, cupboards, and chests but always emerging" (2010, 14). Epic narratives of inheritance charted how "the will – that legalistic fetish expressing its testator's state of mind – also served as a legal technology for textualizing people and making them legible" (Frank, 2006, 327). Legislative change brought about a transformation in the individual; whereas customary laws constrained property holders through primogeniture, law reform permitted greater freedom in the distribution of wealth. For Frank, this marked a change from the expression of individual, or private, "character" to the creation of social, or public, "identity" (2006, 326; 2010, 3-4). More broadly, of course, it had the effect of transforming people into testators, and their legal advisors into conduits of the state's control of private property rights. Lawyers, by drafting uniform instruments to transmit assets, aided in building ever-larger bureaucracies for the public regulation of private wealth. This is David Graeber's "utopia of rules", in which "paperwork" functions to provide state oversight of private profit and interests (2015, 15-16).

Formal and informal wills

The 21st century has witnessed moves seeking to relax the formal requirements needed in order for private property to be bequeathed. In the United Kingdom, for instance, a long-running process has sought to modernise the law relating to wills (UK Law Commission, 2017). It responds to the convergence of an aging population, new medical understandings about the cognitive capacity of people with certain conditions, the rapid transition to digital technologies, acceptance of diverse types of family formation, and increasing rates of property ownership. The reforms aim to dispense with the formalities of will-making wherever possible, ensuring that it is a simple and accessible process for people to make a valid will. Whilst certain measures are needed to protect testators from fraud and undue influence, the broad objective is to support testamentary freedom and to prioritise testator intentions (UK Law Commission, 2017, 13).

In the United States, the legal scholar Stephen Clowney (2008) has demonstrated that testators have, for a very long time, created informal wills and that, most of

the time, no legal dispute has arisen. His focus is the holograph, or holographic, will. These are wholly handwritten, usually unwitnessed, and are valid in many jurisdictions, in some circumstances (Ellwand, 2014, 2-3). Holograph wills are conceptually considered to be "home-made wills"; collectively these arise where a person has made their will without the assistance of a lawyer.

Home-made wills have been said to give rise to "difficulties", "inelegancies", "ambiguities", "colloquialisms", they "may use words improperly" or "use the vernacular" (Haines, 2007, [1.44]). In the words of one commentator, they are reserved for "times of crisis, isolation, or poverty" (Ellwand, 2014, 22); that is, occasions where a testator does not have the opportunity to make a valid formal will. Authors of succession law texts repeat apocryphal lawyer jokes: in these jokes, people who refuse to use a lawyer when making their will, after their death inadvertently contribute to the enrichment of the lawyers who will litigate their drafting errors. In David Haines' text, makers of home-made wills "may have led to the cliché which is the toast of the Chancery bar: 'Here's to the man who makes his own will'" (Haines, 2007, [1.44]).

For Clowney, who undertook a large-scale study of home-made wills in the United States, the "patchwork of humorous anecdotes and appellate level court decisions" provides a distorted account; his research points to the "rich diversity" of testators in his study, and notes that home-made wills are made by people across the entire socio-economic spectrum, and most are made by women (2008, 46). He argues that to characterise home-made will-makers as foolish, ignorant or hellbent on squandering their possessions, is offensive and usually wrong. He shows that most of their wills are held to be valid and give rise to no dispute (Clowney, 2008).

Despite the method used in its making, Cecil George Harris' tractor fender message was held to be an exemplar of a holograph will. Celebrated for his enactment of "Prairie practicality", Harris took an important step when he "unwittingly" or "perhaps intuitively" placed his signature at the end of his message (Ellwand, 2014, 14-15). The inclusion and placement of a signature, and also the mark made when signing, has attracted considerable judicial attention (Halsbury's, 2nd ed, 1940, Vol. XXXIV, Sect. 2, [67-77]). In another Saskatchewan case, Cornelia Cleveland Smith left a wholly handwritten document which she signed, "Mother" (*In re Smith Estate* [1948] 2 WWR 55). In a dispute between her children, the court was asked whether "Mother" was a sufficient signature for a will (at 56). The court reviewed *Halbury's Laws of England*, 2nd ed., which stated:

> A mark or initials are sufficient if intended to represent a signature, even though the testator's hand is guided in making it, and whether the testator can write or not. A stamped signature may be sufficient. A signature however must have been made with the purpose of authenticating the instrument (at 56).

