To dispense or not to dispense? Part 3

Article

Accepted Version

A Comparison of Dispensing Powers and Their Judicial Application

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This is the third in a series of three linked articles examining the operation of dispensing powers in other common law jurisdictions. In the previous articles (published in Private Client Business Issue 6 of 2018 and Issue 1 of 2019) the different legislative provisions in Australia, New Zealand, the United States (under the Uniform Probate Code) and South Africa were set out, the type of testamentary intention that they required was analysed, and the type of evidence that would prove that intention existed in relation to an informal document was discussed. This final article will consider two final questions that were posed in the first article, namely what standard of proof is required, and when must the testator have held the requisite testamentary intent?

What is the Standard of Proof?

The previous article in this series showed that there will be many ambiguous documents to which the courts would be asked to apply a dispensing power, so the standard of proof against which the evidence is to be measured will often be pivotal. Unlike with a validly executed will there is no presumption of validity so the burden will always be on the propounder of the informal will. The Law Commission have recommended that any dispensing power should use the ordinary civil standard of proof, "the balance of probabilities," because the criminal standard 'could have the effect of substantially limiting the utility of such a power' and it was stated that there is no need to introduce a new standard of proof when the civil standard is 'appropriate'.[1]

The USA Uniform Probate Code requires the propounder to establish by 'clear and convincing evidence that the decedent intended the document or writing to constitute [their] will'.[2] This more onerous standard of proof has been used to justify the court taking a liberal approach to the question of testamentary intent, because it 'imposes evidential standards and safeguards appropriate to satisfy the fundamental mandate that the disputed instrument correctly expresses the testator's intent.'[3] Despite this explicit acknowledgement that flexibility in application would be tempered by evidential strictness, concerns have been raised that this standard is not being upheld.[4]

The history of the Australian dispensing provisions demonstrates prevarication as to the appropriate standard of proof; the original wording of the South Australia dispensing power required the court to be satisfied 'that there can be no reasonable doubt that the deceased intended the document to

[1] Law Commission, *Making a Will* (Law Com No 231, 2017) para 5.101
[2] Uniform Probate Code s 2-503
[3] *In re Estate of Ehrlich* 47 A3d 12, 18 (NJ Super Ct App Div 2012)
[4] Baron, 'Irresolute Testators, Clear and Convincing Wills Law' (2016) 73(1) *Washington and Lee Law Review* 3, 48

constitute his or her will.'[5] This stricter standard of proof was more akin to that used in criminal cases, but despite this it seems that the courts construed the standard of proof in a relatively liberal light.[6] Langbein's review of the South Australian cases in the first decade after the dispensing power was introduced revealed that all witnessing defects were excused,[7] despite there being doubts as to whether the evidence was sufficient to satisfy the higher standard of proof.[8]

When the South Australia provision was amended in 1994 the reference to 'no reasonable doubt' was removed;[9] the New South Wales dispensing power also used the civil standard of proof[10] and this has since been replicated in almost all of the other Australian states.[11] Interestingly, though, the Australian case law indicates that the judiciary have settled on an approach somewhere between the two standards of proof. For example in *Dolan,* Murray J recited that the standard of proof was the usual civil standard[12] but then referred to the case of *Briginshaw v Briginshaw*[13] in which it was noted that, although there are only the two standards of proof, in some civil cases the court may require a greater degree of satisfaction, depending on the seriousness of the matter.[14]

Murray J concluded: 'In my view, the question of fact involved and the seriousness of the consequences of the finding to be made…dictate that I should apply the civil standard of proof to achieve *a considerable degree of satisfaction* that the deceased intended the document to constitute his will.'[15] This reflects in many ways the "clear and convincing" requirement from the USA, even though the *Briginshaw* principle is not encapsulated within the dispensing power itself. It therefore seems that strict standards of proof have been applied leniently, whilst the lower civil standard of proof has been applied with as much scrutiny of the evidence as possible.

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[5] Wills Act Amendment Act (No 2) 1975 (SA) s 9, amending Wills Act 1936 (SA) s 12(2). Western Australia and Tasmania also initially adopted the criminal standard of proof.

