

WILLS FORMALITIES IN THE TWENTY-FIRST CENTURY—PROMOTING TESTAMENTARY INTENTION IN THE FACE OF SOCIETAL CHANGE AND ADVANCEMENTS IN TECHNOLOGY: AN AUSTRALIAN RESPONSE TO PROFESSOR CRAWFORD

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INTRODUCTION

The law of wills is steeped in tradition, including what is required for the valid execution of a document purporting to contain a testator's intention for the distribution of her or his estate upon her or his death. This is reflected in the need to comply with certain formalities for a will to be valid. Although these formal requirements differ in extent and form throughout the world, their purposes, in common law jurisdictions such as Australia and the United States of America, are fourfold: they serve evidentiary, cautionary or ritual, protective, and channeling functions.¹ The evolution of society, and particularly the pace of technological advancements, has arguably called the need for such formalities into question—both as to the extent to which they should exist and be enforced. The role of the wills formalities has also been called into question in the context of access to will-making: for some the very act of making a will can be problematic as the associated legal costs can be prohibitive.² In response to the cost of will-making, in Australia at least, there has been a rise in “homemade” wills, wills prepared using “will-kits,” and online forms which use artificial intelligence (AI). However, such “do-it-yourself” wills often fall foul of the aforementioned formalities and may not be upheld. Consequently, although well-intentioned, such homemade wills can actually negatively affect testamentary freedom because wills evidencing a clear testamentary intention can be found to be invalid or uncertain owing to a lack of technical know-how if strict or substantial compliance is required.³

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1. See Bridget J. Crawford, *Wills Formalities in the Twenty-First Century*, 2019 WIS. L. REV. 269, 271.

2. *Id.* at 123.

3. See, e.g., *O'Brien & Anor v Smith & Anor*, [2012] QSC 166. In that case a gift of the residue in a homemade will to “a trust or other entity to be set up by my executors and Administrators and administered by them as they shall see fit” was declared invalid.

The strict construction of the Queensland substantial compliance doctrine enacted in 1981 has served as a cautionary tale to other jurisdictions seeking to dispense with a narrow application of wills formalities in certain circumstances.⁴ In fact, legislative reform in 2006 saw Queensland move away from substantial compliance, with the adoption of the current intention-based dispensing power.⁵ Given the problems that can arise with a strict or substantial compliance approach to wills formalities, Crawford has called for a review of the formalities required for a valid will.⁶ She first questions whether the formalities meet their proclaimed functions as set out above, and then proposes the utility of adopting an authenticity approach based upon intention rather than one heavy with form.⁷

A critical review of the approach to formalities is especially timely given the increasing number of “informal” wills matters coming before the courts in Australia, and in Queensland in particular. This Response seeks to respond to Crawford’s claims as set out above with specific reference to the Queensland context. It will therefore explore the role of formalities, and the functions they purport to serve, in light of Crawford’s call to action.⁸ The formalities will be examined with reference to wills made by individuals with testamentary capacity, noting that the formalities for a statutory will in Australia differ.⁹ The Queensland dispensing power will then be examined, including a discussion of a number of recent informal wills cases. This will include consideration of the reasons evident for the apparent increased numbers of informal will cases coming before the courts, such as technological advances and the increase in “homemade” wills. This discussion will demonstrate that while the functions of the formalities may no longer retain the historical significance they once held, particularly the protective function, they arguably still have a role to play, at least in the Australian context. Further, the dispensing power adopted in

Id. ¶ 45. Margaret Wilson J held that “(t)he deceased purported to establish a trust for the distribution of his residuary estate, but he did not identify the beneficiaries of that trust or provide any means by which the beneficiaries could be ascertained. Accordingly, the trust failed.” *Id.* ¶ 8.

4. John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987); SCOTTISH LAW COMMISSION, REPORT ON SUCCESSION 40–41 (Scot Law Com No 124, 1990); LAW COMMISSION, MAKING A WILL 95 (Consultation Paper No 231, 2017).

5. *Succession Act 1981* (Qld) s 18.

6. Crawford, *supra* note 1, at 271–73.

7. *Id.* at 271–72.

8. Crawford’s article is so timely in fact, that the Queensland University of Technology 2019 Succession Law assignment was set on an excerpt succinctly summarizing the issues presented by modern society in relation to the formalities and their traditional functions.

9. See, e.g., *Succession Act 1981* (Qld) ss 21–28; Crawford, *supra* note 1, at 277–78.

Queensland arguably makes provision for Crawford's adaptation of the authenticity approach.¹⁰

I. WILLS FORMALITIES

Wills formalities can vary markedly around the world. For example, in civil law countries such as Germany, wills are prepared by a notary (which is a separate profession to a solicitor or lawyer).¹¹ Generally it is also compulsory to register the will. These are not overly familiar concepts to common law countries such as Australia, the United Kingdom, and the United States of America, with respect to the requirements to execute a valid will. It is possible to register wills in Australia, but this is voluntary and not a legal requirement to establish validity. There are also no prevalence studies to determine the take up of such a scheme. There has, however, been a growing discussion around the registration of another estate planning tool, the enduring power of attorney, as a way in which to combat elder abuse.¹² Consequently, the registration of estate planning tools, such as a wills register, could be promoted more heavily into the future as a possible means of both combatting elder abuse, as well as minimizing the cost and time associated with estate administration.

