

To Dispense or Not to Dispense?

A Comparison of Dispensing Powers and Their Judicial Application

Juliet Brook*

It is not known how many wills fail due to non-compliance with the formalities set out in s9 Wills Act 1837,¹ but strict application of the formalities requirements can frustrate the testator's intentions.² Although the presumptions of due execution have occasionally enabled the English courts to take a liberal approach to the witnessing requirements,³ and the 'strong public interest in valid testamentary dispositions being upheld' has recently been noted,⁴ there is no discretion by which the court can overlook proven imperfections.⁵ The Law Commission's proposal to introduce a dispensing power would enable the courts to admit a will to probate despite non-compliance with formalities.⁶ They argue this will ensure testamentary freedom and avoid the 'unsatisfactory consequence' of an intestacy.⁷ However it is important that the scope and extent of these powers is considered carefully.

This series of three articles will briefly explain the justifications for dispensing powers, and will examine the different attributes of the dispensing powers in Australia, New Zealand, the USA (under the Uniform Probate Code) and South Africa. There will be greater analysis throughout of the Australian caselaw, partly because the testamentary formalities of the Australian states are most closely aligned with those in England⁸ and partly because this is where dispensing powers have been in place for longest. The diversity amongst the models of dispensing powers, and the competing tensions inherent in the exercise of them, will be demonstrated and these findings will be used to identify the key considerations for the Law Commission if dispensing powers are to be introduced in England and Wales.

* Principal Lecturer, University of Portsmouth

¹ Law Commission, *Making a Will* (Law Com No 231, 2017) para 5.90. The Law Reform Committee's Twenty-Second Report (The Making and Revocation of Wills) (1980) (Cmnd 7902) previously rejected the notion of a dispensing power partly because only a "tiny minority" of wills failed due to formalities defects (para 2.5)

² *Ahluwalia v Singh* [2011] EWHC 2907 (Ch) [127]

³ For example *Weatherhill v Pearce* [1995] 1 WLR 592, in which a will that appeared to be validly signed and witnessed was upheld in the absence of 'clear evidence of non-compliance.' (598 (Kolbert HHJ))

⁴ *Payne v Payne* [2018] EWCA Civ 985 [45]

⁵ *Re Groffman* [1969] 2 All ER 108

⁶ Law Commission, *Making a Will* (Law Com No 231, 2017) Chapter 5

⁷ Law Commission, *Making a Will* (Law Com No 231, 2017) paras 5.87-5.88

⁸ In particular the Australian states do not permit holograph wills, but these are widely accepted across the USA.

The Argument for Dispensing Powers

Whilst it is logical that a will that was made without testamentary intent but otherwise complies with the formalities will not be valid,⁹ the rationale for the converse situation which invalidates the will of a testator who had testamentary intent but did not comply with the formalities is less clear. The solution advocated by Professor John Langbein in 1975¹⁰ was to take a functionalist approach to formalities; Langbein reasoned that the formalities serve a purpose but that they are not, in themselves, essential for the creation of a valid will. The statutory formalities are generally seen to perform four main functions:

1. Evidentiary – both that the will was made by the testator, and to provide clear evidence of the testator’s wishes
2. Cautionary – alerting the testator to the serious nature of the document so that it is given due consideration
3. Channelling – the testator knows that they have carried out an accepted and well-defined method of disposing of their property on death
4. Protective – shielding the testator from fraud and undue influence.¹¹

Together, the formalities provide evidence that the testator intended to make the will, that it reflects the testator’s intentions and was freely entered into by the testator. Due compliance with the formalities raises a presumption of this, saving the courts from having to analyse each will in detail. Langbein’s proposal was that, instead of non-compliance automatically rendering a will void, it should be possible for ‘the proponents in cases of defective execution to prove what they are now entitled to presume from due execution – the existence of testamentary intent and the fulfilment of the Wills Act purposes’.¹² However it is implicit within this functionalist approach to testamentary formalities that these functions should be adequately performed in another way; to do otherwise creates uncertainty, risks a person creating a legally binding document inadvertently, or increases the risk of fraud.

