

## *To dispense or not to dispense? Part 2*

Article

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## **To Dispense or Not to Dispense?**

### **A Comparison of Dispensing Powers and Their Judicial Application**

**Juliet Brook\***

This is the second of a series of three linked articles examining the operation of dispensing powers in other common law jurisdictions. In the previous article (published in Private Client Business Issue 6 of 2018) the different legislative provisions in Australia, New Zealand, the United States (under the Uniform Probate Code) and South Africa were set out, and the type of testamentary intention that they required was analysed. It argued that a requirement for specific testamentary intention (i.e. that the deceased intended the document to have a dispositive effect) is the only way to provide some limit to the remit of dispensing powers, and prevent them from being used to admit vague musings to probate. This article will focus on the second key question for the operation of dispensing powers, namely how this testamentary intention is to be proved?

A duly executed will raises a presumption that the deceased intended the document to be his or her will.<sup>1</sup> When dispensing powers are exercised, as the formalities of s 9 of the Wills Act 1837 have not been complied with, evidence would need to be put forward to satisfy the court that the deceased had the requisite testamentary intention. As the deceased will be unable to give evidence for themselves, the evidence will be both extrinsic and from within the document itself. A dispensing power that required substantial compliance with the formalities would be expected to invoke certain red lines of formalities to demonstrate the attempted compliance. However, an intention-based dispensing power (as advocated by the Law Commission) is inherently much more flexible in its approach.

The effect of this in the early Australian case law was to produce ‘a ranking of the Wills Act formalities’; documentation was, by statute, essential, but witnessing made ‘a more modest contribution’.<sup>2</sup> In the first reported South Australian case of *Re Graham*,<sup>3</sup> the deceased had not signed in the presence of the witnesses but the other evidence was sufficient to prove that ‘the deceased intended the document...to constitute her will’,<sup>4</sup> Jacobs J further commented that ‘the greater the departure from the requirements of formal validity...the harder will it be for the Court to reach the required state of satisfaction’.<sup>5</sup> Although the South Australian dispensing power did not require substantial compliance

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<sup>1</sup> Sloan, *Borkowski’s Law of Succession* (OUP, 3<sup>rd</sup> edn, 2017), 83

<sup>2</sup> Langbein, ‘Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law’ (1987) 87 *Columbia Law Review* 1, 52

<sup>3</sup> *Re Graham* (1978) 20 SASR 198

<sup>4</sup> *Ibid*, 201

<sup>5</sup> *Ibid*, 205

with the formalities, this makes clear that acts of substantial compliance provide clear proof of the testator’s intention and this rationale was followed in other states.<sup>6</sup>

### Is a Signature Essential?

The signature formality lies somewhere between these two extremes. If the dispensing power merely stipulates general testamentary intent (“these are the terms on which I want to make my will”) then there is no justification for requiring a signature. The effect of this can be seen in New Zealand,<sup>7</sup> where a signature has never been considered a pre-requisite. The only absolute is that there must be a document, and even that can have been created after the testator’s death.<sup>8</sup>

In contrast, in all of the other jurisdictions considered the courts are required to find evidence of specific testamentary intent. For example, the current South Australian dispensing power states that:

if the Court is satisfied that

(a) a document expresses testamentary intentions of a deceased person; and

(b) the deceased person intended the document to constitute his or her will,

the document will be admitted to probate as a will of the deceased person even though it has not been executed with the formalities required by this Act.<sup>9</sup>

A signature is clearly an important piece of the evidence that the deceased *intended the document to be his or her will*. As Langbein stated:

Our courts rely upon signature as the most important evidence of finality of intention. Signature separates the preliminary draft from the decided "last will". Signature is also the primary evidence of the will's authenticity...a will with the testator's signature omitted...leaves in doubt all the issues on which the proponents bear the burden of proof.<sup>10</sup>

With every unsigned will there is a possibility that the reason it remained unsigned was that the deceased was still pondering the terms of the will<sup>11</sup> or felt under pressure to execute a will in particular terms and was resisting that pressure. An unsigned document should only be admitted if it can be

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<sup>6</sup> See, for example, the later New South Wales case of *Application of Brown, Estate of Springfield* (1991) 23 NSWLR 535, 539

<sup>7</sup> Wills Act 2007 (NZ) s 14(2), which only requires evidence that ‘the document expresses the deceased person’s testamentary intentions’

<sup>8</sup> *Pfaender v Gregory* [2018] NZHC 161 [33]-[34]. See also the first in this series of articles, page [????]