In Scotland, wills are valid when they are simply written and signed at the end by the testator.¹³ This is obviously closer in nature to the requirements in Australia. Australia has a federalist system and the formalities for a valid will are therefore subject to state- and territory-based legislation, although they are generally similar.¹⁴ In Queensland, the *Succession Act 1981* (Qld) part 2, particularly section 10, establishes the formalities necessary to make a valid will. The will must be in writing¹⁵ and signed by the testator or by some other person in the presence of and by the direction of the testator.¹⁶ Another person can sign on the testator's behalf if she or he is unable to do so, for example, if she or he is illiterate or physically unable to, for instance, if she or he is blind.¹⁷

10. Crawford, *supra* note 1, at 291.

11. See LAW COMMISSION, *supra* note 4, at 72; K G C Reid, MJ De Waal & R Zimmermann, *Testamentary Formalities in Historical and Comparative Perspective*, in *COMPARATIVE SUCCESSION LAW: TESTAMENTARY FORMALITIES* 448 (2011).

12. AUSTRALIAN LAW REFORM COMMISSION, *ELDER ABUSE—A NATIONAL LEGAL RESPONSE* 160, 181–98 (ALRC Report 131, 2017).

13. Requirements of Writing (Scotland) Act 1995, §§ 1(2)(c), 2(1), 7(1); see LAW COMMISSION, *supra* note 4, at 72.

14. *Succession Act 1981* (Qld) s 10; *Succession Act 2006* (NSW) s 6; *Wills Act 1936* (SA) s 8; *Wills Act 2008* (Tas) s 8; *Wills Act 1997* (Vic) s 7; *Wills Act 1970* (WA) s 8; *Wills Act 1968* (ACT) s 9; *Wills Act 2000* (NT) s 8.

15. *Succession Act 1981* (Qld) s 10(2)(a).

16. *Id.* s 10(2)(b)(i)-(ii).

17. See *id.*

Either the actual making of the signature or the acknowledgement of that signature must then occur in the presence of two or more witnesses who are present at the same time. This acknowledgement must be of the signature and not the will. It is sufficient if the testator requests the witnesses to sign the document and they see or have the opportunity to see the testator's signature on it.¹⁸ The position of signatures need not be at the foot (the end) of the will as was previously the tradition.¹⁹ The signature does, however, have to be connected to the whole will to satisfy the requirement that the testator must have the requisite intention to give effect to the whole will (irrespective of the position of the signature). At least two of the witnesses must then attest and sign the will, and while they must be in the presence of the testator, they do not need to be in each other's presence at this stage.²⁰ Witnesses also do not need to know that the document is a will.²¹

In Australia, it is usual to have an attestation clause, particularly in formally drafted wills, but this is not necessary.²² An attestation clause facilitates the cost-effective and timely grant of probate because there is a (rebuttable) presumption of due execution, which fulfills the evidentiary function of the formalities. The presumption provides that where a will appears regular on its face, this evidences that the formalities have been complied with.²³ However, in *Burnside v Mulgrew*,²⁴ a will that appeared to be prima facie valid was held invalid given questions around the signature of the deceased, which emphasizes the rebuttable nature of the presumption. The presumption of due execution is also linked to a presumption of knowledge and approval, one of the mental requirements for a valid will in Australia.²⁵ That is, if a testator had capacity and the will was duly executed, then knowledge and approval of the terms of the will will be presumed absent any suspicious circumstances. This presumption of knowledge and approval is especially difficult to displace where the will was read over to the testator by a solicitor at the time it was executed.²⁶

Further, some people are disqualified from witnessing a will. A person who cannot see and therefore attest to the testator's signature on

18. *Id.* s 10(3).

19. *Id.* s 10(6). The Australian Capital Territory still requires signatures to be at the foot (or end) of the document, see the *Wills Act 1968* (ACT) s 9.

20. *Succession Act 1981* (Qld) s 10(4).

21. *Id.* s 10(5).

22. *Id.* s 10(9).

23. *Re Unsworth* (1974) 8 SASR 312, 319.

24. [2007] NSWSC 550 ¶ 65–66.

25. For the general principles in relation to knowledge and approval see, for example, *Re Fenwick* [1972] VR 646 and *Re Bryden* [1975] Qd R 210.

26. See, e.g., *Mullavey v Verri* [2016] QSC 83 ¶¶ 45, 52; *Estate Stojic, Deceased* [2017] NSWSC 168 ¶ 95; *Stojic v Stojic* [2018] NSWCA 28 ¶ 136.

the document is disqualified.²⁷ Anyone who is a beneficiary under the will is also disqualified, which is known as the witness disqualification rule.²⁸ That is, the witness cannot take under the particular testamentary instrument that he or she witnessed. The purpose of this rule is protective in nature. That is, theoretically it is designed to prevent the use of inappropriate pressure, such as undue influence and/or unconscionable conduct, from occurring and the perpetrator benefiting under the will. In practice however, as noted by Crawford, the efficacy of this rule in achieving this purpose is questionable, as discussed below in relation to the protective function of the formalities.

It should be noted that “in writing” has a specific definition throughout Australia. In Queensland, the *Acts Interpretation Act 1954* (Qld) s 36 defines writing to include “any mode of representing or reproducing words in a visible form.”²⁹ This is significant considering several of the recent informal wills cases where purported testamentary intentions have been recorded via electronic devices such as DVDs,³⁰ computers,³¹ and mobile phones.³² With respect to the requirement that a will be “signed,” the form of signature is not prescribed. What is required is some mark on the will with the intention that it is a signature.³³ It is clear, however, that the testator (or other person as above) must sign with the *animus testandi* or testamentary intention that the whole document is her or his will.³⁴ As identified by Crawford, the question therefore arises, as to whether the strict construction of the formalities for a valid will effectively fulfill their intended functions in modern society.