[6] Peart, 'Testamentary Formalities in Australia and New Zealand' in K G C Reid, MJ De Waal and R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (OUP, 2011) 349 citing *Estate of Crocker* [1982] 30 SASR 321; *Estate of Clayton* [1982] 31 SASR 153; *Estate of Kelly* [1983] 32 SASR 413 and *Estate of Crossley* [1989] WAR 227

[7] 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, 16–23

[8] Ibid, 35. Langbein found the case of *Kelly* [1983] 32 SASR 413 'particularly difficult to reconcile with the high standard of proof that section 12(2) imposes.' (ibid, 21)

[9] Wills (Miscellaneous) Amendment Act 1994 s 7, amending Wills Act 1936 (SA) s 12(2)

[10] Wills, Probate and Administration Act 1898 s 18A(1), as amended in 1989.

[11] Wills Act 1968 (ACT) s 11A; Succession Act 2006 (NSW) s 8; Wills Act 2000 (NT) s 10; Succession Act 1981 (Qld) s 18; Wills Act 1997 (Vic) s 9; Wills Act 1970 (WA) s 32. Only Wills Act 2008 (Tas) s 10 still requires there to be 'no reasonable doubt'

[12] *Dolan v Dolan* [2007] WASC 249, [15] (Western Australia had previously had a requirement that there be no reasonable doubt as to the testator's intention but this was removed in 1997.)

[13] *Briginshaw v Briginshaw* (1938) 60 CLR 336

[14] *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361-362 (Dixon J)

[15] *Dolan v Dolan* [2007] WASC 249 [17] (Dolan J) (emphasis added)

The courts in England and Wales have already taken a similar approach in civil matters to that expressed in *Briginshaw*. For example in *Re Dellow's Will Trusts*[16] it was expressed thus:

> It seems to me that in civil cases it is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue, but…that the gravity of the issue becomes part of the circumstances which the court has to take into consideration in deciding whether or not the burden of proof has been discharged. The more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.

Whilst this approach has been rejected in a family law context,[17] it is submitted that it is wholly appropriate in the operation of a dispensing power. If the public are to have confidence that the dispensing power is being applied to give effect to the deceased's intentions, without risking the admission of half-thought-through deliberations, then somewhat more cogent evidence is needed to convince the court that the deceased intended the document to be his or her will than merely "it is more likely that it is, than that it is not." Due to the inability of the testator to give evidence on his or her own behalf, and the potential for fraud, there is a parallel with the way in which the courts have approached claims of a donatio mortis causa. It has long been established that the courts will only accept evidence of such a gift if there is clear proof – this was expressed in *Cosnahan v Grice* as meaning that 'no case of this description ought to prevail, unless it is supported by evidence of the clearest and most unequivocal character.'[18] The similarities between the two contexts are such that the same considerations should apply to operation of a dispensing power.

When Must the Deceased have held this Intention?

The final aspect of testamentary intent that must be addressed is when the intention should be held. The general principle is that a testator must have testamentary intent at the time of execution of the will.[19] If s/he subsequently changes his or her mind, a new will must be created but the old will remains valid until revocation. The Californian harmless error provision replicates this by expressly providing that the deceased must have intended the document to constitute their will 'at the time of signing'.[20] A similar approach can be seen in the New South Wales case of *Hatsatouris*, in which the deceased

[16] *Re Dellow's Will Trusts Lloyds Bank Ltd v Institute of Cancer Research and Others* [1964] 1 All ER 771, 773 (Ungoed-Thomas J)
[17] *Re B* [2008] UKHL 35
[18] *Cosnahan v Grice* (1862) 15 Moo PC 215, 223
[19] Sloan, *Borkowski's Law of Succession* (OUP, 3rd edn, 2017) 82. See also 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, 33.
[20] California Probate Code s 6110(c)(2)

had made a valid will but also attempted to enter into a codicil that would favour one daughter over his other children. The codicil was drawn up and signed by the testator but it remained unwitnessed because a matron in the testator's nursing home had intervened, prescient of the potential for family feud, and the testator subsequently appeared to have changed his mind about the codicil. He requested that a further codicil be drawn up to re-affirm the earlier will but this was not executed at all – there were therefore conflicting accounts of his testamentary intentions at the time of his death.

