APK v JDS [2012] NTSC 96

PARTIES:	APK v JDS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	51 of 2012 (21220732)
DELIVERED:	3 July 2012
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JUDGMENT OF:	BARR J

CATCHWORDS:

SUCCESSION – Wills, probate and administration – statutory requirements of will – testamentary capacity – whether suicide note constitutes will

Wills Act (NT) s 8(1), s 10(2)

Bailey v Bailey (1924) 34 CLR 558; *Banks v Goodfellow* (1870) LR 5 QB 549; *Stuart v Kirkland-Veenstra* [2009] 237 CLR 215, considered

REPRESENTATION:

Counsel:

Applicant:	T Liveris
Respondent:	A Young

Solicitors:

Applicant:	Withnalls Lawyers
Respondent:	Maleys Barristers and Solicitors

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

APK v JDS [2012] NTSC 96
No. 51 of 2012 (21220732)

BETWEEN:

APK
Applicant

AND:

JDS
Respondent

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 3 July 2012)

[1] The deceased SDK [aged 41 at date of death] committed suicide by hanging on 5 February 2012.

[2] Found next to the deceased's body was a note written by him in a Spirax Note Pad notebook, which read as follows:

> "To the cops:-
>
> Well it has finally come to this. I Can't Keep Getting Kicked in the head from this shit. I leave everything to my son J. I mean all I own. I Know it is not much But after all is paid he should have a Bit of a Start. I am So Sorry J, I Love You So Much. But I Just Can't Go on any more. IT IS NOT YOUR fault.
>
> JDS – I Give You Nothing You have been the Biggest Bitch! Thank For J, But now fuck off.

> My family is to look after my money until J is old enough to take over.
>
> BLK is to have NO Say or intervention in these issues.
>
> I want to Be Burned and Scattered over the Sea. NO Big Funeral, Just Burn me and fuck me off.
>
> I am So Sorry for being me. Just a wanker, Low Life, cock head.
>
> Catch you all on the other side.
>
> I am So Sorry J.
>
> I Love You. XXXXXXX
>
> K, I Love You with all my heart. Please Be [*illegible, possibly "onest", ie, honest*]
>
> Miss You. XXXXXX
>
> I love you Mum and family. take care I will Be watching.
>
> Love to You all.
>
> NO more Drama's NOW.
>
> all free and ezey.
>
> Weak prick I am.
>
> Bye all.
>
> Please look after my Kids Someone!!
>
> Good Bye
>
> XXXXXXXXXX

[3] JDS is the former de facto partner of the deceased and is the mother of the deceased's son, J. BLK is the brother of the deceased.

[4] The note took up three pages in the note book. There is no issue that the handwriting was that of the deceased.[1] The deceased also wrote the words "Such is Life", with triple underlining, on the following page of the notebook.[2]

[5] The plaintiff seeks an order pursuant to s 10(2) of the *Wills Act* (NT) that "the undated document written and unsigned by the deceased and found next to his body on 5 February constitutes his last will and testament."

[6] Under s 8(1) *Wills Act*, the document written by the deceased is not a valid will because it does not satisfy the statutory requirements that it be signed by the testator (s 8(1)(a)) and that such signature be made or acknowledged by the testator in the presence of two or more witnesses present at the same time (s 8(1)(b)).

[7] Notwithstanding formal invalidity, however, the document will still constitute the will of the deceased if the Court is satisfied that the deceased intended that the document (or part of the document that purports to embody his testamentary intentions) constitute his will.[3]

[8] In forming a view as to whether the deceased intended the document or part document to constitute his will the Court may have regard, in addition to the document itself, to any evidence relating to the manner of execution or the

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1 See par [3] affidavit of BLK sworn 13 June 2012.
2 The notebook, including the relevant 3 pages extracted in par [2], is annexure "A" to the affidavit of BLK sworn 13 June 2012.
3 s 10(2) *Wills Act* (NT).

testamentary intentions of the deceased, including evidence of statements made by the deceased.[4]

[9] In the present case, the document purports to embody the testamentary intentions of the deceased. The contents of the document provide clear evidence that it was written in contemplation of his imminent death, and demonstrate the deceased's wish to give all his property after his death to his son. The deceased emphasised the gift to his son by the additional words "I mean all I own". The testamentary intentions of the deceased are unambiguous.