<sup>9</sup> Wills Act 1936 (SA) s 12(2). The provisions of the other states are similar insofar as they all stipulate specific testamentary intent.

<sup>10</sup> Langbein, ‘Substantial Compliance with the Wills Act’ (1975) 88(3) *Harvard Law Review* 489, 518

<sup>11</sup> Langbein, ‘Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law’ (1987) 87 *Columbia Law Review* 1, 27

proved that the deceased had moved from deliberation to the point of conviction, yet without signature there will always be room for doubt.

The first time the South Australian dispensing power was used to admit a completely unsigned document to probate was in *Re Blakely*<sup>12</sup> in which wills had been prepared for a husband and wife but they had mistakenly signed the wrong wills. This acceptance of an unsigned document seems uncontroversial – the lack of signature was clearly a mistake – and such cases are often put forward as the exception to the rule that a signature will be required.<sup>13</sup> Such errors can be resolved using the court’s powers of rectification, as the Supreme Court of England and Wales demonstrated in *Marley v Rawlings*,<sup>14</sup> but it has been questioned whether this is a more artificial method of upholding the will than using dispensing powers.<sup>15</sup>

However in the subsequent case South Australian case of *Williams*<sup>16</sup> the reason for the omission of the signature was less clear. Both husband and wife were executing home-made wills in front of neighbours but somehow the wife’s will remained unsigned. The witnesses adduced evidence to the effect that she was busy with other matters, and the Supreme Court of South Australia concluded that the complete absence of a signature did not render the dispensing power ‘totally inapplicable’.<sup>17</sup> King CJ differentiated between the act of validly executing a document and the act of signing it, noting that ‘signature is simply one of the formalities required by the Act for valid execution.’<sup>18</sup> The court was convinced that the testatrix had carried out ‘unequivocal acts’ that satisfied the criteria for operation of the dispensing power.<sup>19</sup>

Once this Rubicon had been crossed the focus switched from the formality of a signature towards a search for evidence that the deceased had ‘in some way authenticated, or adopted’<sup>20</sup> the document. For example in the Western Australian case of *Dolan v Dolan*<sup>21</sup> a will form (supplied by life insurers) had been completed but not signed. The relevant Western Australian provision similarly requires the court to be ‘satisfied that the person intended the document to constitute the person’s will.’<sup>22</sup> The

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<sup>12</sup> *Re Blakely* (1983) 32 SASR 473

<sup>13</sup> See, for example, Langbein, ‘Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law’ (1987) 87 *Columbia Law Review* 1, 6 and Scottish Law Commission, *Report on Succession* (Scot Law Com No 124, 1990) para 4.15

<sup>14</sup> *Marley v Rawlings* [2014] UKSC 51

<sup>15</sup> *In the Estate of Hennekam* [2009] SASR 188 [37]; *Re Daly* [2012] NSWSC 555 [26]

<sup>16</sup> *Re Williams* (1984) 36 SASR 423

<sup>17</sup> *Ibid*, 434 (Legoe J)

<sup>18</sup> *Re Williams* (1984) 36 SASR 423, 425

<sup>19</sup> *Re Williams* (1984) 36 SASR 423, 434 (Legoe J)