The New South Wales Court of Appeal held that the improperly attested codicil could be admitted to probate under the dispensing powers because the deceased had the requisite intention at the time he had signed it.[21] Having concluded thus, it was held that the codicil operated as a testamentary instrument from that moment; it became a will at that time, and not only at the pronouncement of the court.[22] Under the statutory provisions in New South Wales a will or codicil can only be revoked by writing, destruction, or by another will or codicil (either properly executed or admissible under the dispensing power).[23] None of these events had occurred (it does not appear to have been submitted that the later unsigned codicil should also be admitted under the dispensing power) so the earlier codicil was admitted to probate *despite* there being evidence that the testator may have changed his mind.

In *Hatsatouris*, Powell JA set out three questions of fact for the operation of the dispensing power that have since been used by courts across Australia, as follows:

a. was there a document?

b. did that document purport to embody the testamentary intentions of the relevant Deceased?

c. 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?[24]

It is the third of these questions that addresses the question of the time of the intention, but a clear temporal conjunction of act and intent is only possible if there is an absolute requirement for an identifiable act such as signing the document. It was shown in the second article in this series that this is not the case in all jurisdictions, nor is it part of the Law Commission's proposals for England and

[21] *Hatsatouris v Hatsatouris* [2001] NSWCA 408 [3]
[22] Ibid, [59]
[23] Wills Probate and Administration Act 1898 (NSW) s 17. See *Hatsatouris v Hatsatouris* [2001] NSWCA 408 [48] (citing with approval the first instance decision in the same case)
[24] *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).

Wales. If there is an unsigned document, when must the deceased have had the requisite testamentary intention?

In the subsequent Western Australian case of *Dolan,* Murray J reviewed the requirements of the third limb of *Hatsatouris* and held that the relevant time at which the deceased must have had the testamentary intention was the time of death.[25] This meant that a document that the deceased had initially had reservations about could be effective as a will if the testator *later* came to a settled view about the terms, and conversely if the deceased originally intended a document to operate as his will but had then changed his mind about it, such a document could not be subject to the dispensing power.[26] This implies that an unsigned document admitted under a dispensing power could be the ultimate in ambulatory wills, with its validity being determined simply by the testator changing his or her mind.

The significance of this is demonstrated in the New Jersey case of *Ehrlich*, in which the deceased's actual will could not be located after his death but an unsigned copy was propounded. Despite acknowledging that the deceased had changed his mind about one of the gifts in the copy will[27] scant attention was given to the possibility that the reason the original will could not be located may have been that the deceased had destroyed it to revoke it. The court acknowledged that the copy will did not fully reflect the deceased's intentions at the time of his death, but held that the admission of the unsigned copy to probate avoided an 'intent-defeating outcome'.[28] This suggests that there would be a tendency for the courts to engage in a comparison of the estate distribution if the dispensing power were to be exercised against the alternative distribution under the intestacy rules / another will to determine which matches the testator's intent better. Such unnerving contextual nuances are the enemy of certainty.

Furthermore, a fundamental difficulty is that, although the deceased might have had the requisite testamentary intention at the time of signature or creation, they may not appreciate that an informal document can have legal validity – this was probably true of the testator in *Hatsatouris*[29] – or may later be informed that the document is invalid as a will.[30] In such circumstances the deceased would

[25] *Dolan v Dolan* [2007] WASC 249 [24]
[26] Ibid [25]
[27] *In re Estate of Ehrlich* 47 A3d 12, 18 (NJ Super Ct App Div 2012)
[28] Ibid, 19. See also Baron, 'Irresolute Testators, Clear and Convincing Wills Law' (2016) 73(1) *Washington and Lee Law Review* 3, 42-43
[29] *Hatsatouris v Hatsatouris* [2001] NSWCA 408 [40]
[30] *Re Hodge* 40 SASR 398; see also 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, 32, discussing the unreported case of *Re Sierp*

be unaware of the need to alter or revoke the putative will.[31] As one of the functions of testamentary formalities is a cautionary one, a dispensing power that enables a testator to accidentally create a will would not appear to cover these functions adequately. Similar concerns regarding knowledge of validity can be raised in relation to privileged wills, but these wills are relatively rare. The number of wills admitted under a dispensing power will potentially be much greater.

