CITATION:	*In the Estate of the late Rae Mackay between Jacobs v Silbert and Shpilman* [2019] NTSC 83
PARTIES:	IN THE ESTATE of the late RAE MACKAY also known as RAE ANNE MACKAY late of 24 Packard Street, Larrakeyah in the Northern Territory of Australia, Retired Lawyer, deceased BETWEEN: JACOBS, David Lynden Plaintiff and SILBERT, Jonathon Olisch First Defendant and SHPILMAN, Aviva Felicia Second Defendant
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	90 of 2019 (21931866)
DELIVERED:	21 November 2019
HEARING DATE:	On the papers
JUDGMENT OF:	Kelly J

CATCHWORDS:

SUCCESSION – Wills, probate and administration –– Documents in existence expressing testamentary intent not meeting the formal requirements for a valid will – Whether documents constitute the will of the deceased under the *Wills Act* s 10(2) – Deceased an experienced solicitor with knowledge of formal requirements – Documents unsigned, labelled "draft" and containing signing and attestation clauses in proper form – No intention of deceased person that documents constitute her will – Documents do not constitute the last will of the deceased

Probate and Administration Act 1898 (NSW) s 18A

Wills Act 2000 (NT) ss 6, 8, 10(2), 15(3) and 15(6)

Hatsatouris v Hatsatouris [2001] NSWCA 408; *Oreski v Ikac* [2008] WASCA 220, followed

Kedzier v Postle [2002] NSWSC 875; *Lindsay v McGrath* [2016] 2 Qd R 160, [2015] QCA 206; *Re Newman v Brinkgreve; Estate of Verzijden* [2013] NSWSC 371, referred to

REPRESENTATION:

Counsel:

Applicant & Plaintiff:	R Henschke
First & Second Defendants:	R Williams

Solicitors:

Applicant & Plaintiff:	Halfpennys
First & Second Defendants:	Ward Keller

Judgment category classification:	B
Judgment ID Number:	Kel1914
Number of pages:	17

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

In the Estate of the late Rae Mackay between Jacobs v Silbert and Shpilman
[2019] NTSC 83

No. 90 of 2019 (21931866)

IN THE ESTATE of the late **RAE MACKAY** also known as **RAE ANNE MACKAY** late of 24 Packard Street, Larrakeyah in the Northern Territory of Australia, Retired Lawyer, deceased

BETWEEN:

DAVID LYNDEN JACOBS
Plaintiff

AND:

JONATHON OLISCH SILBERT
First Defendant

AND:

AVIVA FELICIA SHPILMAN
Second Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 21 November 2019)

[1] Rae Mackay (also known as Rae Anne Mackay) ("the deceased") died on 28 April 2014 at the Royal Darwin Hospital, aged 67 years.

[2] She was survived by:

(a) her partner David Lynden Jacobs (the plaintiff in this proceeding), with whom she had been in a de facto relationship for 20 years, living together from 1994 to 2014; and

(b) the two children of her marriage to Stuart Silbert, which ended through divorce in around 1992:

(i) Jonathon Olisch Silbert (the first defendant); and

(ii) Aviva Felicia Shpilman (the second defendant).

[3] The first and second defendants are the deceased's only children.

[4] The deceased's death was unexpected; there was no presence of a terminal illness. The causes of death are stated, on her death certificate, as:

(a) chronic myeloid leukaemia (duration 1 month); and

(b) cacuexia (duration 1 year).

[5] The deceased was a legal practitioner. She practised in Western Australia from the late 1970s until 1995, when she moved to the Northern Territory.

[6] The plaintiff was practising as a psychiatrist in Western Australia when he and the deceased formed a relationship in 1994. They moved to Darwin together in 1995.

[7] The deceased practised as a solicitor in the Territory until she retired. She dealt with wills and estate matters in the course of her practice.

[8] The first defendant deposed that the deceased was meticulous in preparing and signing all letters and documents, and the plaintiff accepts that this is the case.

The deceased's estate

[9] The deceased's estate, at her death, comprised:

24 Packard Street, Larrakeyah, NT	$1,020,000.00
Furniture and jewellery	$63,814.00
Money	$810.00
ANZ Bank Access Advantage account	$1,073.73
ANZ Bank Progress Saver account	$260,696.65
Total	**$1,346,394.38**

[10] At the time of her death, the deceased was living with the plaintiff in the house owned by the deceased at 24 Packard Street, Larrakeyah.