<sup>20</sup> *Re Springfield* (1991) 23 NSWLR 535, 540

<sup>21</sup> *Dolan v Dolan* [2007] WASC 249

<sup>22</sup> Wills Act 1970 (WA) s 32

*Hatsatouris* test (set out in full in the first article in this series) has been used by courts across Australia in their exercise of dispensing powers, and the third part of this test is as follows:

did the evidence satisfy the Court that, either, at the time of the subject document being brought into being, or, at some later time, the relevant Deceased, by some act or words, demonstrated that it was her, or his, *then* intention that the subject document should, *without more on her, or his, part* operate as her, or his, Will?<sup>23</sup>

In *Dolan*, the deceased had initially shown an intention to sign the document so his failure to do so could have indicated hesitancy, but the court found that the deceased had ‘intended the document to express, in its terms and without more, the manner in which his estate was to be disposed of after his death’.<sup>24</sup> Importantly, the third part of the *Hatsatouris* test was held to relate to the question of whether the deceased intended its terms to operate without further alterations,<sup>25</sup> so the future intention to execute did not prevent a conclusion that the deceased intended the document to operate as his will.<sup>26</sup>

Simpler cases of unsigned wills can be seen in *Mitchell v Mitchell*<sup>27</sup> and *Deeks v Greenwood*,<sup>28</sup> both of which involved draft wills that were not executed due to unfortunate combinations of missed solicitor appointments and hospitalisations. Here, the temporal proximity of the testamentary instructions and confirmation by the testator that the will accorded with those instructions provided unambiguous evidence that enabled the court to exercise the dispensing power.<sup>29</sup> In *Deeks*, Heenan J commented as follows on the *Hatsatouris* test:

The question of whether or not the document was intended to take effect as the testator’s will **without more** plainly emphasises that it needs to be established that it embodies the final expression of testamentary intentions upon which the testator was at the time resolved, and that it should not be tentative, advisory or prepared in the anticipation that it may need revision, further thought or final confirmation.<sup>30</sup>

As the Australian dispensing powers do not prescribe a signature it is understandable that the courts have held a signature to be neither necessary nor sufficient. Furthermore the wide definition of ‘document’ in the Australian statutory provisions is predicated on there being an alternative to

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<sup>23</sup> *Hatsatouris v Hatsatouris* [2001] NSWCA 408 [56] (emphasis in original). This case was applying s 18A of the Wills Probate and Administration Act 1898 (NSW) and has since been followed in the other states.

<sup>24</sup> *Ibid*, [55] (Murray J)

<sup>25</sup> *Ibid*, [22]

<sup>26</sup> *Ibid*, [43]

<sup>27</sup> *Mitchell v Mitchell* [2010] WASC 174

<sup>28</sup> *Deeks v Greenwood* [2011] WASC 359

<sup>29</sup> *Ibid*, [57] (Heenan J)

<sup>30</sup> *Ibid*, [71] (emphasis in original)

signature; the requirement that the deceased authenticated or adopted the document provides a pragmatic means by which specific intention can be evidenced, without opening the floodgates to the admission of all draft documents.

However it can be extremely hard to identify which unsigned documents remain subject to further revisions and which are concluded statements of testamentary intent. In *Mahlo v Hehir* the deceased’s knowledge of the formality requirements was instrumental in the finding that there was insufficient evidence that she intended that document to be her will.<sup>31</sup> Two recent Queensland cases – *Lindsay v McGrath*<sup>32</sup> and *Nichol v Nichol*<sup>33</sup> – highlight the subtleties particularly clearly. As with the other Australian states, the Queensland dispensing power requires the court to be ‘satisfied that the person intended the document or part to form the person’s will’.<sup>34</sup> In *Lindsay*, the putative will was a hand-written document, containing the deceased’s name but unsigned, which had been subject to ongoing revisions and amendments by the deceased. In a majority judgement, the Queensland Court of Appeal held that the lack of signature and numerous changes were consistent with the document being subject to further thought and consideration.<sup>35</sup> In contrast, the circumstances in *Nichol*, in which a text message was typed but unsent shortly before the deceased committed suicide, were such as to convince the court that the message was intended to operate as the final will of the deceased, without further revisions.<sup>36</sup>