Halsbury's also stated that "Signature in an erroneous or assumed name, if intended as the name of the testator, is enough". Following this authority, the court in *Smith* found that "Mother" was a sufficient signature, and that hers was a valid holograph will (at 57).

Reflecting his frustrations about the strict interpretation of rules relating to signatures in Australian succession law, Paul de Jersey, speaking extra-judicially, observed the formal arrangement of the will document. He celebrated the removal of the long-standing requirement that a signature be applied at the "foot or end" of the will (2010, 239). His remarks acknowledge that the will is a material artefact, and that its legal force has long been bound to the architecture of the page. In *How the Page Matters*, Bonnie Mak points to the "dynamic relationship between material and meaning" which is enacted and embodied by the page (2011, 3). Mak investigates the page as both "material platform" and "cognitive space" (2011, 3). For Mak, the "strategies of the page may be simultaneous, overlapping, mutually responsive, complementary, and even contradictory" (2011, 4). She writes, the "architecture of the page is thus a complex and responsive entanglement of platform, text, image, graphic markings, and blank space" (2011, 5). By logging his frustrations about the legal significance of signature placement, de Jersey is implicitly acknowledging the history of the page as, in Mak's words, "a favoured space and metaphor for the graphic communication of ideas" (2011, 8). For Mak, the page is not only a "vehicle or container" for ideas, but itself implicated in the creation and interpretation of those ideas (2011, 9). It is situated at the centre of the "complicated dynamic of intention and reception" (2011, 21). Connecting this with the concept of 'document acts', the arrangement of the page can play a crucial role in the inauguration of new and lawful states of affairs. In pausing over the placement of the signature on a will document, and in acknowledging that there has long been a right and wrong place for the signature to appear, de Jersey is reminding himself – and us – that the page is there, and its physicality is tethered to its legality. That the placement of the signature can suddenly cease to matter, however, tells us that this entanglement is neither natural nor necessary, and that the page – materially and legally – is reimaginable.

Formalism and functionalism

Informal, holographic, homemade, or otherwise strange wills give rise to two strands of jurisprudence. One of these might be termed "formalist" and the other "functionalist". The former is dominant; as the legal scholars Collins and Skover stated, "Law is bound by its form" (1992, 509). They observe that even law's metaphors embody a commitment to form: "put it in writing", "signed and sealed", "the letter of the law", "black letter law", "by the book" (1992, 514).

Formalists are concerned with the *form* of legal documents and lawful conduct. They argue that there is an important rationale in applying legal formalities strictly: formalities sort sincere legal instruments from those which are gratuitous, impulsive, or which otherwise do not expect to be enforced. Formalities will, for example, prevent people from giving away their property accidentally or recklessly.

The United States legal philosopher Lon Fuller, in his landmark 1941 essay, "Consideration and Form", undertook an inquiry into the "rationale of legal formalities" in document-making (1941, 799; see also Kennedy, 1973; 1976; 2000). Fuller, a scholar of contracts, was seeking to distinguish enforceable contracts from what he called "gratuitous promises", because the latter might be made "impulsively and without proper deliberation" (1941, 799). For Fuller, what distinguishes these is not their content or effect, but rather the manner in which they have been made: their form (1941, 799). To draw upon Fuller's work here is not to conflate the promises made in contract law with the gifts given in wills. Instead, it is to draw upon his analysis of 'form' as a significant component of legal document-making. For Fuller, the formality of legal documentation has three primary functions: the first of these is evidentiary; the formalities are evidence of the intention to create a legal effect. The second is cautionary, or deterrent, because the formalities serve as a warning to the document-maker of the potential legal effects of their promise. The third is channeling, by which Fuller means that the formality creates a legal framework that channels the actions of a party towards a better understanding of their intentions. Form is a device for the "channeling of expression" (1941, 803).