II. THE TRADITIONAL FUNCTIONS OF THE FORMALITIES

As Crawford notes, the formalities traditionally serve an evidentiary function, channeling function, cautionary (or ritual) function, and protective function.³⁵ Before examining Crawford’s claim that the formalities no longer serve their traditional purpose, if, in fact, they ever did, the functions will first be examined.

27. *Succession Act 1981* (Qld) s 10(10).

28. *Id.* s 11.

29. *Acts Interpretation Act 1954* (Qld) s 36.

30. *Mellino v Wnuk* [2013] QSC 336.

31. *Mahlo v Hehir* [2011] QSC 243; *Yazbek v Yazbek* [2012] NSWSC 594.

32. *See, e.g., Re Yu* [2013] QSC 322; *Nichol v Nichol* [2017] QSC 220.

33. *Summerville v Walsh* [1998] NSWSC 52; *Re Tinker (deceased)* [2016] QSC 217.

34. *Succession Act 1981* (Qld) ss 10(7), (8).

35. Crawford, *supra* note 1, at 271.

A. Evidentiary Function

The principal purpose of the evidentiary nature of the formalities is to prove what the testator intended. This evidentiary function, along with the protective function, are arguably the most important functions of the formal requirements. As the best source of that evidence, the testator, is deceased, the formalities arguably therefore provide the next best evidence of what the testator wanted to occur with her or his estate on her or his death. The evidentiary function can increasingly be an issue in will contestations and/or family provision claims. *Prima facie* the will evidences the deceased's testamentary intentions, which may involve excluding one or more potential beneficiaries from the estate. Given that a probated will becomes a public document in Australia, there has been a recent increase in the use of memoranda of wishes.³⁶ These documents are generally held to be private in nature and can be directed to the executor(s) to give further instructions about the way in which the testator intended her or his estate to be administered. Unlike a will, these do not have any effect at law however, and are not needed to seek probate. Thus, memoranda of wishes can serve a valuable purpose, given the right circumstances, but it is still the formal testamentary document that evidences, at least *prima facie*, the testamentary intentions of the deceased. As mentioned above, it is usual for formally drafted wills, and for will-kits, to have an attestation clause which, correctly completed, gives rise, *prima facie*, to the presumption of due execution, thus helping to evidence the fact that this was in fact the last will of the deceased.

B. Cautionary or Ritual Function

Death is an unavoidable part of life. The cautionary or ritual purpose of making a will recognizes this and is designed to impress upon individuals the importance of the act of making a will. That is, it is this document that determines who receives what assets from an estate. In practice, this can be particularly important because while it is the lawyer's job to prepare a will, the will-making process is representative of the person making the will's life—and what they want to happen on their death. This has previously been significant, especially when considering the trust and reverence had for the legal profession and the role of "death" in an individual's life.³⁷ However, this seems to be dissipating. Little evidence exists mapping will-making and/or estate contestation trends in Australia, but anecdotal evidence and the increase in construction cases

36. See, e.g., *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 ¶ 446; *Avanes v Marshall* (2007) 68 NSWLR 595 ¶ 21.

37. Kelly Purser & Karen Sullivan, *Capacity Assessment and Estate Planning - the Therapeutic Importance of the Individual*, 64 INT'L J.L. & PSYCH. 88, 92–93 (2019).

tend to indicate an increase in “homemade” wills.³⁸ This leads to a dichotomous situation. On the one hand, people should be able to make a will easily, and not everyone can afford the legal fees to be able to do so. You should also not have to retain a lawyer if you do not wish to. However, on the other hand, there is a wealth of legal knowledge that can inform the making of a will, as well as wider estate planning considerations. The execution of a, for example, homemade will, may actually have the exact opposite effect to what the testator wanted if such wider estate planning issues are not effectively considered, thus potentially opening the estate to attack. In this context, in *Gray v. Gray*,³⁹ Master Sanderson commented as follows:

Home made wills are a curse. Occasionally where the assets of a testator are limited and where the beneficiaries are not in dispute no difficulties may arise in the administration of an estate. Flaws in the will can be glossed over and the interests of all parties can be reconciled. But where, as here, the estate of the deceased is substantial, the will is opaque and there is no agreement among the beneficiaries, the inevitable result is an expensive legal battle which is unlikely to satisfy everyone. All of this could have been avoided if the testator had consulted a lawyer and signed off on a will which reflected his wishes. There is no question but that engaging the services of a properly qualified and experienced lawyer to draft a will is money well spent.⁴⁰

Identifying will-making trends would also offer some insight into (any) societal, generational, and technological tendencies and/or changes. Is there a move away from the traditional formality associated with will-making by younger generations? By the baby boomer generation? Is this reflective of a wider ethos change in society or is it generational? For example, whilst older generations (those aged 80 years and over) did not necessarily question those in positions of authority, such as lawyers, the baby boomer generation has seen a shift in that mentality, often requiring more information.⁴¹

Technological advancements have also seen the availability of more information and options. This therefore raises the question of whether the “do-it-yourself” mentality is becoming more pervasive—and what this

38. See, e.g., Benjamin P. White et al., *Estate Contestation in Australia: An Empirical Study of a Year of Case Law*, 38 U. NEW SOUTH WALES L.J. 880 (2015).

39. [2013] WASC 387.

40. *Id.* ¶ 1.