One problem is that the *Hatsatouris* test, as espoused in *Deeks*, pre-supposes that the testator has settled testamentary intentions<sup>37</sup> and this is not always the case, especially if the deceased had a complicated family life. Langbein stated that the correct question for the exercise of a dispensing power is ‘whether the document embodies the unequivocal testamentary intent’ of the deceased<sup>38</sup> yet this implies that dispensing powers cannot operate on the wills of prevaricating testators.<sup>39</sup> The dissenting judgement in *Lindsay* emphasises this point; although the document in question had been subject to amendments, Philippides JA held that these were minor and that:

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<sup>31</sup> *Mahlo v Hehir* [2011] QSC 243, [41]–[42]

<sup>32</sup> *Lindsay v McGrath* [2016] 2Qd R 160

<sup>33</sup> *Nichol v Nichol* [2017] QSC 220

<sup>34</sup> Succession Act 1981 (Qld) s 18

<sup>35</sup> *Lindsay v McGrath* [2016] 2Qd R 160, [73]

<sup>36</sup> *Nichol v Nichol* [2017] QSC 220, [59]

<sup>37</sup> *Deeks v Greenwood* [2011] WASC 359, [55]

<sup>38</sup> Langbein, ‘Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law’ (1987) 87 *Columbia Law Review* 1, 34

<sup>39</sup> Baron, ‘Irresolute Testators, Clear and Convincing Wills Law’ (2016) 73(1) *Washington and Lee Law Review* 3, 68

There is nothing in the nature of those amendments to suggest that the document was a work in progress and subject to further deliberation. Indeed, the amendments indicate that the deceased continued to adopt it as the document governing the disposition of her property.<sup>40</sup>

There is therefore a strong argument (eloquently made by the dissenting judge) that the document did embody the final testamentary intentions of the deceased *at any particular time*; if she had changed her mind further then she would have changed the document again to reflect that. The Australian formula for the admission of unsigned documents therefore causes as many difficulties as it solves.

### **The Signature Requirement in the United States**

The debate about the need for a signature remains live in the USA, where the ‘harmless error’ provision in the Uniform Probate Code is in the following terms:

Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute:

(1) the decedent’s will...<sup>41</sup>

However three of the ten states that have adopted the harmless error provision (California, Virginia and Ohio) have opted for a more limited version that still requires the will to be signed by the deceased<sup>42</sup> and Colorado requires the deceased to have signed or acknowledged the document.<sup>43</sup>

New Jersey is one of the few states to have adopted the Uniform Probate Code harmless error provision in full<sup>44</sup> and the two New Jersey cases cited in the previous article in this series (*Re Macool*<sup>45</sup> and *Re Ehrlich*<sup>46</sup>) centred on the conflicting arguments about the need for a signature. In *Macool* the New Jersey Appellate Court held that the lack of signature did not prevent a document from being admitted under the harmless error provision noting that, had the deceased been able to read and ‘express her assent to [the draft will] in the presence of witnesses or by any other reasonably reliable

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<sup>40</sup> *Lindsay v McGrath* [2016] 2Qd R 160 [22]

<sup>41</sup> Uniform Probate Code, s 2-503

<sup>42</sup> Horton, ‘Partial Harmless Error for Wills: Evidence From California’ (2018) 103 *Iowa Law Review* 1, 15.

<sup>43</sup> Colorado Revised Statutes s 15–11–503(2)

<sup>44</sup> New Jersey Statutes 3B:3-3, which states ‘Although a document or writing added upon a document was not executed in compliance with N.J.S.3B:3-2, the document or writing is treated as if it had been executed in compliance with N.J.S.3B:3-2 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent’s will...’