The formalities are deliberate devices, wilfully deployed by people signalling their intentions. They serve as a convenience and a short cut, saving future recipients the effort of having to look beneath the surface of the document, searching for context, intention or other modes for interpretation. The formalities testify to their own agreed meaning, and foreclose the need to look deeper. Fuller is interested in the formality of the 'seal', but we might equally consider the signature, or the use of prescribed words, or other agreed devices.

Fuller makes the point that strict formality increases individual autonomy. People are more likely to have their personal wishes enforced, even eccentric or unconventional wishes, where those wishes are articulated through agreed, traditional forms (1941, 814). The United States legal scholar Melanie Leslie disputes this reasoning, arguing that the documentary formalities intended to bolster testamentary freedom end up constraining it (1996, 235-236).

Fuller cautions that formalities are valuable legal institutions, but also obstacles to innovation (1941, 803). For this reason, form is not always necessary nor appropriate. Form, he writes, should be reserved for "relatively important transactions" (1941, 805). Law should know its place, and it has no place where, in his words, "life has already organized itself effectively" (1941, 806).

The other jurisprudential strand – an alternative to formalism - is "functionalism". Advanced by most contemporary Anglophone scholars, and most closely associated with United States legal scholar and historian John Langbein, functionalism allows courts to look at the context, intention or purpose of a document, rather than its form, and give expression to those objectives. Functionalism is said to advance testamentary freedom, liberating testators from the strict formalities of will-making. Some functionalist scholars and practitioners advocate for "testamentary rescue", where informal documents are rescued from the consequences of their errors through fancy jurisprudential footwork (e.g. du Toit, 2014).

A key figure in anti-formalism, Langbein argues that where harmless execution errors occur in the making of wills, judges must have authority to overlook the errors and give effect to the testator's intentions, where the document nevertheless embodies those intentions (Langbein, 1975; 1987; 1993-4; 2017). Known as the "dispensing power", it empowers judges to, in effect, correct drafting errors in order to advance a testator's wishes. Other scholars, including James Lindgren, argue that the dispensing power is inadequate, that most of the formalities in wills are historical anachronisms, and that most formalities ought to be eliminated in favour of other methods of passing property after death (Lindgren, 1992, 1033; see also Clowney, 2008, 66-68). Lindgren believes that succession law has unfairly assumed that laypeople are ignorant; he wrote, "sure, they don't know the law, but they usually know what they want. The fear that they might improvidently give away their property at death has left a legacy of formalism unmatched in American Law" (1992, 1009). This argument is bolstered by changes in other areas – including insurance, banking and trusts – where lesser requirements are sufficient to pass property after death (see Clowney, 2008, 68).

In support of her critique of testamentary freedom, Leslie finds that the case law shows – "quietly but fervently" – courts will impose normative or moral views about how estates should be distributed, and will overlook testamentary intent in order to prioritise those they regard as having "a superior moral claim to the testator's assets", primarily dependant spouses or blood relatives (1996, 236). For Leslie, a concern with the satisfaction of documentary formalities disguises a concern to enforce moral norms arising from familial duty (1996, 237).

Paper, objects and documents

For Clowney, most of the contemporary legal criticisms of informal wills lack proper foundation, by conflating informality and ignorance. These criticisms overstate the occurrence of forgery and fraud, he writes, or they assume that informality arises from poor estate planning (giving rise to class-based pejoratives such as "trailer park" estate planning), or they inaccurately argue that potential heirs will attempt to probate documents which were never intended to function as wills (2008, 35-36). He observes, "Commentators worry that any casual or offhand writing – a greeting card, a love letter, a few sentences scribbled on hotel stationary – can be construed inappropriately as a will"; proponents of formality argue, Clowney writes, that these are necessary "to separate the legal wheat from the chaff and keep testators from accidentally giving away their property" (2008, 35-36). The fear that certain papers (cards, notes, love letters) might be mistaken for legal papers (say, wills) is not borne out by the case law. More commonly, what arises is that some will documents (draft wills, unsigned wills, revoked wills) give rise to a dispute, particularly where multiple will documents have been created by a single testator during their lifetime. An artefact's status *as* a document is less frequently disputed than the status *of* a document as being a last will and testament.