[10] The deceased did not specify any particular person to be the executor of his will or the trustee of his estate. However, he made it clear that he did not want BLK to have any "say or intervention in these issues", a reference to the administration of his estate and the trusteeship of the moneys he assumed would be realised. The deceased attempted to appoint his family (excluding BLK) as the trustees of the money he assumed would be ultimately realised for his son and sole beneficiary.[5]

[11] The document purports to embody the testamentary intentions of the deceased and I am satisfied that the deceased intended the document to constitute his will. Therefore, as a result of the operation of s 10(2) *Wills Act*, the document constitutes the will of the deceased.

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4 s 10(3) *Wills Act* (NT).

5 I mention these matters only in terms of my consideration as to whether the document "purports to embody the testamentary intentions of the deceased person" within the meaning of s 10(2) and in considering whether the deceased intended the document to constitute his will.

[12] There is no issue as to mental illness or lack of testamentary capacity on the part of the deceased. Neither party has put evidence before the Court or made submissions to suggest that the deceased lacked testamentary capacity at the time he wrote the note which, as a result of my finding in par [11], constitutes his will.

[13] *Banks v Goodfellow* (1870) LR 5 QB 549 was a case (unlike the present) in which the testator had suffered mental illness. Cockburn CJ, delivering the judgment of the Court, said at 565:

> It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

[14] Relevant to mental illness, Cockburn CJ continued at 565-566:

> If therefore, though mental disease may exist, it presents itself in such a degree and form as not to interfere with the capacity to make a rational disposal of property, why, it may be asked, should it be held to take away the right? It cannot be the object of the legislator to aggravate an affliction in itself so great by the deprivation of a right the value of which is universally felt and acknowledged. If it be conceded, as we think it must be, that the only legitimate or rational ground for denying testamentary capacity to persons of unsound mind is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in making his will, and to influence his decision as to the disposal of his property, it follows that a degree or form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result, ought not to take away

> the power of making a will, or place a person so circumstanced in a less advantageous position than others with regard to this right.[6]

[15] In *Bailey v Bailey* [1924] HCA 21; (1924) 34 CLR 558, at 570-572, Isaacs J (Gavan Duffy and Rich JJ agreeing) summarised a number of propositions drawn from the case law, including from *Banks v Goodfellow*. Specific mention was made of possibly relevant circumstances which a court might take into account to determine whether illness[7] has affected testamentary capacity, including: (1) the nature of the will itself regarded from the point of simplicity or complexity, or of its rational or irrational provisions, its exclusion or non-exclusion of beneficiaries ...; and (2) the exclusion of persons naturally having a claim upon the testator.[8] These two circumstances were thus mentioned as possible indicators that testamentary capacity had been adversely affected by mental illness.

[16] In the present case, the deceased's intentions were expressed in his will in simple, clear and rational terms. Appropriately, his son was named as sole beneficiary. The parties have not suggested that any person was inappropriately excluded.

[17] The fact that the deceased had formed the intention to end his life does not affect the presumption of testamentary capacity. As French CJ said in *Stuart v Kirkland-Veenstra* [2009] 237 CLR 215 at [46]:

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[6] See the further remarks of Cockburn CJ to similar effect at 569-570.
[7] *Bailey* was a case of a physically infirm testator, and the issue was whether his physical illness had affected his testamentary capacity.
[8] 34 CLR 558 at 571.

> The common law does not even support the general proposition that attempted suicide or suicide gives rise to a presumption of mental illness, at least not to the extent that would amount to testamentary incapacity. A testator's suicide, following shortly upon the making of a will, does not raise a presumption of testamentary incapacity.

[18] French CJ later referred in the same paragraph to the "longstanding caution of the common law" about treating attempted suicide as necessarily reflecting mental illness, and referred to "the complexity and variety of factors which may lead to suicidal behaviour".

[19] There is no factual or legal basis on which I could find that the deceased lacked testamentary capacity at the time he wrote the note which constitutes his will.

Conclusion

[20] I declare that the handwritten note extracted in par [2] above constitutes the will of SDK deceased.

[21] This judgment has been edited to prevent or at least minimise the possibility of a member of the public identifying the parties or any other person.