



WILLS & ESTATES | Issue No. 27 | *How an unsent text message became a Will*

October 2017

This is the story of how an unsent text message became a Will.

The recent decision of *Re Nichol; Nichol v Nichol & Anor* [2017] QSC 220 has received quite a bit of media attention.

A man tragically took his own life, and an unsent text message found on his mobile phone after his death was declared to be his valid last Will. The text message was addressed to the deceased's brother, and contained details about how the deceased wanted his assets treated. It concluded with the words, "My will".

It is an unfortunate reality that suicide notes are often put before the Court in similar circumstances. It is often the case that a person wants to record their wishes immediately before they take their own life.

As well as the grief and devastation left behind in the tragic circumstances of someone taking their own life, the family of the deceased person must then partake in expensive court action if a document which contains testamentary wishes is discovered after their death.

The media outlets have been reporting that this was a controversial decision of the Supreme Court, because the man was survived by a wife and a son from a previous relationship. The deceased and his wife had a tumultuous history and had separated two days prior to his death.

This story starts with the powers given to the Supreme Court by section 18 of the *Succession Act 1981* (Qld) to dispense, or do away, with the formalities required to create a valid Will.

Those formalities include the Will being signed by its maker in the presence of two independent witnesses, who also sign the document.

When the Court considers whether to dispense with the formalities, it has to ask three questions being:

1. Was there a document?
2. Did the document contain the testamentary intentions of the deceased?
3. Did the deceased have an intention that the document operate as his or her Will?

If all of the above questions are answered, "Yes", then the Court will declare that the document is the last Will of the

deceased, even if the deceased did not comply with the formalities (such as signing the document in front of witnesses).

The deceased's wife argued that because the text message was not sent, the deceased did not intend for it to operate as his Will. However the Judge decided that the reason why the deceased did not send the text message was because he did not want to alert his brother to the fact that he was about to take his own life. The Judge concluded that the deceased did intend for the unsent text message to operate as his Will because:

- it was created at a time when he was contemplating his death;
- the deceased's mobile phone was with him when he died;
- the deceased addressed how he wished to divide his assets;
- the text message was detailed; and
- he had not expressed any contrary wishes or intentions.

What now for the deceased's wife and child? They will have rights to apply for further provision from the estate pursuant to Part 4 of the *Succession Act 1981* (Qld), on the basis that the deceased did not make adequate provision for them from his estate.

Whether they take those steps remains to be seen, especially given the small size of the estate, which has already been subject to expensive Court action to deal with the unsent text message.



Chris Herrald

Senior Associate

Mullins Lawyers

t +61 7 3224 0256

cherrald@mullinslaw.com.au



Michael Klatt

Partner

Mullins Lawyers

t +61 7 3224 0370

mklatt@mullinslaw.com.au