For Clowney, the only requirements for a valid will ought to be writing and a signature: "Signature indicates a decision, final unless later revoked, and supplies evidence of genuineness" (2008, 69). The court assessing Cecil Harris' tractor fender took a similar view. When he carved his final message into the fender, Harris placed his signature at the end of it, and this was found to be a formal component in an otherwise informal will. Evidence was taken from his bank manager and also from his friend and former business partner that the handwriting and signature on the fender matched Harris'. His wife and his lawyer also swore affidavits that the handwriting on the fender was authentic. That this evidence required the deponents to compare his usual handwriting *on paper* against a large message *scratched into metal with a knife* seems to represent a blurring of form and function that could have – but here did not – represented an insurmountable

leap between evidentiary forms. Here, Harris' fender slid smoothly from being an object to a document.

On the day he received it, Harris' lawyer took the step of calling a professional photographer to photograph the fender, with the expectation that this image would be required in court (Ellwand, 9-10). The idea that one document – a photograph – can prove the contents of another – a scratched fender – is something that the law of evidence provides tools for achieving. But Harris' lawyer had not anticipated that the fender *itself* would need to be brought into the courtroom. Nor was it expected that the court would order the message to be cut from the remainder of the fender, with the message portion physically appended to the court file. The fender stayed in the court registry until 1996, when the court handed it to the University of Saskatchewan law school. In displaying it behind glass in a vitrine, the law library transformed this document back into an object.

The history of succession law is filled with instances of people leaving strange, surprising, eccentric or cruel artefacts behind for their loved ones to wrestle with, conjuring enforceable wills from, amongst other things, an eggshell, a nurse's petticoat, scratchings on a wall, or suicide notes. As Cathrine O. Frank observed, the legal narratives in which "curious wills" are litigated run parallel with the literary narratives in Victorian novels in which they function as devices – of plot, character, place and context (2006). One of Frank's texts is H. Rider Haggard's 1888 novel *Mr Meeson's Will*, in which the protagonist, Augusta Smithers, encourages Mr Meeson to have his will tattooed onto her back. This later gives rise to a legal dispute about the will's validity. It also gives rise to a fundamental evidentiary dispute: is Augusta a witness or a document? Her solicitor wonders whether, if her skin were flayed, it would satisfy the requirement of paper: "if carefully removed and dried, [it] would make excellent parchment"; by leaving it upon her body, it might be regarded as "parchment in its green state" (Frank, 2006, 334). The Defence argues that, if Augusta is a document, she is not entitled to speak: "there is no precedent for a document giving evidence" (Frank, 2006, 334). For Frank, the novel's satire arises from the conflict between the rule-bound law, on one hand, and common sense and humanity, on the other (2006, 334). It is a tension which emerges as a clear theme in the case law arising from informal wills.

In 1925 in England, a ship pilot named James Barnes died. On top of his wardrobe, his wife Margaret, known as "Mag", found an empty eggshell resting on cotton wool in a small wooden box (*Hodson v Barnes* [1926] Times LR, Friday 3 December 1926, 71; at 72). On the eggshell, in indelible ink, in Barnes' handwriting, was this message:

17-1925. Mag. Everything i possess. – J.B.(at 71)

In court, Margaret asserted that this eggshell represented her husband's last will and testament; she said it revoked his earlier – formal – will, in which she was to share his estate with his children from a prior marriage, and all of his grandchildren.

The eggshell was tendered into evidence. The President of the Court, Lord Merrivale, announced: "It is a fragile thing. It is here" (at 71).

The facts in this case are complex and rather sad, and in the end the Court ruled that the eggshell – and all of the evidence received about it, and about Barnes' special egg-rich diet, and about his other will – was not sufficient to revoke his earlier will, and to convey the entirety of his estate to his current wife. Instead, the court described the eggshell artefact as "one of the most grotesque proceedings conceivable"; "one of the most incredible things of which [the Court] had ever heard", and which was also "inconsistent with the character of the testator" (at 72).