There are two disparate mechanisms by which these powers might operate. The first is to consider whether there has been ‘substantial compliance’ with the formalities. This was the approach first

⁹ *Lister v Smith* (1863) 164 ER 1282

¹⁰ Langbein, ‘Substantial Compliance with the Wills Act’ (1975) 88(3) *Harvard Law Review* (1975) 489

¹¹ Law Commission, *Making a Will* (Law Com No 231, 2017) para 5.6. These were expounded in Langbein’s 1975 article and for the purposes of this article it will be accepted that all four perform some function in the attestation formalities.

¹² Langbein, ‘Substantial Compliance with the Wills Act’ (1975) 88(3) *Harvard Law Review* 489, 513

advocated by Langbein in 1975¹³ and it was adopted by Queensland in 1981.¹⁴ However a strict judicial interpretation of the requirement for substantial compliance resulted in very few successful cases, and Langbein later described the measure as a ‘flop’.¹⁵

The alternative is to consider whether, notwithstanding the defect in attestation, the testator demonstrated testamentary intention in creating the document.¹⁶ A statutory dispensing power that took this approach was introduced in South Australia in 1975¹⁷ and since then has spread across a number of common law countries.¹⁸ The advantage of such a flexible approach is that there is no need to try to predict the way in which a testator will fail to comply with the formalities. The South Australian dispensing power was described by Langbein as ‘a triumph of law reform’¹⁹ and it is this model that is preferred by the Law Commission, observing that the history of Queensland’s substantial compliance doctrine is ‘a cautionary tale’.²⁰

It is hardly surprising that the intention based approach won out over the substantial compliance model. Testamentary intention is already a requirement for a valid will, so detailed consideration of intention is not a novel concept for the courts.²¹ Indeed, the Law Commission has suggested that judicial analysis of the evidence to establish testamentary intention may ‘offer more protection than adherence to a particular form.’²² However this article will demonstrate that not all of the principles of testamentary intention translate easily from validly executed wills to non-Wills Act 1837 compliant wills, and that the goal of prioritising the testator’s intentions raises complex questions about the application of dispensing powers.

¹³ Langbein, ‘Substantial Compliance with the Wills Act’ (1975) 88(3) *Harvard Law Review* 489, 489 and 515-516

¹⁴ Succession Act 1981 (Qld) s 9

¹⁵ Langbein, ‘Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law’ (1987) 87 *Columbia Law Review* 1, 1

¹⁶ As Langbein expressed it in 1975, they have shown ‘intent to use the probate system, intent to make a will.’ – Langbein, ‘Substantial Compliance with the Wills Act’ (1975) 88(3) *Harvard Law Review* 489, 524

¹⁷ Wills Act 1936 (SA), s 12(2)

¹⁸ The first state in Australia to adopt a dispensing power was South Australia in 1975 with the enactment of s 12(2) Wills Act 1936. Other states followed suit and all now have a dispensing power. Further examples can be seen in s 2(3) Wills Act 1953 in South Africa, added in 1992, the Uniform Probate Code in the USA (s 2-503) and the Canadian Uniform Wills Act 2000 s 19.1

¹⁹ Langbein, ‘Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law’ (1987) 87 *Columbia Law Review* 1, 1

²⁰ Law Commission, *Making a Will* (Law Com No 231, 2017) para 5.83

²¹ In England, questions of testamentary intention have been prevalent in the context of privileged wills made under s 11 Wills Act 1837, discussed below. See also Langbein, ‘Substantial Compliance with the Wills Act’ (1975) 88(3) *Harvard Law Review* 489, 514

²² Law Commission, *Making a Will* (Law Com No 231, 2017) para 5.86

The Terms of the Statutory Dispensing Powers

The original South Australian dispensing power has been re-drafted twice since its inception in 1975; Langbein suggested that the original statutory provision ‘was not a carefully considered product.’²³ The plethora of slightly differently worded provisions within Australia alone demonstrates that there is no clear consensus as to exactly what the scope (or indeed the limitations) of an intention-based dispensing power should be. Despite their differences, there are noticeable similarities in that all of them include requirements that there is a document, that the document contains the testamentary intentions of the deceased and that the deceased intended the document to constitute his or her will.²⁴ The following three questions, set out in *Hatsatouris v Hatsatouris*, have been adopted by the courts in their application of dispensing powers across Australia and best sum up the Australian requirements:

- a. was there a document?
- b. did that document purport to embody the testamentary intentions of the relevant Deceased?
- c. did the evidence satisfy the Court that, either, at the time of the subject document being brought into being, or, at some later time, the relevant Deceased, by some act or words, demonstrated that it was her, or his, *then* intention that the subject document should, *without more on her, or his, part* operate as her, or his, Will?²⁵

Similarly, there is no comprehensive probate law covering all of the USA, but the Uniform Probate Code does contain a dispensing power (known as the ‘harmless error’ provision) in the following terms:

Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute:

- (1) the decedent’s will...²⁶

²³ Langbein, ‘Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law’ (1987) 87 *Columbia Law Review* 1, 10

²⁴ Wills Act 1968 (ACT) s 11A; Succession Act 2006 (NSW) s 8; Wills Act 2000 (NT) s 10; Succession Act 1981 (Qld) s 18; Wills Act 2008 (Tas) s 10; Wills Act 1997 (Vic) s 9; Wills Act 1970 (WA) s 32; Wills Act 1936 (SA) s 12(2)

²⁵ *Hatsatouris v Hatsatouris* [2001] NSWCA 408 [56] (emphasis in original). This case was applying s 18A of the Wills Probate and Administration Act 1898 (NSW) and has since been followed in the other states.

²⁶ Uniform Probate Code, s 2-503

Only ten states have adopted the harmless error provision, and out of those ten, three (California, Virginia and Ohio) have opted for a more limited version of this provision that still requires the will to be signed by the deceased²⁷ whilst Colorado requires the deceased to have signed or acknowledged the document.²⁸

In South Africa their Condonation Principle enables a document to be admitted to probate if the court is satisfied that the document was 'drafted or executed by a person who has died since the drafting or execution thereof [and] was intended to be his will or an amendment of his will'.²⁹

Finally New Zealand has been the most recent adopter of a dispensing power, introducing the following provision in 2007: 'The High Court may make an order declaring the document valid, if it is satisfied that the document expresses the deceased person's testamentary intentions.'³⁰ This is the briefest of all of the dispensing powers considered in this article.

It is immediately noticeable that all of these provisions require that there be a 'document', emphasising the importance of the evidential function, but the definition of a document differs. In New Zealand, 'document' is confined to written records³¹ but this has been held to include transcripts of audio recordings, even if those transcripts are created after the death of the deceased.³² In Australia the current statutory requirements define 'document' to include both hard and soft copy documents and recordings³³ and these have been used to admit DVD recordings and documents on computers, iPhones and USB sticks to probate,³⁴ along with text messages.³⁵ The Law Commission's consultation echoes the Australian provisions, proposing that the dispensing power be drawn widely enough to cover both traditional documents and electronic or audio-visual recordings³⁶ although there

²⁷ D Horton, 'Partial Harmless Error for Wills: Evidence From California' (2018) 103 *Iowa Law Review* 1, 15. A number of states also permit holograph wills though, which may lessen the perceived need for adoption of a harmless error provision.

²⁸ Colorado Revised Statutes s 15-11-503(2)

²⁹ Wills Act 1953 (SA) s 2(3)

³⁰ Wills Act 2007 (NZ) s 14(2)

³¹ Wills Act 2007, s 6 and Interpretation Act 1999, s 29

³² *Pfaender v Gregory* [2018] NZHC 161 [33]-[34]

³³ N Peart, 'Testamentary Formalities in Australia and New Zealand' in K G C Reid, MJ De Waal and R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (OUP 2011) 351. See, for example, Wills Act 1970 (WA) s 32, Wills Act 2000 (NT) s 10, Wills Act 2008 (Tas) s 10, Wills Act 1997 (Vic) s 9, Succession Act 1981 (Qld) s 5, Succession Act (NSW) s 3, Acts Interpretation Act 1915 (SA) s 4

³⁴ Langbein, 'Absorbing South Australia's Wills Act; Dispensing Power in the United States: Emulation, Resistance, Expansion' (2017) 38 *Adelaide Law Review* 1, 9-10