<sup>45</sup> *Re Macool* 3 A.3d 1258 (NJ Super Ct App Div 2010)

<sup>46</sup> *In re Estate of Ehrlich* 47 A.3d 12 (NJ Super Ct App Div 2012)

means’ then the requirement of a signature would be ‘needlessly formalistic and against the remedial purpose that animates [the dispensing power]’.<sup>47</sup>

This echoes the Australian approach from *Williams*<sup>48</sup> and was followed by the majority in *Ehrlich*. It emphasises the functional nature of the formalities – beyond the statutory requirement for a document, no formality is absolute as this may defeat the purpose of the dispensing power.<sup>49</sup> As long as the functions of the formalities have been achieved by a different method then the document can and should be admitted to probate. Interestingly, though, the dissenting judge in *Ehrlich* (Skillman JAD) had been on the panel in *Macool* but took the opportunity in *Ehrlich* to review that decision and change his mind about the need for a signature. He cited comments by the National Conference of Commissioners on Uniform State Laws setting out the circumstances under which the harmless error provision would be used, in which it had been noted that the greater the departure from the formality requirements, the harder it will be to convince the court that the document reflects the testator’s wishes.<sup>50</sup> Skillman’s conclusion was that acceptable signature errors were only those where two people sign each other’s wills inadvertently, or the testator is unable to complete his or her signature due to illness, concluding that ‘a mere verbal “assent” to the terms of a will’ should not be sufficient.<sup>51</sup>

Herein lies the potential contradiction within dispensing powers: To require a signature seems to contradict their ethos, yet to admit unsigned documents raises difficult questions of evidence. The aim of dispensing powers is to disregard *unnecessary* formalities, but there is no consensus on whether a signature is necessary. The signature performs evidential, cautionary and protective functions, it ‘separates the preliminary draft from the decided “last will”’.<sup>52</sup> It has been argued that the adoption of ‘partial harmless error’ provisions which retain the signature requirement in states such as California ‘weeds out a broad range of tentative, informal writings’.<sup>53</sup>

However it is the potential for sudden death to occur prior to the act of signing that has led many commentators (and the dissenting judge in *Ehrlich*) to stop short of requiring a signature as an absolute.<sup>54</sup> The examples from *Mitchell v Mitchell* and *Deeks v Greenwood* show that these are not merely hypothetical academic exercises but real concerns. There is therefore much appeal in a flexible

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<sup>47</sup> *Re Macool* 3 A.3d 1258, 1266 (NJ Super Ct App Div 2010) (Fuentes JAD)

<sup>48</sup> *Re Williams* (1984) 36 SASR 423, 425 (see also n 110 above)

<sup>49</sup> ‘Because N.J.S.A. 3B:3–3 is remedial in nature, it should be liberally construed.’ *In re Estate of Ehrlich* 47 A.3d 12, 17 (NJ Super Ct App Div 2012) (Parrillo PJAD)

<sup>50</sup> This echoes the earlier comments in the Australian cases of *Re Graham* (1978) 20 SASR 198 and *Application of Brown, Estate of Springfield* (1991) 23 NSWLR 535

<sup>51</sup> *In re Estate of Ehrlich* 47 A.3d 12, 23 (NJ Super Ct App Div 2012)

<sup>52</sup> See Langbein, ‘Substantial Compliance with the Wills Act’ (1975) 88(3) *Harvard Law Review* 489, 518

<sup>53</sup> Horton, ‘Partial Harmless Error for Wills: Evidence From California’ (2018) 103 *Iowa Law Review* 1, 7

<sup>54</sup> See, for example, Langbein, ‘Substantial Compliance with the Wills Act’ (1975) 88(3) *Harvard Law Review* 489, 518 and Miller, ‘Substantial compliance and the Execution of Wills’ (1987) 36 *ICLQ* 559, 586

approach that enables the signature to be dispensed with where the facts merit it, yet ‘this holistic approach also has a dark side...[that] can spawn thorny questions about a decedent’s intent’.<sup>55</sup> Skillman JAD’s retraction of his previous views in his dissenting judgement in *Ehrlich* should give us cause to reconsider the extent to which a signature is ‘an anchor in the murky waters of testamentary intent’.<sup>56</sup>