The following year, 1926, George Hazeltine, described as a rich and eccentric recluse, wrote on his nurse's petticoat what purported to be his last will and testament. By this device, the court was told, he revoked his earlier will, which divided his large estate amongst various charitable and educational institutions. Instead, according to the petticoat will, his estate would go to his grandniece, with considerable gifts to the nurse and the hospital matron who attended to him in his final days. Against a complicated factual background, most of the court's attention was paid not to the form of the document, but to whether it was made freely, and without undue influence. A judge ruled that, because the nurses who witnessed the will were also its beneficiaries, it was null and void. On appeal to a jury, the jury held that the will was valid, albeit the matter had meanwhile settled out of court. *The Los Angeles Times* described the case – with its raunchy exhibit – as "more like Exhibit A in a divorce action than a will" ('Will On Petticoat May Dispose of Large Estate', 1 February 1926, A1) – but since six firms of attorneys litigated the matter, it seemed that – as the old jokes affirm – the real winners were the lawyers.

In a 1988 case in South Australia, Pantelej Slavinskyj, born in the USSR, left a message shortly before he died (*In the Estate of Slavinskyj* (1988) 53 SASR 221). On a plasterboard wall in his house, in poorly-spelled Ukrainian, he wrote [here translated into English by the court]:

To all my nieces
USSR. Ukrainian Socialist Republic 324047

Krivoy Rog
R – K Keina
Karbyshova Street
No. 10 Flat 69 N.G. Kartvova (at 229).

Into a crack in the wall, he placed an envelope on which he had written the name and address of one niece. He had two of his neighbours witness these acts, and one of them – the one who could read Ukrainian – signed the wall. Mr Slavinskyj died shortly after; his neighbour who signed the wall died before the court hearing. The court judgment, written by Justice Legoe, is filled with irresistible references to the story of Pyramus and Thisbe, two lovers separated by a wall, but who nevertheless whisper to each other through a small crack in it. Re-told in Shakespeare's *A Midsummer Night's Dream*, Legoe J reproduces dialogue from the play-within-a-play performed in Act V, Scene 1. In the play Snout the Tinker, playing the Wall, explains the function of the wall in transacting human affairs.

> WALL: In this same interlude it doth befall
> That I, one Snout by name, present a wall;
> And such a wall, as I would have you think,
> That had in it a crannied hole or chink,
> Through which the lovers, Pyramus and Thisby,
> Did whisper often very secretly.
> This loam, this rough-cast and this stone doth show
> That I am that same wall; the truth is so:
> And this the cranny is, right and sinister,
> Through which the fearful lovers are to whisper (*A Midsummer Night's Dream*, Act V, Scene I).

Whilst it is not convention for legal judgments to cite Shakespeare, nor is it rare, as the Bard is known for capturing the enduring themes of humanity. Christopher Legoe, reflecting in his retirement, explained: "I felt that sometimes poetry, and particularly Shakespeare, had a wonderful ability to describe human feelings, human intentions, human understandings, and human meanings. And I did quote Shakespeare on more than one occasion, I'm afraid" (History Lab podcast, Season 3, episode 1, at 13:36).

The court was told that it would be possible to cut out that portion of the wall – the documentary portion – and bring it to court, but the registrar had said that a photograph would do. As Snout the Tinker had observed: "You can never bring in a wall" (Act III, Sc. 1). Legoe, speaking in his retirement, explained why he did not require the wall to be brought before the court: "Well, because it was

somewhat impractical and it might destroy the wording, whereas the photograph would of course give the complete wording and be undestroyed" (History Lab podcast, Season 3, episode 1, at 18:20). The photograph formed part of the judgment, but its poor quality meant that it could not be reproduced in the reported judgment.