The question of when the deceased must intend a document to be his or her will has the potential to impair the claim that dispensing powers enable the courts to give effect to the testator's wishes. It is argued that the time at which the deceased must intend an informal document to operate as his or her will should be neither the time of signature nor of creation but the time of death. There is a marked contrast between duly executed wills and wills admitted under a dispensing power; with the former, the formalities and the intention each play their part in the act of execution so they must all be present at that time. With the latter the testamentary intention of the deceased is the validating factor so the requirement for a temporal link between testamentary intention and creation / signature is neither necessary nor justifiable.

Stipulating that the time for testamentary intention is the time of death would address the difficulties raised by *Hatsatouris* and *Ehrlich.* It could also explain the operation of the dispensing power in sudden death cases such as *Mitchell,*[32] in which the deceased died unexpectedly just before executing a draft will. In such cases it is unlikely that the deceased initially intended the unsigned draft to operate as his will, but it is possible to adduce an argument that this intention changed immediately prior to death.

The New Zealand dispensing power has the very simple requirement that the court be 'satisfied that the document expresses the deceased person's testamentary intentions'[33] which implies that those intentions need to be held at the time of death.[34] This interpretation is supported by the decision in *Tamarapa v Byerley*,[35] which focused on the consistency of the deceased's intention between the creation of the putative will and his death nearly nine years later, and echoes the application of the Western Australian provision in *Dolan.*[36]

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[31] See 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, 32-33 for a discussion of the potential problems when the deceased knows that the putative will has not been validly executed. In particular, in his analysis of *The Estate of Kelly* [1983] 32 SASR 413 he noted that the testator had subsequently spoken as though a legacy contained in an earlier will was still in effect – ibid, 21

[32] *Mitchell v Mitchell* [2010] WASC 174. See

[33] Wills Act 2007 (NZ) s 14(2)

[34] Peart, 'Testamentary Formalities in Australia and New Zealand' in K G C Reid, MJ De Waal and R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (OUP, 2011) 353

[35] *Tamarapa v Byerley* [2014] NZHC 1082

[36] *Dolan v Dolan* [2007] WASC 249 [26]

This approach would imbue these informal wills with an extremely transient nature; the testator's intention may have changed repeatedly over the course of the preceding months, and the admissibility of the document would be determined by proof of the testator's final intention prior to his death. However this task would not be insurmountable, and it is argued that this detailed analysis of intention is preferable to the court admitting to probate a document that the testator believed to be invalid and about which he had changed his mind.

Indeed, a similar evidential challenge is already faced in the context of lost wills. Whilst there is a presumption that a lost will that was known to be in the testator's possession has been destroyed with the intention of revocation[37] a copy will can be admitted to probate if sufficient evidence can be supplied to the registrar to rebut any presumption of revocation.[38] The questions to be addressed in order to provide this evidence include whether the deceased had taken steps to revoke the will, and whether there was evidence that he still intended it to have effect at the time of his death. Considering issues such as these in the operation of dispensing powers is essential for the discharge of the cautionary function; if such questions had been raised in *Ehrlich* and *Hatsatouris* the outcomes may have been different.

Conclusions

Although the general principle that the courts should have the ability to give effect to the deceased's intentions is hard to disagree with, this series of articles has demonstrated the wide variations in both the structure and application of dispensing powers in the various jurisdictions discussed. In other jurisdictions the remedial purpose of intention-based powers has been used to support leniency in application and the less prescriptive such a power is, the greater the potential for inconsistency from the courts. The danger is that the courts focus excessively on the most equitable outcome, especially when there is a significant difference between the putative testator's wishes and the alternative distribution of their estate.