41. See KELLY PURSER, CAPACITY ASSESSMENT AND THE LAW: PROBLEMS AND SOLUTIONS (2017).

will ultimately mean. Will-kits have been readily available in Australia for some time. More recently online options, often utilizing AI, have also been made available for will-makers, which may include a suitability pre-test.⁴² The question does need to be asked, however, about the utility of this. Again, on the one hand individuals should be able to express their testamentary wishes without needing to engage a lawyer. However, while this will often be sufficient, in a growing number of cases (often representative of familial and financial complexity), a homemade will instead provides the source of a future construction case.⁴³ Therefore, instead of giving effect to the testator's intentions, this runs the risk of leading to costly litigation, both in terms of money and time.

C. Protective or Control Function

The protective function seeks to prevent undue influence, unconscionable conduct, fraud, forgery, or impropriety, which is significant when considering the purpose of wills formalities in the context of the ageing population and increasing rates of mentally disabling conditions. It is important to note that age alone does not indicate diminished or lost capacity. Nevertheless, cognition can be an issue especially for people in the "old, old" cohort, that is, people aged approximately 80 or 85 years and over.⁴⁴ A diagnosis of a mentally disabling condition, such as dementia, does not automatically equate to a loss of capacity. It can, however, impact decision-making ability, thus exposing the person in question to an increased risk of abuse if their capacity is diminished (although retaining the capacity necessary to make a valid will).⁴⁵ The increased risk of vulnerability, which it should be noted is not predicated upon a diagnosis of a mentally disabling condition, can also give rise to the issue of elder abuse when executing a will. Elder abuse is a significant issue in both the execution of a will and for practitioners when taking instructions.

Crawford notes that witnesses may be "insufficient although, perhaps helpful" in providing evidence as to the authenticity of the will and the testator's mental state.⁴⁶ It is important to note that in Australia the mental requirements are a separate requirement to the formalities, and that both the mental and formal requirements are necessary to make a valid will.⁴⁷

42. See, e.g., SLATER + GORDON ONLINE, <https://online.slatergordon.com.au/sgo/> [<https://perma.cc/L99C-WSP8>].

43. See, e.g., *Gray v Gray* [2013] WASC 387.

44. Kelly Purser et al., *Alleged Financial Abuse of Those Under an Enduring Power of Attorney: An Exploratory Study*, 48 BRITISH J. SOC. WORK 887, 887–905 (2018).

45. See PURSER, *supra* note 41, at 6.

46. Crawford, *supra* note 1, at 272.

47. See, e.g., *Succession Act 1981* (Qld) s 10.

The point of the (minimum) two witness requirement in Queensland is to “attest and sign the will” in the testator’s presence.⁴⁸ They do not have to know that the document in question is a will.⁴⁹ That is, they are attesting a signature, not the authenticity of the document or the mental acuity of the testator. The overarching question, as raised by Crawford, however, is whether the formalities actually serve the intended purpose of protecting the will-maker from the types of risks outlined above. It is arguable in the case of undue influence and unconscionable conduct as to whether they do or not. On the one hand, lawyer involvement in the preparation of the will should help safeguard against this kind of inequitable conduct. However, as discussed previously, the advent of homemade wills and will-kits means that people are increasingly preparing their own wills and they (and the witnesses) may not be aware of this protective function. Thus, if a beneficiary is, for example, unduly influencing a will-maker, absent formal legal advice, no matter of formal requirements will address this risk. This therefore raises the real test of validity, as noted by Crawford, which is the testator’s intention. Further, the existence of formal requirements may mean that more people are likely to seek formal advice than they otherwise would if the requirements to make a valid will were reduced to focusing solely on intention or authenticity. Nevertheless, where deliberate acts of undue influence and unconscionable conduct and, increasingly, elder abuse, occur, the capability of formalities to fulfill an effective protective function is questionable.

The situation is arguably a little more straightforward in the case of fraud, forgery, or impropriety. Certainly, in Australia this helps explain why there is a requirement for two (rather than a sole) independent witnesses. Cases alleging fraud, forgery, or impropriety are relatively rare, which could be argued to be a result of the formal requirements. Empirical research into will-making tendencies would greatly deepen our knowledge about people’s views in response to making a will. A recent example of an allegation of mistaken identity was seen in the case of *Farrell v. Boston*.⁵⁰ The applicant in this matter claimed that a will was improperly executed by someone who had assumed a false identity to benefit the testator’s nephew. It was alleged that the testator’s nephew, who was also the residuary beneficiary, had someone pose as his aunt (the testator) to the solicitors who drew up the will to ensure his inclusion as the residuary beneficiary. It was noted in the case that such a suggestion was not borne out by the evidence⁵¹ and such an “extraordinary claim” would require “not only that a bogus Mrs. Farrell was taken to [the solicitors’ firm which prepared the will]’s offices, but that on those occasions when [the estates

48. *Succession Act 1981* (Qld) s 10(4).

49. *Id.* s 10(5).

50. [2016] QSC 278.

51. *Id.* ¶¶ 3–10.

clerk] visited Mrs. Farrell's home and the nursing home, Mrs. Farrell was somehow secreted and the other woman substituted."⁵² The application was dismissed with the court regarding that scenario as "highly improbable." Thus, it is arguable that the formalities, in this context, do serve a protective function.

D. Channeling Function

The channeling function recognizes the role of the formalities in ensuring conformity and uniformity of testamentary instruments, that is, establishing the integrity of the will. Again, traditionally this function did indeed achieve its purpose and thus helped to ensure the preservation of testamentary freedom. This is because the validity of wills was upheld, therefore giving effect to the testamentary intentions of the deceased, which is a different issue from being able to access lawyers/the legal system and the provision of low-cost wills. As mentioned previously, the increasing growth in home-made wills or will-kits has arguably seen the erosion of this function. People are falling foul of the formal requirements and the validity of their will is then called into question, requiring a dispensing or construction application to be made to the court to be able to give effect to the terms of the will. As will be seen in the next section, such applications are primarily concerned with the testator's intention, thus giving credence to Crawford's focus on intention as the key question in the validity of a will, which is the primary focus of the intent-based dispensing power that has now been adopted in Queensland.