Search for a Will

[11] Initially, no will could be found. The plaintiff and the defendants agreed that the plaintiff would search for a will in the house.

[12] The deceased used one of the rooms in her home as an office. After her death, the plaintiff searched through over 30 boxes, carry cases and stacks of papers in folders looking for a will. He eventually found five documents in a carry case in her bedroom wardrobe in a section marked "My Will (STOPPED)".

[13] The documents are as follows. (They are collectively referred to as "the Informal Documents".)

(a) The first is a document consisting of a printed form on which there are handwritten additions. The heading on the form is "DRAFT WILL". There follows a series of numbered possible clauses with lines for details to be filled in. Some of these have been ticked and some crossed out. Handwritten details have been inserted in a number of the ticked sections. Omitting the parts that have been crossed out, the document reads as follows. (The parts in italics are in handwriting. The rest is part of the printed form.)

DRAFT WILL

This is the last Will and Testament

1.1 Made by *RAE LANDAU MACKAY*
Of *24 PACKARD STREET, LARRAKEYAH, DARWIN*
In the state/ territory of *NORTHERN TERRITORY*
Post Code *0820*

2.1 I revoke all previous Wills and other Testamentary Dispositions made by me.

Executor(s) and Trustee(s)

3.1 I appoint *DAVID LYNDON JACOBS*
Of *24 PACKARD STREET, LARRAKEYAH, DARWIN*
In the state/ territory of *NORTHERN TERRITORY*
Post Code *0820*

…

3.3 to be the executor(s) and trustee(s) of my estate. In the event that he predeceases me or is unwilling or incapable of acting then I appoint *as joint executors my son by my former marriage JONATHON OLISCH SILBERT of OLIVER HILL FARM, BREEZE ROAD, GIDGEGANNUP, WESTERN AUSTRALIA, and my daughter by my former marriage, AVIVA FELICIA SHPILMAN of PARIS, FRANCE*

as the executor. I grant my executor(s) the authority to administer my estate by the powers given under Australian Legislation.

…

Residuary Estate

6.1 I give the residue of my estate to such of the following beneficiary or beneficiaries as survive me *6.1.1 TO DAVID LYNDON JACOBS my property at 24 PACKARD STREET, LARRAKEYAH, DARWIN, NORTHERN TERRITORY, being LOT 3778 CITY OF DARWIN (A SINGLE MAN A CLOSE COMPANION)*

If the above beneficiary predeceases me, I give *my property to* the following beneficiaries as survive me … in equal shares:

6.1.2 TO JONATHON OLISCH SILBERT my son from my former marriage, currently residing at OLIVER HILL FARM, BREEZE ROAD, GIDGEGANNUP, WESTERN AUSTRALIA, and

6.1.3 TO AVIVA FELICIA SHPILMAN, my daughter from my former marriage, currently residing at PARIS, FRANCE

6.1.4 In the event my son or my daughter pre-decease the other, then I GIVE and BEQUEATH my property referred to above to the survivor of them ABSOLUTELY.

…

9.4 Other Instructions *I wish to be buried according to the rites of the JEWISH ORTHODOX FAITH.*

Near the "example" name on the draft form ["Tom Watts (signature of Testator)"] there is written ~~*Rae Mackay*~~ *Rae Landau Mackay*. On the top of the first page, the date *16/4/2013* has been handwritten.

It should be noted that this document does not deal with the whole of the estate. The bequest to the primary beneficiary is of the house only, and although the gift over refers to "my property", it is expressed to take effect only if the primary beneficiary predeceases the testator.

(b) The second document consists of a single handwritten page. It appears to be intended to be added to the first document, and to deal with at least some of the estate not dealt with in the first. It consists of two

sections numbered 6.2 and 8.1. These numbers fit in with the numbering on the first document.

(i) 6.2 (which would logically follow the handwritten 6.1.4) is a bequest to the deceased's grandchildren in equal shares of "*my monetary bank deposit, and all sums of money investments*". Details of the grandchildren's names are given and there is a *per stirpes* clause.

