

# CONSTRUCTION OF WILLS IN AUSTRALIA

DAVID HAINES

FOREWORD

The Hon Justice Michael Kirby AC CMG\*

In June 1904, within less than a year of its establishment, the High Court of Australia was hearing appeals concerning the meaning and effect of wills. In the very first volume of the *Commonwealth Law Reports* a decision appears in which the Court had to consider a will by a grateful but ill-advised parishioner in Cowra whose gift to her parish priest was held not to be a good gift for charitable purposes and void for uncertainty<sup>1</sup>.

In the second volume, two cases appear concerned with the construction of wills: *Caraher v Lloyd*<sup>2</sup> and *Parkin v James (No 2)*<sup>3</sup>. In the third volume, in 1906, there were no fewer than five cases concerned with wills and probate duty<sup>4</sup>. Four of them derived from

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<sup>1</sup> *Attorney-General (NSW) v Metcalfe* (1904) 1 CLR 421.

<sup>2</sup> (1905) 2 CLR 480.

<sup>3</sup> (1905) 2 CLR 565.

<sup>4</sup> *Smidmore v Smidmore* (1906) 3 CLR 344; *Epple v Stone* (1906) 3 CLR 412; *Butler v Trustees Executors and Agency Co Ltd* (1906) 3 CLR 435; *Jenkins v Stewart* (1906) 3 CLR 799; and *Webb v McCracken* (1906) 3 CLR 1018.

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Victoria, suggesting the power of propinquity as the Court's original seat was, like that of the Parliament, in Melbourne. Maybe the explanation lies in the general prosperity of Victoria at the dawn of Federation to which it had contributed much of the dynamic propulsion.

By the seventh volume of the *CLRs*, in 1909, there were four cases on the construction of wills. One came from the Supreme Court of Western Australia and reversed the order of that court<sup>5</sup>. Another affirmed the decision of the Supreme Court of Tasmania. But Justice Isaacs had arrived in 1906. He dissented in the last appeal, breaking the spell of unanimity that had persisted amongst the original three Justices. In will cases, they had habitually concurred in a single opinion delivered by Chief Justice Griffith. The point of Justice Isaacs' dissent rested on the familiar distinction that he acknowledged between "What did the testator mean to say?" and "What is the meaning of that which he has said?"<sup>6</sup>.

Over the years, up to comparatively recent times, the High Court of Australia enjoyed a lively engagement with the problems presented by the construction of wills and the associated legal difficulties arising in the administration of assets; charities; death, estate and probate duty; federal estate duty; the rights and powers of executors and

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<sup>5</sup> *In re Padbury; Hope of Peace for the Dying and Incurable v Solicitor-General* (1909) 7 CLR 680.

<sup>6</sup> *Nicol v Chant* (1909) 7 CLR 569 at 589.

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administrators; the law governing life tenancies and remaindermen; perpetuities; powers of appointment; probate and letters of administration; testator's family maintenance; and trusts and trustees.

When, in 1986, Professor Pat Lane compiled his invaluable index to the first 150 volumes of the *CLRs*, the fine print contained five closely typed pages of cases concerned with wills. Many of them afford the staple authority now noted in the text and footnoted in this splendid book by David Haines. The variety of problems presenting for judicial decision was equalled only by the human interest of many of them. The attempts of testators to provide for the future that they themselves would never know and to control the destinies (or at least the assets) of family members and other beneficiaries tell stories that hold a measure of fascination that lasts from law school to the grave.

My graduating law school class recently celebrated forty-five years of survival. Those who foregathered have so far escaped the files and red tape of the Probate Division. At our reunion, we remembered our teachers, one of whom was the late Justice Frank Hutley. He taught the law of Succession to generations of Sydney law students. He instructed us in the intricacies of the law of wills. He set very high standards in marking our examination scripts. Correctly, he realised that these were not topics for imprecise generalities. Accuracy and a thorough understanding of many inter-related areas of the law were essential before a lawyer could really call him or herself an expert on the law of wills.

In those far off days, we survived with cyclostyled notes prepared by Frank Hutley, bearing little evidence of revision from the middle 1940s when he first began to teach the topic. As I read David Haines' book my mind travelled back nearly five decades. If only I had had this book at that time, my life as a law student, articled clerk and young practitioner would have been so much easier. Above all, I applaud the clear layout and logical presentation of this work. The wealth of case law, and the references to the new legislative provisions enacted in the several jurisdictions of Australia, will be a boon to lawyers struggling to achieve that precision and excellence of expression that Frank Hutley tried to inculcate in our class, with only mixed success. It is a high tradition that David Haines has striven to maintain.