III. DISPENSING WITH THE FORMALITIES

It is clear that strict application of the formalities can defeat a clear testamentary intention. As stated, Queensland previously adopted the doctrine of substantial compliance. However, the *Succession Act 1981* (Qld) was amended in 2006 to move away from the substantial compliance doctrine to a system whereby courts may dispense with the formalities in certain circumstances pursuant to section 18 of the *Succession Act 1981* (Qld).⁵³ In applying section 18, courts are required to determine whether the informal will: is a document or part of a document;⁵⁴ purports to state the testamentary intentions of the deceased; and has not been executed in accordance with the formalities as prescribed by part 2 of the *Succession*

52. *Id.* ¶ 12.

53. *Succession Act 1981* (Qld) s 18.

54. *Id.* s 18(1).

Act, particularly section 10.⁵⁵ The court will accept the informal will if it is satisfied that the testator intended the document (or part thereof) to be her or his will, alteration, or revocation (either in full or in part).⁵⁶ It is important to note here that the court can dispense with formalities in relation to the making, altering, or revoking a will but not republication. Further, the dispensing power does not alter the need to meet the mental requirements.⁵⁷ The Queensland formalities can be dispensed irrespective of whether the document came into existence within or outside the state.⁵⁸

In examining the requirements of the dispensing power, the first “hurdle” to having an informal will declared valid is the existence of a “document.” A “document” is defined in Queensland to include:

- (a) Any paper or other material on which there is writing; and
- (b) Any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; and
- (c) Any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device).⁵⁹

Not surprisingly, there have been several recent decisions regarding what constitutes a “document” within the meaning of the dispensing power. A note on an iPhone was held to be a document and thus a valid will,⁶⁰ as was an informal will recorded on a DVD.⁶¹ Most recently, two interesting cases have determined whether an unsent text message⁶² and a video recording in which the deceased stated that he would “fill out the damn forms later”⁶³ could be held to be valid wills. In *Re Nichol*,⁶⁴ the widow submitted that, although the unsent text message in question was testamentary, it did not meet the formalities and could not therefore operate as the deceased’s will. It was argued that the fact that the text was not sent supported the position that it was not a valid will because it

55. *Id.* s 18(1)(a)-(b). Holograph wills, or those written and signed in the testator’s own hand, are not expressly permitted in any Australian jurisdiction but can be made valid under the dispensing power.

56. *Id.* s 18(2).

57. For example, testamentary capacity, knowledge and approval, lack of undue influence or unconscionable conduct affecting the contents of the will.

58. *Succession Act 1981* (Qld) s 18(5).

59. *Id.* s 5; *Interpretation Act 1954* (Qld) s 36.

60. *Re Yu* [2013] QSC 322.

61. *Mellino v Wnuk* [2013] QSC 336.

62. *Re Nichol* [2017] QSC 220.

63. *Radford v White* [2018] QSC 306.

64. [2017] QSC 220.

implied that the deceased had not made up his mind enough to send the message. The widow also alleged a lack of testamentary capacity. The respondents argued that the deceased described the unsent text as a “will,” and that it was testamentary in nature given the description of assets, including what was to happen to them on his death. In response to the fact that the text was unsent, the respondents argued that the failure to send the message did not mean that it was not testamentary in nature. Rather, because the deceased committed suicide, if the text had been sent it was likely that the recipients would have attempted to prevent the deceased from taking his own life. In relation to the allegation of a lack of capacity, the respondents noted that in Australia suicide does not automatically equate to a lack of capacity.⁶⁵ The court held that the unsent text message was a “document” and contained the requisite testamentary intention to be a valid will.

The case of *Radford v. White*⁶⁶ is a recent case which addressed whether a video recording can form a valid will.⁶⁷ Earlier cases have held that DVD recordings are documents,⁶⁸ but complicating matters in this case was the fact that the deceased indicated that he “intended to fill out the damn forms later.” That is, the issue was whether the deceased lacked the requisite testamentary intention at the relevant time. The court noted that the video recording contained quite detailed instructions as to what the deceased wanted to happen to his property upon his death. In relation to the testamentary intention issue, Justice Jackson noted that the deceased used quite formal and unconditional language, which, coupled with the circumstances in which the will was made, would imply that he did have the requisite intention.⁶⁹ Ultimately, his Honour determined that the reference to filling out the forms later did not displace the deceased’s intention that this recording was his will in the interim.⁷⁰ Another, very recent decision, raised the issue of whether writing on a post-it note could be a valid will in relation to a AUD\$ 4 million estate. It was held to be valid because the testator had the requisite intention.⁷¹

Some of the most common informal will applications in Queensland relate to the existence of only one or no witnesses instead of the required two.⁷² Where there is only one witness, the Supreme Court of Queensland,

65. *In the estate of Hodges; Shorter v. Hodges* (1988) 14 NSWLR 698.

66. [2018] QSC 306.

67. *Id.*

68. *Mellino v Wnuk* [2013] QSC 336.

69. *Radford v White* [2018] QSC 306 ¶ 16.

70. See, for example, *Yazbek v Yazbek* [2012] NSWSC 594, for discussion on such “stop-gap” wills.

71. The judgment for this decision has not yet been handed down. For a newspaper article, see Kay Dibben, *A Will Has Been Found to Be Legally Changed with Post-it Notes*, *COURIER-MAIL*, Mar. 3, 2019.

