

Howells' List

Barristers

CHALLENGING WILLS

A PRESENTATION TO THE WESTERN DISTRICT LAW ASSOCIATION

CPD DAY 15 MARCH, 2019

PRESENTER: Christopher Thomson

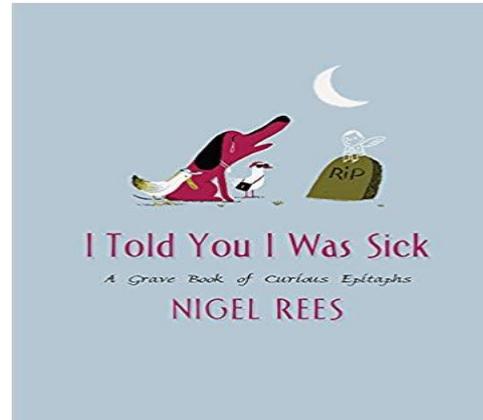
Howells List Barrister, Victorian Bar

Ph: 9225 7666 | Fx: 9225 8450

www.howellslistbarristers.com.au

thawker@vicbar.com.au

SUMMARY



- 1. REQUIREMENTS FOR A VALID WILL
- 2. TESTAMENTARY CAPACITY
- 3. KNOWLEDGE AND APPROVAL
- 4. UNDUE INFLUENCE

REQUIREMENTS FOR A VALID WILL

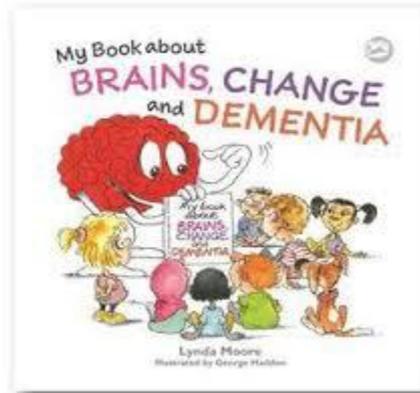
- Wills Act 1997 ss. 7-11.
 - In writing, signed by testator or in the presence of and at the direction of testator;
 - Testator signs with the intention it be his/her will;
 - T's signature is acknowledged by T in presence of two witnesses, present at the same time;
 - Those witnesses attest and sign in presence of testator (but not necessarily in each other's presence);

Valid Will (Cont'd)

- Witness need not know it is a will;
- A witness unable to see and attest that the testator has signed a document may not act as a witness to a will;
- A beneficiary may witness a will.



TESTAMENTARY CAPACITY



- The onus of proving the will lies on the propounder. The propounder must prove that the testator had testamentary capacity and knew and approved the contents of the will at the time of its execution. (*Veall*, [166])

TESTAMENTARY CAPACITY (Cont'd)

- T must know what he/she is doing, and the effect of dispositions;
- Must know what estate has to dispose of, and what persons might have a claim upon his/her bounty.
- “Relevant” time is date of execution; if T suffered from dementia with lucid intervals, inquiry is whether will made in such a lucid interval;
- Duly executed, rational will creates presumption of testamentary capacity; onus shifts to impeacher to point to suspicious circumstances that the T was not competent;

TESTAMENTARY CAPACITY (Cont'd)

- If suspicious circumstances are raised, onus shifts back to propounder to satisfy Court T had testamentary capacity – was of ‘sound and disposing mind’. (Veall [168])
- “It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; **shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will** in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.” (*Banks v Goodfellow* p 565)

KNOWLEDGE AND APPROVAL

- ‘Knowing and approving of the contents of one’s will is traditional language for saying that the will “represented [one’s] testamentary intentions”’.^[78] ‘Testamentary capacity’ and ‘knowledge and approval’ are distinct concepts. The former is a necessary but not a sufficient condition for the establishment of the latter.’ (*Veall, [173]*)
- Some suspicious circumstances can be:
 - Beneficiary instrumental in preparation of the will
 - Failing mental health of T
 - Exclusion of long-standing expected objects of bounty
 - Will not being read or explained to feeble T

KNOWLEDGE AND APPROVAL (cont)

- In suspicious circumstances, onus on propounder to satisfy court T knew and approved the contents of the will – T's understanding is crucial
- Did T give instructions for the will?
- Did T read it over, and comprehend it?
- That a solicitor prepared and read the will to T is “powerful evidence that it represents the testator's intentions” (Veall [184])

KNOWLEDGE AND APPROVAL (further cont)

A solicitor who prepares a will comes under professional duties to exercise proper care and attention. In the United Kingdom, there are several decisions that inform the duty of a solicitor when taking instructions from an infirm testator...

Templeman J said that, where a solicitor is making a will for an old or infirm testator, the solicitor should ensure that the making of the will is witnessed by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and makes a record of his examination and findings. Needless to say, this is a counsel of prudence that must be subject to the circumstances of the case. The exigencies of the situation may make it impracticable; nor would it need to be followed where, despite the age of the testator, he is obviously well and is proposing to make a will that distributes his estate in a manner which is uncontroversial. Where it is evident that a will may be controversial and a solicitor does not take elementary precautions, the Court will have to look elsewhere if it is asked to determine capacity and knowledge and approval.

UNDUE INFLUENCE

- Alleging fraud or coercion so that, despite the Testator perhaps knowing and overtly approving of his will, he was overborne in doing so.
- Courts are slow to make such a finding when the object of the gift is a natural beneficiary, without some cogent evidence of wrongdoing. (Veall [197])

CHALLENGING WILLS

References

- ***Banks v Goodfellow (1870) LR 5 QB 549***
- ***Timbury v Coffee (1941) 66 CLR 277***
- ***Veall v Veall (2015) 46 VR 123***