A great change has come about the involvement of the High Court of Australia in cases concerned with wills since Professor Lane's index up to volume 150 of the *CLRs*. In the second consolidated index, which collects the new cases to 1982, there is but one reported decision of the Court concerned directly with the law governing wills and that in the context of negligence law<sup>7</sup>. Another appeal may be added to those sparse pickings if an appeal on testator's family maintenance law can be included<sup>8</sup>. In *Singer v Berghouse*<sup>9</sup>, the High Court approved some

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<sup>7</sup> *Hawkins v Clayton* (1988) 164 CLR 539.

<sup>8</sup> *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306.

<sup>9</sup> (1994) 181 CLR 201.

words I had uttered about that case when it was before the Court of Appeal of New South Wales<sup>10</sup> and earlier in *Hunter v Hunter*<sup>11</sup>. Naturally I remember that decision. Yet those cases are memorable mostly because they stand out on a barren landscape, affected by the introduction of universal requirements for special leave to appeal in civil appeals to the High Court<sup>12</sup>.

For most of its first century, the High Court of Australia was required to hear civil appeals as of right, when the issue at stake needed only a comparatively modest financial sum to qualify for a hearing. With the changes introduced in 1976, a major shift occurred in the Court's business as it turned to concentrate on cases, chosen by itself, substantially on the subjects of federal, public and statutory law. The result has been a dearth of appeals specifically addressed to the construction of wills and other testamentary concerns. Where such a question now arises, it is usually only in a peripheral way, as in the recent decision (in a revenue context) concerning the law of charities in Australia: *Central Bayside General Practice Association Ltd v Commissioner of State Revenue*<sup>13</sup>. In the third consolidated index to the *CLRs*, and in the supplementary index (vols 185-222) there is not a

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<sup>10</sup> (1994) 181 CLR 201 at 212.

<sup>11</sup> (1987) 8 NSWLR 573 at 576.

<sup>12</sup> *Judiciary Act* 1903 (Cth), ss 35, 35AA; *Federal Court of Australia Act* 1976 (Cth), s 33; *Family Law Act* 1975 (Cth) s 95.

<sup>13</sup> (2006) 80 ALJR 1509; 229 ALR 1.

single case concerned with the law of wills and only one addressed to a family provision statute<sup>14</sup>. Such are the changing times.

Reading through David Haines' book, I have come to the conclusion that the pendulum has swung too far. The High Court needs to rediscover the fascination and importance of the law of wills evident in earlier times and demonstrated in these pages. This is private law. Eventually it concerns most people living in Australia. It is a people rich subject of law. The apex court needs to revisit it.

In the intermediate courts of Australia, will cases remain quite common. Soon after my appointment to the New South Wales Court of Appeal, I had to participate in the decision in *Harris v Ashdown*<sup>15</sup>. Justice McHugh and I, in our earlier manifestations, made common cause in the majority holding that the old English cases, upholding the rule of construction that the word "child" in a will meant only the legitimate child of the testator, should no longer be followed because inapplicable to the altered social attitudes and legislation of the contemporary Australian society in which the will was written. No doubt some of the other authorities discussed, or footnoted, in David Haines' book need to be viewed with a similar caution. Of its nature, this is an area of the law replete with ancient precedents. Each and every one of

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<sup>14</sup> *Barns v Barns* (2003) 214 CLR 169.

<sup>15</sup> (1985) 3 NSWLR 193.

them should be re-read today in the light of the two considerations mentioned in *Harris*: changing social attitudes and expanding local legislation.

I hope that the inclusion in this text of the panorama of case law and legislation relevant to wills will enliven a greater appreciation of the importance of this area of the law. It would be my prayer that, in the next edition of the work, drawing on his encyclopaedic knowledge of the cases and legislation, David Haines will add a further chapter, suggesting future directions for the law of wills in Australia; identifying areas in possible need of law reform; and exploring analogies (if any) between developments in the law governing the construction of wills and the changes that have come about in the construction of contracts, statutes and other legal documents<sup>16</sup>.

For the present, we can be grateful for this work of taxonomy replete with reference materials, ancient and modern. This book will be of great value to law students, practitioners and judges. It may spark a renewed interest in testamentary law in Australia's final Court, for it is certain that changing times and new legislation merit fresh attention to some of the old rules collected here.

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<sup>16</sup> cf M D Kirby, "Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts", (2003) 24 *Statute Law Review* 95.

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