### Scottish Subscribed Wills

Although there is no dispensing power in Scotland their legislation does recognise a subscribed will (i.e. a will signed by the testator without any witness) subject to proof of the authenticity of the signature. A dual system of wills formalities has been in force in Scotland for many years, with the former law accepting both holograph and witnessed wills. Under the current provisions<sup>57</sup> a subscribed will does not have the same presumption of validity as one that has been both signed and witnessed,<sup>58</sup> but can be admitted to probate ‘if the court...is satisfied that the document was subscribed by that granter’.<sup>59</sup> Evidence would be given by way of affidavit from someone who knew the deceased’s signature.<sup>60</sup> There are strong analogies between the Scottish acceptance of subscribed wills and the operation of the dispensing powers that require signature, but the difference is that a subscribed will is valid per se, without the intervention of the court.<sup>61</sup> The potential for subscription to “rescue” a will that does not comply with the stricter formality requirements has been noted with approval;<sup>62</sup> the need for additional proof of authenticity provides the protective function whilst the signature performs both the evidential and cautionary functions.

The adoption of a lesser testamentary formality has led the Scottish Law Commission to abandon their previous proposals for the introduction of their own dispensing power.<sup>63</sup> Whilst the differences between Scottish and English / Welsh formalities more generally means that it is not easy to simply adopt the Scottish practice of subscription without reconsidering formality requirements for other documents,<sup>64</sup> the Scottish example provides a further reason to retain a signature requirement within

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<sup>55</sup> Horton, ‘Partial Harmless Error for Wills: Evidence From California’ (2018) 103 *Iowa Law Review* 1, 38

<sup>56</sup> *Ibid*, 40

<sup>57</sup> Requirements of Writing (Scotland) Act 1995, s 1 and 2

<sup>58</sup> *Ibid*, s 3

<sup>59</sup> *Ibid*, s 4

<sup>60</sup> K G C Reid, ‘Testamentary Formalities in Scotland’ in K G C Reid, MJ De Waal and R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (OUP, 2011) 428

<sup>61</sup> Reid, ‘Testamentary Formalities in Scotland’ in K G C Reid, MJ De Waal and R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (OUP, 2011) 421

<sup>62</sup> *Ibid*, 420, citing *Williamson v Williamson* 1997 SC 94 as an example.

<sup>63</sup> Scottish Law Commission, *Report on Succession* (Scot Law Com No 215, 2009) paras 6.37 – 6.40

<sup>64</sup> Law Commission, *Making a Will* (Law Com No 231, 2017) para 5.70

an English and Welsh dispensing power, not as a lesser formality for execution of a will but to provide evidence of specific testamentary intention.

However to prescribe a signature would both promote debate about what amounts to a signature<sup>65</sup> and prohibit the inclusion of other records such as DVDs, text messages and other electronic media unless a definition of “signature” in this context was provided.<sup>66</sup> These are the horns of the dilemma upon which the Law Commission has placed itself; if the dispensing power is to be drawn widely and apply to electronic documents<sup>67</sup> then a simple signature requirement is inappropriate, yet without this anchor there could be ‘a number of difficult and potentially hopeless litigations, as well as increased prospects of fraud.’<sup>68</sup>

### **The South African Condonation Principle**

A potential solution to the signature conundrum can be found in the South African Condonation Principle, which enables a document to be admitted to probate if the court is satisfied that the document was ‘drafted or executed by a person who has died since the drafting or execution thereof [and] was intended to be his will or an amendment of his will’.<sup>69</sup> The requirement that the testator has ‘drafted or executed’ the document has been strictly interpreted by the Supreme Court of Appeal in South Africa<sup>70</sup> so that it is limited to documents (including electronic documents) that have actually been created by the testator, not just caused to be drafted<sup>71</sup> but in return it provides ‘a measure of reliability’<sup>72</sup> in the application of the condonation principle.