(ii) 8.1 provides that "*As all my grandchildren are minors my bequest to them all shall be held in trust until each becomes 18 years of age*". The trust is to be administered by the deceased's children "*for practical reasons*". There is a deal of crossing out and it looks as though the initial intent was for the trust to be administered by the executor, "*David Lyndon Jacobs*". (Clause 8.1 in document 1 is headed "Trust for Minors".)

Importantly, this document has the word "Draft" handwritten beside each section.

(c) The third document is a single page handwritten note setting out the daughter's address in Paris "as at June 2011", and another address in Israel.

(d) The fourth document is entirely handwritten. It begins: "*THIS IS THE LAST WILL AND TESTAMENT*" and repeats almost word for word the

substance of documents 1 and 3. There are notes in the margin including the words "*2nd Draft*", "*change sequence*", "*move to 3.1*", "*expenses of the executor*" and "*start draft 2 again*". These look like drafting instructions. At the end of the document there is a handwritten section providing for signature by the testator and attestation by two witnesses. These clauses accurately set out the formal requirements for a valid will. There are no signatures on the document.

(e) The fifth document is again handwritten. It is headed: "*THIS IS THE LAST WILL AND TESTAMENT OF RAE LANDAU MACKAY of 24 PACKARD STREET, LARRAKEYAH, DARWIN in the NORTHERN TERRITORY of AUSTRALIA, 0820*". It is plainly incomplete as it contains no bequests. It contains a "*PREAMBLE*" explaining that the testator has "*no living grandparents, parents, sisters, brothers or close cousins*". It appoints "*DAVID LYNDON JACOBS*" as executor and goes on to give much greater detail about their relationship and his contributions, financial and otherwise to her "*life circumstances*" in apparent explanation for choosing to name him as her executor. It contains a clause appointing the deceased's son and daughter as "*ALTERNATE JOINT EXECUTORS*" "*in the event* [Mr Jacobs] *predeceases* [the testator], *or is unwilling to act*". It confers powers on the executors and makes provision for their expenses to be paid before distribution of the assets. It goes on to explain in some detail why there will be no charitable bequests – and there it stops.

[14] It is accepted by all parties that:

(a) the handwriting on the Informal Documents is that of the deceased;

(b) as at April 2013, the deceased was busy, fit and well;

(c) the deceased was, by nature, a private person;

(d) the plaintiff had no knowledge of the existence of the documents before the deceased died and no input into their contents; and

(e) the deceased did not say anything to the plaintiff to the effect that she had made a will, but about a month before her death she said to him, *"If anything happens to me, this is your home, this is where you will stay and live"*.

The 1970 Will

[15] Some time after the Informal Documents were discovered, the first defendant received some documents from a law firm in Perth. Among those documents was a will of the deceased dated 7 October 1970, prepared by that firm ("the 1970 Will").

[16] The terms of the 1970 Will provide for:

(a) the revocation of all previous wills and testamentary dispositions;

(b) the appointment of the deceased's then husband Stuart Silbert as executor and trustee; and

(c) for her estate to pass to her children who survive her and attain the age of 21 years, in equal shares.

[17] It also provides, for the appointment of Brian John Silbert as substitute executor and trustee "should my said husband predecease me or should there be any doubt as to whether he shall predecease me or not".

[18] The deceased died domiciled in the Northern Territory so questions relating to the 1970 Will are governed by Northern Territory law.

[19] Pursuant to ss 15(3) and (6) of the *Wills Act 2000* (NT) ("the *Wills Act"*):

(a) the appointment of the deceased's former husband, Stuart Silbert as executor and trustee was revoked by their divorce; and

(b) the 1970 Will takes effect, in respect of that revocation, as if Stuart Sibert had died before the deceased.

Stuart Silbert has, in any event, renounced all rights to the probate of the 1970 Will.

[20] The substitute executor, Brian John Silbert, is deceased. Accordingly, if the 1970 Will is the last valid will of the deceased, the appropriate form of grant of representation is letters of administration with the will annexed. The parties are agreed that, if the Court finds that the 1970 Will is the last valid will of the deceased, the plaintiff, as the deceased's de facto partner, is an appropriate person to take the grant and to administer the estate.