The Supreme Court of South Australia was clear: the wall was a document. Legoe J ruled, "The document in this case is the wall, and like Snout the Tinker, represents the division between neighbours, namely, the deceased and his universal devisees and legatees in the USSR" (at 233). But the court was hesitant: the wall was signed by one witness, not two. In his writing on the wall, Slavinskyj did not appoint an executor. But on the other hand, the court was confident: the deceased's intentions were clear: he wanted the writing on the wall, together with the envelope stuck in the wall, to constitute his last will and testament. He had done something ceremonial and solemn when he invited the neighbours to witness his writing on the wall and his placing of the envelope into the crack. Legoe J, again drawing upon Shakespeare, wrote:

> The circumstances and the words actually used by the testator leave me in no doubt whatsoever that what the testator was doing was attempting to express his final disposition of his estate to his nieces in Russia by publishing this fact in a way which can have had no other intention. As two members of the audience to the Pyramus and Thisbe drama remarked:
>
> > Would you desire lime and hair to speak better?' and 'It is the wittiest partition that ever I heard discourse. (at 233, citing Act V, Sc. I).

For all of these documentary insufficiencies, the court found solutions. 18 George Street, Semaphore Park is a small weatherboard and tin cottage with a carport and a mature ficus carica tree behind a picket fence in Adelaide's western beachfront suburbs (Google Street View, captured Jan 2008). Upon a wall inside that house, in March 1984, Slavinskyj and his neighbours, the Skoryks from number 14, performed a series of document acts, conjuring the ontological magic that would convey this modest property to three women he had never met, in the USSR.

Suicide notes as wills

Within the jurisprudence of informal wills is a large body of suicide notes, or other communications made concurrently with the event of suicide. Some of these communications contain testamentary intentions. That is, amongst the other messages that the person is communicating – their regrets, anger, pain, their apologies for their suicide – there are also expressions about how they want their property and assets to be distributed after their death. In some cases, the courts

find these writings to have testamentary force; sometimes they don't. In one case, a man died by suicide after a long history of mental illness. He had made a valid will many years earlier, but left an unsigned note shortly before his death:

MUM AND

DAD I THINK

I M DYING

PLEASE

LOOK

AFTER

ALL

MY

GOOD

WRITING.

THERE

MIGHT

BE

SOME

MORE

IN

THE DRAWER

TAKE CARE OF 'EM

I WANT YOU

TO HAVE MY HOUSE (*Alexander Costa and anor v The Public Trustee in the Estate of Robert Costa* [2007] NSWSC 1271 at [7]).

The first time it came before a court, the court was clear that this was a document, that it embodied the deceased's wishes, and that he deliberately left it in a prominent place. However, it wasn't signed; the manner in which was it written down the page, the court said, was "expressing emotions and not legal intentions" (*Alexander Costa and anor v The Public Trustee in the Estate of Robert Costa* [2007] NSWSC 1271 at [15]). He didn't entrust it to anyone, and there was no

other evidence to support that these really were his wishes for the distribution of his property after death. Because the deceased knew how to make a valid will – having made one before – the court reasoned that he must have known that in creating this document, he was not creating an enforceable will. The court concluded that "its form and wording" meant that the document was not a testamentary instrument; rather it expressed wishes and requests (*Alexander Costa and anor v The Public Trustee in the Estate of Robert Costa* [2007] NSWSC 1271 at [19]).

However, this decision was appealed and the appellate court, with identical facts before it, made the opposite decision. On appeal, the court decided to give less weight to matters of form, and more weight to the fact that "the document was written on a solemn unique occasion, as a last message to his parents, the persons apparently closest to him" (*Costa and Another v The Public Trustee of NSW* [2008] NSWCA 223 at [28]). It was held to be his last will and testament. The decision illustrates that the same piece of paper might be recognised as mere paper or a legal instrument, and that it travels between these categories at varying speeds, and depending upon one's point of view, the transition from mere paper to legal will turns upon either jurisprudence or magic.

