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Electronic wills and jurisdictional issues surrounding a “digital estate”

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PRINCIPAL THEMES

- The legal position pertaining to electronic ‘wills’ and documents in the context of:
 - South African law
 - foreign jurisdictions
- Challenges posed in the above mentioned regard

INTRODUCTION AND GENERAL BACKGROUND

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Testate succession \implies intention of testator \implies AS
EXPRESSED IN A WILL

Will - no statutory definition (existing definitions should include all the requirements necessary for a will to be valid/for a document to become a will)

Valid execution of a will entails that all the statutory requirements have been complied with (s 2(1)(a) of the Wills Act 7 of 1953 as amended) - De Waal (2008:53)

Purpose of formalities - Corbett (1980:36):

In ancient law the execution of a will was regarded as a solemn act and was invested with a high degree of formality. The retention of a measure of formality in modern law is designed to curtail opportunities for fraud and to ensure as far as possible that wills reflect the genuine and voluntary dispositions of testators.

Functions of formalities – evidentiary, cautionary, channeling, protective and identifying.

Formalities versus formalism

Langbein (1975:489):

What is peculiar about the law of wills is not the prominence of formalities, but the judicial insistence that any defect in complying with them automatically and inevitably voids the will.

Reid *et al* (2011:462):

The slow but steady shift from strict formalism ...

In modern law there is a general trend to move away from formalities...

THERE IS STILL A NEED TO RETAIN A LEGAL REQUIREMENT FOR WILL FORMALITIES - South African Law Commission (1986:5) and Reid *et al* (2011:433)

Is the current will form and formalities still relevant/sufficient in ‘a quicksilver technological environment’? - Papadopoulos (2012:93)

Reid *et al* (2011:363):

The court distinguished commercial transactions from wills by noting that ‘much more formality has historically been required in the execution of wills than in the execution of the day-to-day business and commercial papers.’

Raubenheimer v Raubenheimer 2012 (5) SA 290 (SCA) [par 1]:

It is a never-ending source of amazement that so many people rely on untrained advisors when *preparing their wills, one of the most important documents they are ever likely to sign.*

Is this a *renewed* call for reform?

- 1904 – typed wills
- 1972 – ‘toonbandopname’/ ‘El testamento ológrafo’
- 1990 – videotaped wills

Is this a *necessary* call for reform?

‘Digital Revolution’, ‘Information age’, ‘Technological era’,
‘paperless society’, ‘online existence’, ‘digital estate’

ELECTRONIC 'WILLS' AND DOCUMENTS – SOUTH AFRICAN LAW

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Electronic 'wills':

Electronic Communication and Transactions Act 25 of 2002 (ECT Act) excludes wills from the Act's compass: S 4(3) read with Schedule 1 and S 4(4) read with Schedule 2

Result: A will cannot be executed electronically

Electronic documents:

S 2(3) of the Wills Act – three requirements:

- a document must be presented to the court
- this document must have been drafted or executed by the deceased
- the deceased must have intended this document as a will

Nothing in the ECT Act that prevents the application of the condonation provision to be applied - Wood-Bodley (2004:527)

- *MacDonald v The Master* 2002 (5) SA 64 (O)
- *Lindeque*-case (unreported Free State decision 2006)
- *Van der Merwe v The Master* 2010 (6) SA 544 (SCA)
- *Ex parte Porter* 2010 (5) SA 546 (WCC)

Electronic version versus printout wrt INTENTION

ELECTRONIC 'WILLS' AND DOCUMENTS – FOREIGN JURISDICTIONS

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Electronic wills:

Formally recognised:

Nevada (NRS 133.085) in the United States of America enacted legislation to enable electronic wills

Problem: 'The requirement for the authoritative copy make compliance with the Nevada Electronic Wills Statute impossible because there is no software capable of meeting these requirements.' Schwarzentraub (2013:1)

Accepted:

In re estate of Javier Castro (Case no.: 2013ES00140)

Taylor v Holt 134 SW3d 830 (Tennessee Court Appeals, 2003)

Electronic documents:

Re: Yu [2013] QSC 322 (6 November 2013)

CHALLENGES POSED

- Electronic media
 - security
 - Access (knowledge/accessibility)
- Formalities
 - Signatures (electronic signature, advance electronic signature, digital signature)
 - in the nature of a process (advanced electronic signature)
 - can be removed
 - certification authorities become susceptible to fraudulent or erroneous issuance
- Electronic estates
 - definition
 - property rights (monetary value/sentimental value)
 - jurisdictional issues

CONCLUSION

We *are* in a technological era – we must start exploring the new possibilities that come part and parcel with it. Van Staden and Rautenbach (2006:586) state:

By using and understanding technology, the integrity and genuineness of an electronically executed will can be ensured.

S 2(3) provides a good platform to start exploring how to deal with technological changes and challenges

With the importance of formalities in mind, the new challenge is to reformulate current formalities in the interest of finding a new regime that facilitates the fullest possible formal carrying out of the testator's intention

Current position:

‘Worldwide will’ – international assets

‘Traditional (paper) will’ – national assets

‘Additional traditional (paper) will’ – digital estate

‘Australian makes digital will’ (on his watch with digital signature from himself and two witnesses).

It gives a new meaning to ‘watch this space’!

Thank You