³⁵ *Nichol v Nichol* [2017] QSC 220

³⁶ Law Commission, *Making a Will* (Law Com No 231, 2017) para 5.95

would be a requirement for some form of 'record', to perform both the evidentiary and protective functions of the formalities.³⁷

In the absence of a statutory provision for electronic wills³⁸ a dispensing power would be the only means by which an electronic record could be admitted to probate.³⁹ Whilst the potential flexibility of dispensing powers to adapt to twenty-first century methods of documentation has been noted,⁴⁰ concerns have also been raised in the United States about the impact on litigation.⁴¹ However the focus of this article is on the rest of the provisions, which also vary widely between jurisdictions. The Law Commission's consultation proposes a dispensing power that would 'apply to records demonstrating testamentary intention'⁴² but does not analyse 'testamentary intention' in any further detail. This raises the following questions, which are of fundamental importance in defining the scope of an intention-based dispensing power:

1. What must be intended?
2. How is this intention proved?
3. What is the appropriate standard of proof?
4. When must the deceased have held this intention?

The first of these questions is considered below, and the remaining ones will be addressed in two subsequent articles.

What must be Intended?

The concept of testamentary intention – the intention that the testator's wishes are to take effect on his death⁴³ – has received very little analysis to date, probably because it is relatively simple to infer testamentary intention from a formal document that proclaims itself to be a will. Most of the existing body of English caselaw on testamentary intent is in the context of privileged wills,⁴⁴ for which there

³⁷ Law Commission, *Making a Will* (Law Com No 231, 2017) para 5.98

³⁸ See Law Commission, *Making a Will* (Law Com No 231, 2017) Chapter 6 for a discussion of the considerations for the introduction of electronic wills.

³⁹ Law Commission, *Making a Will* (Law Com No 231, 2017) paras 6.110-6.112

⁴⁰ Langbein, 'Absorbing South Australia's Wills Act; Dispensing Power in the United States: Emulation, Resistance, Expansion' (2017) 38 *Adelaide Law Review* 1; Law Commission, *Making a Will* (Law Com No 231, 2017) paras 5.94-5.99

⁴¹ Horton, 'Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism' (2017) 58(1) *Boston College Law Review* 1, 33

⁴² Law Commission, *Making a Will* (Law Com No 231, 2017) Consultation Question 28

⁴³ B Sloan, *Borkowski's Law of Succession* (OUP, 3rd edn, 2017) 82

⁴⁴ Wills made by members of the armed forces and mariners at sea under s 11 Wills Act 1837. Such wills do not require witnesses and can be oral.

are no prescribed formalities. Intention is therefore all; a privileged testator need not know that they are making a will or even that they are able to make a will,⁴⁵ but they must know that they are making a statement as to how they wish their property to be distributed upon their death.⁴⁶ The courts have been required to identify testamentary intention from a variety of informal statements reportedly made by the deceased, often many years after the event.⁴⁷ They have distinguished between mere statements of information (for example the deceased describing what he believed to be the case) and those intended as a request to be acted on (including instructions for a will),⁴⁸ only the latter of which has been held to demonstrate testamentary intent. Unfortunately the differentiation is easier to achieve in theory than in practice, especially when statements were made casually; it has been questioned whether the validity of a will should turn on such fine distinctions.⁴⁹

Similar difficulties can be seen in the caselaw from the USA on holographic wills. Whilst there is no need for the deceased to intend the document to be a will in the formal sense, the deceased must intend it to make gifts that will take effect on death – there must be a donative intent.⁵⁰ The holograph will in *Re Kuralt*⁵¹ was an informal letter, which made its true nature hard to discern. The Montana Supreme Court's decision in *Re Kuralt* has been criticised on the basis that the letter was merely setting out future intentions to create a will and was not a will itself.⁵² As many putative wills propounded under dispensing powers will be informal documents an inference of intention will be much less straightforward than with a formal will; a transition away from a formalistic approach towards an intention-based one therefore necessitates greater clarity on what testamentary intention really means.⁵³

The Australian dispensing powers identify two different types of intention. First of all the document must set out the deceased's testamentary intentions and secondly the deceased must have intended it to be their will – these form the second and third limbs of the *Hatsatouris* test set out above. This separates the deceased's general testamentary intention (“these are the terms on which I want to make my will”) from specific testamentary intention (“**this** is my will”). The former could include