Wills in the digital age

More recently, courts have been challenged by the presentation of testamentary messages prepared or contained on, for instance, DVDs (*Wilden (Deceased)* [2015] SASC 9 (30 January 2015) and digital videos (*Re Estate of Wai Fun CHAN, Deceased* [2015] NSWSC 1107 (7 August 2015), iPhone notes (*Re Yu* [2013] QSC 322 (6 November 2013), Microsoft Word documents (*Yazbek v Yazbek & Anor* [2012] NSWSC 594 (1 June 2012), encrypted computer files (*The Estate of Roger Christopher Currie, late of Balmain* [2015] NSWSC 1098 (5 August 2015) and other digital artefacts. The law is prepared to accept that these artefacts are all "documents", but some of them are found to be valid wills, and some are not.

The functionalist scholar, Lindgren, writes critically of the "print paradigm" that he regards as having dominated succession law. For Lindgren, paper is administratively convenient, and its abstraction, and its preparation by legal professionals, effectively serves a channeling function (1992, 1021). He argues that visual technologies – his example is the videotape – provide superior means for assessing the validity of wills, the manner in which they were executed, and the cognitive state of the testator (1992, 1021). Lindgren draws upon Collins and Skover, who describe visual documents as "paratexts", "new and context-rich", and superior to pre-electronic forms of communication, which they identify as

"oral, scribal, print" (in Lindgren, 1992, 1021). For Collins and Skover, the paratext goes "beyond" the text, and encompasses technologies for capturing images and sounds (1992, 510). For Collins and Skover, pre-electronic forms are characterised by "closure, systematization, control, abstraction", and are at odds with forms which are "open ended, uncategorized, uncontrolled, and particular" (1992, 535). Broadly, they argue for the law to take a more tolerant view of emerging technologies. Paratext is more commonly associated with Gérard Genette, the structuralist literary theorist who deployed the term alongside peritext, epitext, hypotext; all terms which help to elucidate how the form of the text is bound together with its function (see Tomlins, 2014). Expanding its application to new digital technologies offers a promising way forward.

An example of this arose following a man's death by suicide in 2016. A friend found an unsent text message on his mobile phone. It read:

> *Dave Nic you and Jack keep all that I have house and superannuation,*
> *put my ashes in the back garden with Trish Julie will take her stuff only*
> *she's ok gone back to her ex AGAIN I'm beaten. A bit of cash behind TV*
> *and a bit in the bank Cash card pin 3636*
> *MRN190162Q*
> *10/10/2016*
> *My will* (*Re Nichol; Nichol v Nichol* [2017] QSC 220 (9 October 2017))

After a bitter dispute between the man's widow and his brother and nephew, the Supreme Court of Queensland decided that this was a valid will (*Re Nichol; Nichol v Nichol* [2017] QSC 220 (9 October 2017).

The Supreme Court of Queensland had no difficulty in finding that the unsent text message was a 'document'. However, it was not a formal will. The court noted that the unsent message was identified as a will – *"my will"* – dated – *10/10/2016* – and contained the deceased's initials and date of birth – *"MRN190162"*. It included clear wishes about the distribution of his assets, identified most of his assets, provided a pin code and gave instructions about the placement of his ashes. The court also heard evidence about his state of mind at the time of his death and determined that he had sufficient capacity to make a will. Consideration was given to the fact that he did not send the text message: did it mean that his will was still in 'draft' form and did not reflect his final

wishes? The court accepted evidence that he did not send the message so that his family would not interrupt his suicide. Despite lacking nearly all of the formalities of a will, it was found to be his valid last will and testament.

Conclusion

For centuries, across the jurisdictions of the civil law and common law worlds, the last will and testament has been a powerful technical document. Its formal elements enable it to communicate beyond the grave, to give voice to the dead, and to devise strategies by which a person's memory might survive them, by distributing their property in accordance with their wishes. The law is committed to honouring the wishes of the dead, and to giving people the freedom to do what they like with their possessions. But where people depart from the agreed form of the legal document, the law has left a long history of conjuring meaning from the material, immaterial and ephemeral artefacts left behind. Entangling form and function, object and performance, paper and digital, law enacts its ontological magic in attempting to do justice to the dead.

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