CITATION:	*The Estate of Estrella Nadonza Ellis* [2017] NTSC 56
PARTIES:	THE ESTATE OF ESTRELLA NADONZA ELLIS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	223 of 2016 (21701102)
DELIVERED ON:	25 July 2017
DELIVERED AT:	Darwin
JUDGMENT OF:	BARR J

CIVIL LAW – Probate – Australian national residing in the Philippines – suffering motor neuron disease – executed will by applying fingerprint or thumb print in lieu of written signature – will not "international will" under Convention – Northern Territory law "the internal law in force" to which execution of will had to conform – will "signed" and otherwise complied with requirements of *Wills Act* (NT) – order made authorizing Registrar to issue probate.

Wills Act (NT) s 8(1), s 8(3), s 46 (1), s 46(1)(b), s 46(1)(c), s 48B, Sch 2 Article 4, Sch 2 Article 9

Administration and Probate Act (NT) s 17

Morton v Copeland (1855) 16 CB 517, *Regina v Moore, ex parte Myers* (1884) 10 VLR 322, applied

Legal Services Board v Forster (2010) 29 VR 277, referred to

REPRESENTATION:

Solicitors:

Applicant:	Story & Associates

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Estate of Estrella Nadonza Ellis [2017] NTSC 56
No. 223 of 2016 (21701102)

THE ESTATE of **ESTRELLA NADONZA ELLIS**

CORAM: BARR J

REASONS FOR DECISION ON REFERENCE BY THE REGISTRAR

(Delivered 25 July 2017)

[1] On 19 July 2017, I made an order pursuant to s 17 *Administration and Probate Act* authorising the Registrar to issue probate of the will of the late Estrella Nadonza Ellis, deceased, dated 9 November 2015, to the appointed executor, Michael Francis Lane.

[2] Mr Lane is resident in Wanguri, a suburb of Darwin, and was a friend of the deceased. He applied for a grant of probate on 15 December 2016.

[3] The deceased lived in Darwin for many years, from 1985 at least. In late August or early September 2015, she returned to live in the Philippines. She was then suffering a motor neuron disease. Her will was made in the Philippines on 9 November 2015. She died in the Philippines just over six months later, on 19 May 2016.

[4] The assets of the deceased's estate were predominantly savings in the (Australian) People's Choice Credit Union, Club 55 Savings Account.

[5] The Registrar referred the application in accordance with s 17(2) *Administration and Probate Act*. The Registrar's particular concern was that the deceased executed her will in the Philippines by applying her fingerprint or thumb print to each page of the document, instead of a normal signature.

[6] The evidence of the applicant was that the deceased had great difficulty signing her name when she was a patient in the Royal Darwin Hospital in late August 2015. By 9 November 2015, when she executed her will, she was "very feeble, had difficulty in speaking and she was unable to hold a pen".[1] Mr Lane was able to depose to the state of the deceased in November 2015 because he travelled to the Philippines and visited her in hospital.

[7] The deceased's will was executed, as described in [5], in the presence of three witnesses who then certified that the deceased had "published" her will to them and "signed" the will on each page in their presence. None of the witnesses was a beneficiary. Each witness signed all pages of the will in the presence of the testatrix and in the presence of the other witnesses. The document was then notarized.

[8] There was no evidence that the will was valid under the laws of the Philippines. Notarization does not of itself connote legal validity.[2] However, in the absence of evidence that the will was valid under Filipino law, the

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1 Affidavit of Michael Francis Lane, promised 13 March 2017, pars 10 and 12.