⁴⁵ *Re Stable* [1919] P 7

⁴⁶ *Re Knibbs* [1962] 1 WLR 852, 855-856

⁴⁷ *Re Servoz-Gavin* [2009] EWHC 3168 (Ch)

⁴⁸ *Re Knibbs* [1962] 1 WLR 852, 855-856; *Re Stable* [1919] P 7, 9

⁴⁹ Sloan, *Borkowski's Law of Succession* (3rd edn, OUP 2017) 84-85

⁵⁰ M Glover, 'A Taxonomy of Testamentary Intent' (2016) 23 *George Mason Law Review* 569, 582-587

⁵¹ *Re Kuralt*, 15 P.3d 931 (Mont. 2000)

⁵² J B Baron, 'Irresolute Testators, Clear and Convincing Wills Law' (2016) 73(1) *Washington and Lee Law Review* 3, 37; Glover, 'A Taxonomy of Testamentary Intent' (2016) 23 *George Mason Law Review* 569, 586

⁵³ Glover, 'A Taxonomy of Testamentary Intent' (2016) 23 *George Mason Law Review* 569, 603

letters of instruction to solicitors, draft wills that remain unsigned, and even correspondence with friends and family stating that there is an intention to make a will in specific terms. The latter limits the use of the dispensing power to documents that purport to be a will. The deceased must intend 'the document to take effect as a testamentary disposition, a disposition of property upon his death.'⁵⁴

This requirement for specific testamentary intention can also be seen in the Harmless Error provision of the Uniform Probate Code ('evidence that the decedent intended the document or writing to constitute...[their] will') and the South African Condonation Principle ('a document...was intended to be his will'.) In contrast New Zealand has adopted only general testamentary intention, requiring merely that the document 'expresses the deceased person's testamentary intentions'.⁵⁵

Unsurprisingly this difference has a noticeable effect; in *Re Campbell*⁵⁶ it was noted that of approximately eighty cases that had been heard in New Zealand at the time, only four cases had been unsuccessful and two of those failed because the document in question pre-dated the legislation.⁵⁷ Although many of the applications were unopposed, Mackenzie J concluded that 'the preponderance of successful applications does however indicate that the evidential burden on a s 14 applicant is not subject to a high threshold'.⁵⁸ The absence of a requirement for specific testamentary intention has enabled instructions for a will to be admitted to probate in New Zealand,⁵⁹ including a telephone note made by the deceased's solicitor that the deceased had not seen.⁶⁰

In contrast the effect of a requirement for specific testamentary intention can be seen in the New Jersey appeal case of *Macool*⁶¹ in which an unsigned draft will, prepared according to the deceased's instructions but which the deceased never had an opportunity to review, was refused probate under the New Jersey statutory provision that adopted the harmless error provision in full.⁶² The statutory

⁵⁴ *Dolan v Dolan* [2007] WASC 249 [26]

⁵⁵ Interestingly, the South Australian Wills Act 1936 did not include a requirement for specific intent between 1994, with the enactment of the Wills (Miscellaneous) Amendment Act 1994, and 1998 when the Statutes Amendment (Attorney-General's Portfolio) Act 1998 re-introduced it.

⁵⁶ *Re Campbell (deceased)* [2014] NZHC 1632

⁵⁷ *Ibid*, [17]. By s 5 Wills Amendment Act 2012 (NZ) the requirement that the will must post-date 31 October 2007 was repealed and s 14 of the Wills Act 2007 (NZ) now applies for any deaths on or after 1 November 2007.