The Law Commission must consider carefully what model is best suited to England and Wales to ensure that dispensing powers do not expand beyond the relatively narrow scenarios portrayed in the consultation paper. Despite stating that dispensing powers should be drawn widely,[39] the Law Commission have also emphasised that their use does not 'involve a broad, unstructured judicial power'.[40] This can only be achieved if the functions of the formalities are not forgotten. As was acknowledged in *Deeks v Greenwood*:

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[37] *Eckersley v Platt* (1866) LR 1 P & D 281
[38] Non-Contentious Probate Rules 1987, r 54(3)(a)
[39] Law Commission, *Making a Will* (Law Com No 231, 2017) para 5.94
[40] Law Commission, *Making a Will* (Law Com No 231, 2017) para 5.91

> it is necessary for the court to bear in mind the purposes which the formal requirements were designed to achieve, that is, to guard against fraud, preliminary but not concluded expressions of opinion, lack of full deliberation, possible adverse influence upon the deceased, and lack of appreciation of the seriousness and effect of the intentions as expressed.[41]

This series of articles has identified four questions, the answers to which would define the scope of an intention-based dispensing power:

1. What must be intended?
2. How is this intention proved?
3. What is the appropriate standard of proof?
4. When must the deceased have held this intention?

The first article in this series argued that any English and Welsh dispensing power must require specific testamentary intention, i.e. that the testator intended *that document* to operate as his / her will. If a dispensing power were to be proposed for England and Wales that only requires general testamentary intention (as in New Zealand) then, in order to reassure the public, it would be essential for the Law Commission to identify a range of factors that the courts should take into account in their determination of whether the document accurately sets out the terms upon which the deceased wished to make his/ her will.

The second article in this series demonstrated the complexities that can arise when proving that the deceased intended that an informal document take effect as their will, and queried whether there should be any 'pockets of bright-line principles',[42] in addition to the requirement for a document, to help prove testamentary intention. The cautionary, evidential and protective functions are best served by retaining the need for a signature; the Scottish Law Commission's change of opinion is indicative of how many validity problems could be resolved by retaining a simple signature requirement without opening the Pandora's Box of other alternatives. However, if (as proposed) the English dispensing power defines 'document' widely then an alternative to a signature needs to exist for such documents. In the author's view the South African condonation provision, requiring that the document be *drafted or executed* by the testator occupies a workable middle ground, balancing certainty with flexibility. It is acknowledged that this would prevent dispensing powers from operating on professionally drafted but unexecuted wills; if this was seen as too limited in scope then the

[41] *Deeks v Greenwood* [2011] WASC 359 [55]
[42] Horton, 'Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism' (2017) 58(1) *Boston College Law Review* 1, 20

strictures of the South African model could be widened by permitting acceptance of a document that the testator caused to be created and to which s/he has given his or her assent.

The standard of proof is of the core questions that the Law Commission identified in their consultation paper,[43] but it has been shown that stricter standards of proof tend to have been applied liberally. Moreover, courts are accustomed to requiring coherent and cogent proof in similar circumstances; suggesting that a stringent application of the civil standard of proof can be accommodated within current civil law procedure.

The issue on which there has been the least discussion to date is the question of when the testamentary intention must have been held. A dispensing power will be required to operate on very different types of document and a new approach is therefore required that separates the time of intention from the act of signing or creating the document. To do otherwise overlooks the cautionary function and has the potential to haunt dispensing powers if it is not addressed; evidence that a testator had changed his mind before death should be sufficient to prevent a document from being admitted to probate under any dispensing power.

The more stringent the statutory provisions are, the more limited their application would be, but it must be remembered that a dispensing power will never be a panacea to all formality problems. There will always be "hard luck" cases that fall outside of its ambit, and conversely uncomfortable cases may be encompassed by its scope. The following comments from the Scottish case of *Walker v Whitwell* are pertinent:

> It is quite true that a neglect, perhaps only accidental or springing from ignorance ... may frustrate a perfectly honest will, and thus cause the very mischief which these precautions were intended to avert. That risk is inevitable and must have been foreseen. But it is held better that a few instances of that kind should occur, rather than admit the flood of uncertainty which would follow if the simple rules be relaxed.[44]

It is impossible to draw a clear and incontrovertible line in exactly the right place; the challenge for the Law Commission will be to approximate as best they can.

[43] Law Commission, *Making a Will* (Law Com No 231, 2017) para 5.100-5.101
[44] *Walker v Whitwell* [1916] (SC)HL 75, 76 (per Earl Loreburn)