72. See *Succession Act 1981* (Qld) ss 10(3)–(4).

Practice Direction No. 2 of 2009 allows dispensing applications in certain circumstances to be heard by a registrar of the court rather than a judge in order to streamline procedure.⁷³ This can occur where there is evidence available demonstrating: that the deceased intended the document to be his or her will; due execution by the testator in the presence of the witness; and any explanation why more than one witness did not attest the document.⁷⁴

Informal will applications are also frequent where there are no witnesses, often in suicide cases. In these situations, the court is again looking at whether there is a document, whether the document purports to embody the testamentary intentions of the deceased, and whether there is evidence of this intention. That is, at the time the subject document was created, did the deceased intend that this document would operate as her or his final will, without more being done on the deceased's part?⁷⁵ Such evidence will take into account: the deceased's knowledge of the formal will-making process, that is, whether the deceased had made a will before and therefore has some experience with the formal requirements of doing so;⁷⁶ as well as storage of the document. For example, if the deceased has a history of being neat and keeping official documents in a locked filing cabinet, then it is unlikely that a document found in an "old beauty case with leather gloves, scarves, costume jewelry, color slides of her travels, and some postcards" would contain her testamentary intention.⁷⁷

What these cases demonstrate is threefold. First, this is a topical legal issue given that anecdotal evidence seems to indicate an increasing frequency of informal wills. Consequently, Crawford's article is incredibly timely, raising questions about the need for continued reliance on the formal requirements and critically asking whether these formalities truly meet their stated functions.

Secondly, intention is key in the successful application of the dispensing power in Queensland.⁷⁸ This is included in the legislation.⁷⁹ Further supporting this, the statute also makes specific reference to the admissibility of extrinsic evidence about the way in which the document

73. SUPREME COURT OF QUEENSLAND, PRACTICE DIRECTION NO. 2 WILLS ATTESTED BY ONLY ONE WITNESS: DISPENSATION: POWERS OF REGISTRAR (2009).

74. See also *Uniform Civil Procedure Rules 1999* (Qld) r 601 as to when the Registrar may make a grant of representation.

75. See *Hatsatouris v Hatsatouris* [2001] NSWCA 408; *Fraser & Anor v Melrose & Ors* [2016] QSC 213.

76. See also *Mahlo v Hehir* [2011] QSC 243 ¶¶ 41–42.

77. See *Lindsay v McGrath* [2015] QCA 206 ¶¶ 6, 49.

78. In addition to intention, the writing requirement (and clearly the failure to comply with the formalities) in the Act echo Langbein's minimum requirements for a valid will as being in writing and signed. See Crawford, *supra* note 1, at 276–77 (citing John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 498 (1975)).

79. *Succession Act 1981* (Qld) s 18(2).

was executed, as well as the deceased's testamentary intentions.⁸⁰ This can include any statement she or he may have made about the way in which she or he wanted her or his property to be distributed upon death.⁸¹ The discretion of the court as to the matters it can hear in this regard is not restricted.⁸²

Thirdly, the coverage of such matters in the media would seem to indicate that this issue has wider social import as well as legal significance. Whilst people's approach to death may be changing, how highly they value their property and its transmission is arguably not, especially as people begin to accumulate more wealth through the value of land in Australia as well as the superannuation scheme providing funds on retirement. Such coverage can be both advantageous and disadvantageous. On the one hand, people are being exposed to these types of issues and can see the legal outcome, which may inspire them to take the necessary steps to avoid such a result. On the other hand, the takeaway message from the media reports could be argued to be that you do not need a "formal" will, but that scribbling something on a, for example, post-it note will suffice. This is an overly simplistic view that does not consider the expense associated with the informal will or construction application. Nor does it take into account any potential future will contestations, which can also prove costly and which will require the retention of a lawyer. Certainly, in Australia, there was a response from a solicitor to the publishing of such an "inflammatory" and "sensationalist" news report.⁸³

IV. COMMENT

In considering the role of the formalities there are two main approaches: formalist, or a strict adherence to the formal requirements; or functionalist, which is exemplified by the intention based dispensing power adopted throughout all Australian jurisdictions and in many states in the United States of America.⁸⁴ What is clear, certainly in the Australian context, is that the courts are not only clearly conscious of the dispensing power, but are also willing to use this power to give effect to the testator's intention.⁸⁵ Is the need for formal requirements for a valid will therefore redundant when the courts are ultimately having reference to the

80. *Id.* s 18(3). This is also to avoid the evidential hearsay rule which generally prohibits hearsay evidence, that is, anything that is not said or heard firsthand.

81. *See id.*

82. *Id.* s 18(4).

83. *See* Chris Herrald TEP, LINKEDIN, https://www.linkedin.com/feed/update/urn:li:activity:6507749337026695169?fbclid=IwAR1_g71qR6fZxTqiafmuiZCFFbR4Lwe5VkSTWqFhgWzM95fcsWTLW1xh6gs.

84. LAW COMMISSION, *supra* note 4, at 13.

85. *In the Will and One Codicil of Lesley Cleland deceased* [2009] QSC 189 ¶ 19.

deceased's intention, especially in light of (anecdotally at least) an increase in informal will applications? Are the formalities meeting their stated functions or are such functions an anachronistic fallacy? Further, what role does a lawyer have to play in the preparation of a will if intention reigns supreme thereby resulting in the eradication of formal requirements?