The Documents

Issues

[21] The question for determination by the Court is whether the Informal Documents constitute an informal will which can be recognized and given effect to under s 10(2) of the *Wills Act*. If so, then the parties are agreed that probate of that will should be granted to the plaintiff as the executor named therein.

[22] None of the Informal Documents is executed in accordance with the formal requirements prescribed by s 8 of the *Wills Act* for the execution of a valid will or codicil. The Court may, however, admit some or all of the documents to probate pursuant to the 'dispensing power' in s 10 of the *Wills Act,* if satisfied that the conditions specified in that section are met.

[23] Section 10 provides as follows.

> **10 When Court may dispense with requirements for execution of wills**
>
> (1) In this section, ***document*** means a record of information and includes:
>
> (a) anything on which there is writing;
>
> (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
>
> (c) anything from which sounds, images or writings can be reproduced with or without the aid of another thing or device; and
>
> (d) a map, plan, drawing or photograph.
>
> (2) If the Court is satisfied that a deceased person intended a document or part of a document that purports to embody the testamentary intentions of the deceased person (but which is not

executed in the manner required by this Act) to constitute his or her will or an alteration of his or her will or to revoke his or her will, the document or part of the document constitutes the will of the deceased person or an alteration of the will or revokes the will, as the case requires.

(3) In forming its view whether a deceased person intended a document or part of a document to constitute his or her will or an alteration of his or her will or to revoke his or her will, the Court may have regard (in addition to the document or a part of the document) to any evidence relating to the manner of execution or the testamentary intentions of the deceased person, including evidence (whether or not admissible before the commencement of this section) of statements made by the deceased person.

(4) This section applies to a document whether it came into existence in or outside the Territory.

[24] Before the Court can dispense with the requirements for execution and admit an informal will to probate, the Court must be satisfied of four things:

(i) that there is a document or a part of a document in existence;

(ii) that the document (or part thereof) purports to embody the testamentary intentions of the deceased person;

(iii) that the document was not executed in the manner required by the *Wills Act*; and

(iv) that the deceased person intended the document to constitute his or her will, or an alteration of his or her will.

[25] To be satisfied that the fourth requirement has been met, the Court must be satisfied that, either at the time of the document being brought into being, or at some later time, the deceased, by some act or words, demonstrated that it

was her then intention that the document should, without more on her part operate as her will.[1] It will not be sufficient if the document is intended to be a draft will.[2]

[26] A signature at the foot of a testamentary document has been found to carry the implication that the person intended the signature to give testamentary effect to the document.[3] The absence of a signature may invite the opposite inference.[4] However, the intention of the deceased is a matter of fact and each case must be decided on its own merits taking into account all of the circumstances.

[27] A relevant circumstance to be taken into account is whether the deceased was aware of the formalities required for making a valid will. (For example, the existence of a prior formal will has been found to be evidence that the deceased was aware of the formal requirements for making a will.)[5]

[28] If the Court is satisfied that the four factual conditions are met, the Court may make a declaration that the particular document constitutes the person's will.

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1 *Hatsatouris v Hatsatouris* [2001] NSWCA 408 at [56]. This was said in relation to s 18A of the *Probate and Administration Act* 1898 (NSW) which was not materially different from s 10 of the *Wills Act*. *Hatsatouris* was followed by the Queensland Court of Appeal in *Lindsay v McGrath* [2016] 2 Qd R 160.

2 *Oreski v Ikac* [2008] WASCA 220 at [54] per Newnes AJA (Martin CJ and McLure JA agreeing). This case involved consideration of s 34 of the *Wills Act 1970* (WA) which is the equivalent of s 10 of the *Wills Act* (NT).

3 See for example *Re Newman v Brinkgreve; Estate of Verzijden* [2013] NSWSC 371 at [104]

4 See *Kedzier v Postle* [2002] NSWSC 875 at [36]

5 *Re Estate of Brock; Chambers v Dowker* (2007) 1 ASTLR 127; [2007] VSC 415 at [34]-[37]; cf *Lindsay v McGrath* [2016] 2 Qd R 160 at [25] in which the making of a prior formal will did not allow the inference that signing was a known requirement for validity.