Such a provision is not without its difficulties; concerns have been raised that this requirement discriminates against those who are unable to draft or execute their own wills, although the South African courts have envisaged that such testators could dictate their wills instead of drafting them personally.<sup>73</sup> Recent applications of this power have extended it to electronic documents,<sup>74</sup> but the requirement that the document be either drafted or executed by the testator would prevent most

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<sup>65</sup> Sloan, *Borkowski’s Law of Succession* (OUP, 3<sup>rd</sup> edn, 2017) 112-113

<sup>66</sup> See Law Commission, *Making a Will* (Law Com No 231, 2017) paras 6.15-6.32 for discussion as to whether an electronic document could satisfy s 9 Wills Act 1837 and Ch 6 for the Law Commission’s proposals for electronic wills more generally.

<sup>67</sup> Law Commission, *Making a Will* (Law Com No 231, 2017) paras 5.95-5.96

<sup>68</sup> Scottish Law Commission, *Report on Succession* (Scot Law Com No 215, 2009) para 6.40

<sup>69</sup> Wills Act 1953 (SA) s 2(3)

<sup>70</sup> *Bekker v Naude* 2003 (5) SA 173 (SCA)

<sup>71</sup> *Ibid* [16]-[20]

<sup>72</sup> *Ibid* [16]

<sup>73</sup> M J de Waal, ‘Testamentary Formalities in South Africa’ in K G C Reid, MJ De Waal and R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (OUP, 2011) 398

<sup>74</sup> See, for example, *MacDonald v The Master* 2002 (5) SA 64 (O) and *Van der Merwe v The Master* 2010 (6) SA 544 (SCA)

professionally-prepared draft unsigned wills (as in *Deeks and Mitchell*) from being admitted, relegating dispensing powers primarily to home-made wills cases.

However it is these situations in which formality errors are most likely to be made,<sup>75</sup> and the requirement for a clear linkage between the document and the deceased (either by signature or creation) performs the evidentiary function of the testamentary formalities. The admission of electronic documents brings the greatest potential for fraud so there is merit in stipulating that, in the absence of signature, the court must be satisfied that the document was created by the deceased *as opposed to anyone else* to ensure that the protective function of the formalities is discharged.

## Conclusion

Whilst there will be some situations in which proof of intent is relatively straightforward, this article has shown that there will be a myriad of ambiguous circumstances on which the courts would be asked to rule. The various jurisdictions considered have drawn the line in different places, depending on whether any requirements (beyond that of a document) are viewed as immutable. The ethos of dispensing powers advocates flexibility, but the testator’s signature remains the best proof of testamentary intention, and it has been suggested that the retention of this formality ‘is a good option for legislatures that want to sweep away the cobwebs of formalism but also have qualms about uninhibited functionalism.’<sup>76</sup>

If a signature is not an absolute requirement (which seems impossible if such a wide variety of documents are to be incorporated within the dispensing power) then there would appear to be two alternative approaches. The first is to accept any extrinsic evidence that the deceased adopted, acknowledged or assented to the terms of the will, but it has been shown that this solution also creates uncertainty in its application. The second is to adopt the South African approach and require proof of creation of the document by the testator. Despite its limitations there is much merit in the South African approach, which attempts to find a middle ground between formalism and discretion.

In the final article in this series, the two remaining questions will be addressed, namely:

3. What is the appropriate standard of proof?
4. When must the deceased have held this intention?

It will then draw together all of the issues raised to offer some general conclusions on the proposed introduction of dispensing powers in England and Wales.

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<sup>75</sup> R Kerridge, *Parry and Kerridge: The Law of Succession* (Sweet & Maxwell, 13<sup>th</sup> edn, 2016) 56

<sup>76</sup> Horton, ‘Partial Harmless Error for Wills: Evidence From California’ (2018) 103 Iowa Law Review 1, 7