The adoption of a dispensing power undeniably promotes the protection of testamentary intention. The risk of the testator's intention not being implemented through a lack of formal compliance could be avoided through a focus on determining the deceased's testamentary intention, and would arguably make will-making accessible to more people.⁸⁶ This approach also inherently includes an element of judicial oversight. Consequently, the abolition of formalities and reliance solely on intention could arguably require a more stringent examination of matters than merely following a prescribed form. This is particularly relevant when considering the role of the protective function. It is in relation to meeting this function where the formalities arguably fall short the most, especially when considering the prevalence of, for example, elder abuse and early inheritance syndrome.⁸⁷ Further, although the mental elements exist alongside the formal requirements, there is an increase in incidences of mentally disabling conditions, which cannot be ignored when considering the role of formalities in the protection of the testator.

However, as can be seen from the cases mentioned above, failure to comply with formalities can lead to otherwise unnecessary litigation, delay, and cost, with such cost being not only measured financially and in time, but also emotionally, given that this often coincides with a period of grieving. The application of presumptions, particularly the presumption of due execution, helps to facilitate a grant of probate (relatively inexpensively) where the formalities have been complied with, without the need to resort to more costly litigation. Thus, this exemplifies both the evidentiary and channeling functions at work. Evidentiary because where the will is *prima facie* regular, this expedites the probate process without the need for further evidence. Channeling because the formalities give us a sense of how a "regular" will should look, which helps to establish the integrity of the document. However, there are efficiencies built into the court procedure, such as the practice direction discussed above in the case

86. LAW COMMISSION, *supra* note 4, at 13.

87. In *Chaudhary v Chaudhary* [2017] NSWCA 222 ¶¶ 89–91, Justice Sackville said: "there has been discussion in recent times about the affordability of housing, particularly for young people, in many parts of Australia. One consequence of declining housing affordability is that young adults very often need and sometimes receive assistance from parents (or other benefactors) to enter the housing market." The combined effect of declining housing affordability, increased asset ownership by older Australians since compulsory superannuation and the ageing population creates a perfect storm for elder abuse. See generally AUSTRALIAN LAW REFORM COMMISSION, *supra* note 12, at 267–90.

of a one witness will. This implies that the litigation process could be streamlined, as it has been in Australia in certain circumstances. Nevertheless, at least in the Australian context, the formalities do continue to serve both an evidentiary and channeling function.

The formalities may also continue to have a cautionary or ritual function to fulfill. This is arguably less so in light of modern exigencies than it has been historically given the general change in society from a sacred to a more secular outlook. Whilst will-making may not inspire the reverence it once did, it is still representative of a significant life—or rather end of life—event. Consequently, absent empirical data to the contrary, one cannot discount the role making a will plays in an individual's life.⁸⁸

The primacy of intention in will-making is not disputed. However, does compliance with the formalities facilitate recognition of testamentary intention in a more expedient and less costly manner than having to make an informal will application? Arguably, at least in the Australian context, the answer is yes. A recent review of the law of wills in the United Kingdom also seems to support this position, where there has been a provisional (albeit cautious) call for the adoption of a dispensing power, rather than a more radical approach eliminating the formal requirements altogether for a purely intention-based model.⁸⁹

Does this, however, mean that the formalities are fulfilling their purported functions? As the discussion above has shown, it depends upon the specific function under consideration. The formal requirements still clearly have—and meet—an evidentiary and channeling function. Their ritual or cautionary function may be dissipating and, arguably, the formalities fail to fulfill a protective function in any meaningful way. The utility of the wills formalities, however, clearly lies in the presumptions that can arise and the avoidance of costly litigation. Such litigation is not merely confined to informal will applications. It can extend far beyond this to construction and estate contestation matters. The number of construction matters coming before the courts (again anecdotally given the lack of recent empirical evidence) seems to have increased. This is understandable given the growth in the numbers of homemade wills being made, which may not clearly give effect to the testator's intention, thus requiring a court application to determine the meaning of one or more provisions. Additionally, the complexity of modern estate planning and the risk of estate contestation, especially through family provision

88. On this general point, see CHERYL TILSE ET AL., *HAVING THE LAST WORD? WILL MAKING AND CONTESTATION IN AUSTRALIA* (2015) https://eprints.qut.edu.au/82785/1/_staffhome.qut.edu.au_staffgroupw%24_whiteb_Documents_Having%20the%20last%20word%20-%20Will%20making%20and%20contestation%20in%20Australia%20%28FINAL%20Report%20for%20ARC%20Linkage%20March%202015%29.pdf.

89. LAW COMMISSION, *supra* note 4, at 13.

applications here in Australia,⁹⁰ can expose estates to an increased risk of lengthy and costly litigation.

Significantly, there is a lack of empirical evidence which documents and explores the extent to which wills fail, both historically and at the present time, for non-compliance with formal requirements, and whether the presence of the formalities has reduced litigation. Crawford argues that the lack of data establishing the role of formalities in reducing litigation can be used to question the veracity of the formalities.⁹¹ As stated, anecdotally in Australia at least, it appears that lack of compliance with formalities leads to an increase in court applications. Whilst these obviously include informal will applications, they are also comprised of construction and estate contestation matters. What is therefore necessary is the collection of evidence as to the nature of estate litigation and the reasons for such litigation. There is also a need for current evidence as to how and why people make wills, the ways in which they make them, and how they want to make them.