⁵⁸ *Ibid*

⁵⁹ *Pfaender v Gregory* [2018] NZHC 161

⁶⁰ *Re Feron* [2012] NZHC 44

⁶¹ *Re Macool* 3 A.3d 1258 (NJ Super Ct App Div 2010)

⁶² New Jersey Statutes 3B:3-3, which states 'Although a document or writing added upon a document was not executed in compliance with N.J.S.3B:3-2, the document or writing is treated as if it had been executed in

test was that the testator intended *a particular document* to constitute her will⁶³ and this required evidence that '(1) the decedent actually reviewed the document in question; and (2) thereafter gave his or her final assent to it.'⁶⁴ On the facts, although the deceased had intended to make a will in those terms, she had never seen the draft will so the court could not 'conclude, with any degree of reasonable certainty, that [the will] would have met with decedent's approval.'⁶⁵

The Supreme Court of Queensland took an arguably stricter approach in *Mahlo v Hehir*⁶⁶ when they refused to admit a draft will found on the deceased's computer because she knew she needed to print and sign it for it to have legal effect, despite acknowledging that the deceased intended to make a will in those terms and that the outcome was 'far from satisfactory'.⁶⁷ However the statutory requirements for specific testamentary intent have not always been strictly (or consistently) applied. For example in the earlier Queensland case of *Trust Company Ltd v Oates*⁶⁸ a record of the testator's unsigned instructions for a will were admitted to probate, as Mullins J was 'satisfied that there is a written document that records *the testamentary intentions* of the deceased'.⁶⁹ More recently, in *Borthwick v Mitchell*,⁷⁰ notes dictated by the deceased shortly before his death were found to comply with the specific intention requirement despite that fact that they were neither signed nor reviewed by the deceased.⁷¹

Similar confusion can be seen in the United States. In the Californian case of *Re Caspary*⁷² the propounded document was the deceased's instructions to his attorney, with whom he met the following day. Some aspects of the instructions were still tentative, with question marks against them. The attorney subsequently prepared a will in accordance with those instructions but the deceased never met him to approve or execute it. Despite the will instructions being signed it is highly unlikely that the deceased intended *that document* to be his will, yet the will was admitted under the

compliance with N.J.S.3B:3-2 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will..."

⁶³ *Re Macool* 3 A.3d 1258, 1264 (NJ Super Ct App Div 2010)

⁶⁴ *Ibid*, 1265 (Fuentes JAD)

⁶⁵ *ibid*

⁶⁶ *Mahlo v Hehir* [2011] QSC 243

⁶⁷ *Ibid* [41]-[45]

⁶⁸ *Trust Company Ltd v Oates* [2009] QSC 282

⁶⁹ *Ibid*, 287 (emphasis added)

⁷⁰ *Borthwick v Mitchell* [2017] NSWSC 1145

⁷¹ *Ibid*, [91]. It is interesting to note that *Re Knibbs* was used in this judgement to support the finding by distinguishing between mere statements of information and statements of the deceased's wishes for the disposition of his property.

⁷² *Estate of Caspary*, at 1, No. RP08396884 (Cal. Super. Ct. Jan 28, 2009), cited in Horton, 'Partial Harmless Error for Wills: Evidence From California' (2018) 103 *Iowa Law Review* 1

dispensing power.⁷³ Furthermore in the New Jersey appeal case of *Re Ehrlich*⁷⁴ the deceased's actual will could not be located after his death but an unsigned copy was propounded. It was noted on the copy that the original had been sent to his executor, but the executor had pre-deceased. The original will had not been seen for some years, but there had been comments by the deceased that indicated that he had made a will in the terms set out in the copy. However there was also evidence that he had changed his mind about one of the gifts.⁷⁵ The court applied the *Macool* tests and concluded that the unexecuted document 'was reviewed and assented to by decedent and *accurately reflects his final testamentary wishes*'.⁷⁶ This case was cited with approval by the Law Commission as a good example of the utility of dispensing powers⁷⁷ but this emphasis on the deceased's general testamentary intention disguises the fact that it is doubtful the deceased could really be said to have assented to a copy in the same way that one would assent to an original document.⁷⁸

It appears to be rather too easy to slide between questions of specific or general testamentary intent,⁷⁹ especially when there is clear evidence of the deceased's wishes and these differ markedly from the alternative distribution of the estate.⁸⁰ Indeed, the Law Commission's consultation paper appears to conflate the two; when citing the New South Wales case of *MacDonald v MacDonald*⁸¹ the consultation states that a suicide note was 'an expression of testamentary intentions and treated as a will'⁸² when the court's decision was in fact that the deceased intended the relevant paragraphs 'to form his will'.⁸³