2 Nor was the deceased's will an "international will" within the meaning of s 48B *Wills Act* (NT). A will is not an "international will" unless it is made in accordance with the requirements of the Annex to the Convention set out in Schedule 2 to the Act. There were a number of departures from those requirements, including the absence of the testator's declaration, pursuant to Article 4, and the absence of a certificate from an 'authorised person' in accordance with Article 9 establishing compliance with the obligations of the Annex to the Convention.

will might still be held to be properly executed if, inter alia, its execution conformed to the internal law in force in the place "of which the testator was a national either at the date of execution of the will or at the testator's death".[3]

[9] I was satisfied on the balance of probabilities that the deceased was an Australian national, both at the date of execution of her will and at the time of her death. She was the holder of an Australian passport, N2355925, issued to her on 20 April 2010, which showed her nationality as 'Australian'.[4] The passport had validity to 20 April 2020. To the extent that it is relevant, the passport was sighted and referred to (by its number) by the Notary Public who notarized the deceased's will on 9 November 2015. The passport was found by the deceased's niece amongst the deceased's possessions in the Philippines after her death.

[10] I then had to consider whether the execution of the will conformed "to the internal law in force … in the place of which the testator was a national …".

[11] The drafting of s 46(1)(c) *Wills Act* made the subsection somewhat difficult to apply in the Australian federal context, and in the facts of this case, but I concluded that Northern Territory law was the "internal law in force", to which execution of the will had to conform for the will to be deemed "properly executed" under s 46(1) *Wills Act* (NT).

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3 *Wills Act* (NT), s 46(1)(c).

4 Exhibit 'ML1' to the affidavit of Michael Francis Lane promised 20 June 2017.

[12] In Australia, in the absence of provision to the contrary under State or Territory law, execution by means of a fingerprint or thumbprint applied to a document may constitute valid signing.

[13] In the decision of the Full Court of Victoria in *Regina v Moore, ex parte Myers*,[5] Higinbotham J stated:

> A signature is only a mark and where a Statute merely requires that a document shall be signed, the Statute is satisfied by proof of the making of a mark upon the document by or by the authority of the signatory. Thus it has been held that when the Statute does not require that the document shall be signed with the name of the party signing, a cross … or initials … or a part only of the full name will be sufficient.

[14] I note that the relevant formal requirement for the valid execution of a will under s 8(1) *Wills Act* (NT) is that the will must be in writing and signed by the testator.[6] The Act thus "merely requires that the document be signed", not that it be signed with the name of the testator.

[15] In *Legal Services Board v Forster*,[7] a member of the Victorian Legal Services Board had communicated her consent to the Board's determination to apply for the appointment of a receiver by means of an email. Emerton J found that the Board member had intended her typed signature to stand as her signature. Moreover, the Board consented to her providing a signature in the form in which she did. His Honour apparently accepted a submission made on behalf of the Legal Services Board that 'the common law has long

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5 (1884) 10 VLR 322 at 324.

6 The signature must also be made or acknowledged by the testator in the presence of at least two witnesses, and must be made with the intention of executing the will – see *Wills Act* (NT) s 8(1)(b) and s 8(3)(a).

7 (2010) 29 VR 277 at [41].

held that a signature is not necessarily the writing of a name, but may be any mark which identifies it as the act of the party', citing *Morton v Copeland*.[8] In that case, Maule J said:

> Signature does not, necessarily, mean writing a person's Christian and surname, but any mark which identifies it as the act of the party.

[16] My conclusion from a reading of the authorities was that, where a testator intends that a mark or sign made by the testator on a will should stand for his or her name, a court should not be overly exacting in relation to the nature of that mark or sign. Depending on the facts of a case, a testator's thumb print or finger print would be sufficient, and particularly so in a case (such as the present) where the infirmity or physical incapacity of the deceased explained her inability to sign her name in the usual way.

[17] I was satisfied that the deceased's will was properly executed and that it was valid under Northern Territory law, specifically that it was in writing and "signed" by the testatrix and that it otherwise complied with the requirements of s 8(1) and s 8(3) *Wills Act* (NT). Moreover, it was clear from the affidavit evidence that the testatrix intended that the will should constitute her will, and I would be so satisfied pursuant to s 10(2) of the Act even in the event that the legal requirements for execution were not made out.

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8 (1855) 16 CB 517 at 535; 139 ER 861 at 869.

[18] Given that the deceased was an Australian national, both at the date of executing her will and at the time of her death, it was not necessary to decide the issues of ‘domicile’ or ‘habitual residence’ in relation to the requirements of s 46(1)(b) *Wills Act*.