Parameters of the dispute

[29] The plaintiff and the first and second defendants have very sensibly entered into a Deed of Agreement under which they have agreed how the assets of the deceased's estate are to be administered and distributed and they will each be bound by the terms of that agreement regardless of whether the 1970 Will or the Informal Documents are admitted to probate.[6]

[30] I am asked to determine whether the Informal Documents constitute the last will and testament of the deceased purely for the purpose of determining whether letters of administration with the 1970 Will annexed should be granted to the plaintiff, or a declaration should be made that the Informal Documents constitute the deceased's will and probate of that will be granted to the plaintiff as the executor.

[31] By leave, the parties submitted joint written submissions in which the facts were set out and joint submissions made as to the applicable law. There followed in those submissions, sections setting out the differing submissions of the plaintiff and the defendants as to whether the Informal Documents should be declared to be the will of the deceased under s 10 of the *Wills Act*.

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6 The Deed of Agreement provides [in clause 4.1 (g)] that, "The gifts stated in the [Informal] Documents in favour of the Deceased's grandchildren will be paid, whether or not the [Informal] Documents are admitted to probate, to each respective grandchild's parent, for the benefit of that respective grandchild." This being the case, the grandchildren have no interest in the outcome of this proceeding.

Plaintiff's submissions

[32] The plaintiff submits that the Informal Documents found among the deceased's papers satisfy the conditions in s 10(2) and that:

(a) a declaration should be made pursuant to s 10(2) that those documents constitute the will of the deceased; and

(b) an order should be made that a grant of probate of that will be made to the plaintiff, who is named as executor in three of the documents.

The plaintiff's submissions did not elaborate further.

Defendants' submissions

[33] The defendants submit that the documents are in the nature of notes preparatory to making a will and that this Court cannot be satisfied that the deceased intended that any of them would operate, without more, as her will.

[34] The defendants rely on the following factual matters.

(a) Of the five documents, only one is signed, and that document is undated (the type-written date of 12th December 1999 which appears at the foot appearing to be part of the printed form).

(b) The five documents cannot sensibly be read together as a single testamentary document.

(c) The deceased was a retired, experienced solicitor who had previously made a formal will and whom, it can be assumed, was fully familiar with the legal requirements for the execution of wills and codicils.

(d) The documents do not appear to have been made in circumstances of urgency that may otherwise have made it difficult for the deceased to:

(i) consult a solicitor to have a formal will prepared, or

(ii) to prepare a single document, to encapsulate her settled testamentary wishes.

(e) The Informal Documents were all located together, in a carry case marked "My Will (STOPPED)".

Conclusion

[35] As can be inferred from the descriptions and analysis of the Informal Documents at [13](a) to (e) above, in my view it is plain that the Informal Documents were not intended by the deceased to constitute her will – either individually or collectively. They represent three draft wills. The evidence suggests that the deceased intended to make a new will in which she left the house at Larrakeyah to the plaintiff and her money deposits to her grandchildren. She started the process by filling in a "Draft Will" form and adding handwritten clauses, including those on the separate page constituted by the second document. She then hand wrote a second draft in substantially the same terms, which she labelled "draft" and made drafting

notes on. She clearly intended amendments to be made to that second draft and then for it to be made into a format which would be signed by her and attested to by two witnesses in accordance with the formal requirements for a valid will. The signing and attestation clauses were handwritten on the document in the appropriate form but not executed. Later, she started, but did not complete, a third draft which incorporated at least one of the changes she noted should be made on the second draft (ie making provision for the executor's expenses). None of these documents was intended, without more, to constitute her final will. Rather, it is plain that the deceased had not yet completed the process of drafting her new will.

[36] The claim for a declaration that the Informal Documents constitute the last will of the deceased must fail. Letters of Administration with the 1970 Will annexed should be granted to the plaintiff.

Costs

[37] Because this application has been necessitated by the fact that the deceased left various documents of a testamentary nature, the parties have agreed that, in the circumstances, it is appropriate that an order be made that all parties' costs be paid out of the estate, on the indemnity basis.

ORDERS:

1. The plaintiff's application for a declaration that the Informal Documents constitute the will of the deceased is dismissed.

2. Subject to any formal requirements of the Probate Registrar, letters of administration with the 1970 Will annexed, be granted to the plaintiff.

3. All parties' costs are to be paid out of the estate on an indemnity basis.