Langbein's original argument was that strict compliance with the formalities could lead to inequitable results,⁸⁴ but should dispensing powers give 'judges the freewheeling power to admit any statement

⁷³ Horton, 'Partial Harmless Error for Wills: Evidence From California' (2018) 103 *Iowa Law Review* 1, 39

⁷⁴ *In re Estate of Ehrlich* 47 A.3d 12 (NJ Super Ct App Div 2012)

⁷⁵ *Ibid*, 18. The lack of evidence of the signed will may have prevented a claim for the original to be admitted to probate as a lost will, because the relevant New Jersey statute requires evidence of the witnesses or another person with knowledge of the execution – N.J.S 3B:3-19

⁷⁶ *In re Estate of Ehrlich* 47 A.3d 12, 19 (NJ Super Ct App Div 2012) (emphasis added)

⁷⁷ Law Commission, *Making a Will* (Law Com No 231, 2017) para 5.84. Copy wills can be admitted to probate in England under the Non-Contentious Probate Rules 1987, r 54 without the need for a dispensing power.

⁷⁸ Baron, 'Irresolute Testators, Clear and Convincing Wills Law' (2016) 73(1) *Washington and Lee Law Review* 3, 43

⁷⁹ *Ibid*, 37

⁸⁰ Baron, 'Irresolute Testators, Clear and Convincing Wills Law' (2016) 73(1) *Washington and Lee Law Review* 3, 43; see, for example, *Borthwick v Mitchell* [2017] NSWSC 1145

⁸¹ *MacDonald v MacDonald* [2012] NSWSC 1376

⁸² Law Commission, *Making a Will* (Law Com No 231, 2017) para 5.84

⁸³ *MacDonald v MacDonald* [2012] NSWSC 1376 [13] (White J)

⁸⁴ Langbein, 'Substantial Compliance with the Wills Act' (1975) 88(3) *Harvard Law Review* 489, 500-501

of dispositive wishes into probate?⁸⁵ There is a risk of increased leniency in cases in which the alleged beneficiaries are perceived to have a right to inherit, but just because someone should have made a will does not mean they have done so.

In *Ehrlich* the court discounted the fact that the document did not fully reflect the testator's wishes at the time of his death because the changes that the deceased wanted did not alter the primary beneficiary of the estate who was 'the natural object of decedent's bounty'.⁸⁶ This discussion suggests that the court was influenced by the knowledge that the alternative intestacy distribution was even further from the deceased's general testamentary wishes than the unsigned will.⁸⁷

These intention problems are exacerbated by the informality of home-made documents, and the inclusion of electronic messages and recordings would multiply exponentially the potential number of documents submitted to court for determination. The Law Commission acknowledged that a wide definition of 'document' could encourage disappointed relatives to scour through 'a huge number of texts, emails and other records in order to find one that could be put forward as a will on the basis of a dispensing power'.⁸⁸ Restricting the dispensing power to instances where specific testamentary intent can be proved would preclude the dispensing power from operating on the deceased's un-concluded musings and deliberations; whilst the cases discussed above demonstrate that this has not always been strictly adhered to, it is the only way to prevent the fine distinctions and uncertainties seen in privileged wills caselaw from entering into the ambit of dispensing powers.

Conclusion

So far, this article has demonstrated that the concept of testamentary intention is not as clear as the Law Commission would, perhaps, like. In the next two parts the remaining questions will be addressed, namely:

2. How is this intention to be proved?
3. What is the appropriate standard of proof?
4. When must the deceased have held this intention?

⁸⁵ Horton, 'Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism' (2017) 58(1) *Boston College Law Review* 1, 20

⁸⁶ *In re Estate of Ehrlich* 47 A.3d 12, 18 (NJ Super Ct App Div 2012)

⁸⁷ In contrast in one of the few unsuccessful New Zealand cases, *Fitzgibbons v Fitzmaurice* [2014] NZHC 710, although the document was refused on the basis of lack of testamentary capacity it was noted that a prior will was 'was made in terms entirely appropriate to his family situation' ([44]).

⁸⁸ Law Commission, *Making a Will* (Law Com No 231, 2017) para 5.96

The answers to these questions will identify the principles that need to be considered if any future dispensing powers were to have a chance of operating successfully in England and Wales.