Exploring the (apparent) evolution of attitudes towards will-making is particularly relevant considering the advantages and challenges posed by the role of technology in will-making, as noted by Crawford.⁹² In Australia, as seen above, issues with wills and technology have already been coming before the courts, which have been addressed by a dispensing application.⁹³ Whilst technology may make will-making more accessible to more people, it can also constitute a vehicle for abuse, especially of the vulnerable.⁹⁴ Therefore, even though the formalities arguably no longer effectively serve a protective purpose themselves, their existence may be the catalyst for independent, often expert, third party involvement, such as a lawyer, who will then turn their mind to the mental requirements.⁹⁵ Thus, in this way, the formalities can inadvertently play a protective function, albeit as a conduit to a closer examination of the mental requirements. A review of informal wills applications in the various international

90. See *Succession Act 1981* (Qld) ss 40–44, regarding the making of a family provision application in Queensland. Each Australian jurisdiction has family provision legislation. See *Succession Act 2006* (NSW) ch 3; *Administration and Probate Act 1958* (Vic) pt IV; *Inheritance (Family Provision) Act 1972* (SA); *Family Provision Act 1972* (WA); *Testator's Family Maintenance Act 1912* (Tas); *Family Provision Act 1970* (NT); *Family Provision Act 1969* (ACT).

91. Crawford, *supra* note 1, at 272.

92. Crawford, *supra* note 1, at 292–93.

93. See, e.g., *Re Yu* [2013] QSC 322; *Mellino v Wnuk* [2013] QSC 336; *Re Nichol* [2017] QSC 220; *Radford v White* [2018] QSC 306. Whether the ability to make a dispensing application pursuant to section 18 of the *Succession Act 1981* (Qld) is adequate to address issues of “electronic” wills will depend upon how that term is defined. On the imprecise nature of the term “electronic will,” see LAW COMMISSION, *supra* note 4, at 105.

94. See further on this point in the Australian context, AUSTRALIAN LAW REFORM COMMISSION, *supra* note 12.

95. Kelly Purser et al., *supra* note 44, at 902.

jurisdictions would also greatly assist in providing more information about will-making in modern society and the role of formalities in fulfilling an evidentiary, cautionary (or ritualistic), protective, and channeling function.

V. CONCLUSION

As Australia is a federalist system, each state and territory has its own succession laws, including the formal requirements necessary to execute a valid will. Although there are many similarities between the states and territories, harmonization of these laws is still elusive. In Queensland, the movement away from substantial compliance with the formalities towards the adoption of an intent-based dispensing power occurred through legislative amendment in 2006. This was done to preserve and protect, where possible, testamentary intention.

Crawford has argued that the wills formalities no longer serve their traditional evidentiary, protective, ritual or cautionary, and channeling functions. The paper has sought to respond to this claim in the Australian, but particularly the Queensland, context. To this end, the formalities, their functions and the Queensland dispensing power have been discussed. This has included an examination of recent cases that have applied the dispensing power with an overarching view of examining whether the formalities do in fact still serve their stated evidentiary, channeling, ritual or cautionary, and protective functions.

As discussed above, in the Australian context it is arguable that the formalities do continue to fulfil their stated evidentiary and channeling functions, especially considering rebuttable presumptions such as the presumption of due execution and the avoidance of costly construction disputes. However, the achievement of a ritual or cautionary function is now questionable and may become even more so as we look to the future of will formalities and the role of technology, as suggested by Crawford. While the increasing use of will-kits and online wills may improve access to will-making and thus promote freedom of testamentary disposition, the opportunity for estate planning advice may thereby be missed because no legal advice is sought, which may instead give rise to costly litigation and challenges, as well as claims by those who believe they have not been adequately provided for.⁹⁶ It is, notably, the protective purpose which is the most ineffective when faced with the demands of modern life and society. As stated, the formal requirements are not meant to be a substitute

96. Where the deceased has made no provision or an inadequate provision for family members or dependants, the court has jurisdiction to award a portion of the deceased's estate to that person upon a family provision application being commenced, see *Succession Act 1981* (Qld) ss 40–44. This moral obligation to provide for certain categories of dependants is of course a restriction on testamentary freedom.

for the mental elements necessary to execute a valid will, but to suggest that they are always effective in protecting vulnerable testators is a fallacy. This is especially the case given the increasing incidence of mentally disabling conditions, elder abuse, and early inheritance syndrome.

As Crawford correctly states, “any change that makes estate planning more available to a greater number of people should be embraced and welcomed,”⁹⁷ but is a transition away from formalities the vehicle through which to achieve this? Certainly, in the Australian context the argument, at least in the present legal and social climate, is no. The channeling and the evidentiary function served by the formalities means that probate is, generally, more easily and therefore quickly as well as cost effectively obtained where the formalities have been complied with. Absent the formalities, even with an intention-based dispensing power, informal will applications can be very costly, in both time and financially, as well as emotionally for those involved. The advent of homemade wills arguably does widen the opportunity to make a will to include more people than may otherwise do so, but is this “estate planning”? In Australia, the answer is maybe. A will can be the “estate plan,” particularly for people with uncomplicated financial and personal circumstances. However, such a plan, when undertaken by a lawyer, will normally encompass at least a discussion about enduring powers of attorney, advance health directives, and any other vehicles of wealth management, protection, and transmission that may be appropriate given the individual’s circumstances. It is therefore possible that homemade wills can inadvertently decrease the opportunity for individuals to avail themselves of effective estate planning,⁹⁸ especially in relation to risk management for potential estate contests. Consequently, increasing access to will-making and estate planning more generally should indeed be “embraced and welcomed” but serious thought needs to be given to how this will be practically and effectively achieved.

97. Crawford, *supra* note 1, at 294.

98. “Effective” could be interchanged with “good” which is a pertinent but different question.