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iPhone will case calls out what constitutes valid testamentary documents

By Keeli Cambourne, Deputy Editor, SMSF Adviser and Matthew Burgess, Director, View Legal

A recent court decision has reiterated that there are stringent requirements for a lawful will to be valid, a legal specialist has warned.

Matthew Burgess, director of View Legal, has said courts can recognise informal statements as valid testamentary documents if it can be proven that the deceased intended the relevant documents to, in fact, serve as their last will.

“[This can happen] even when basic, widely known requirements, such as being signed by the willmaker and witnessed by two independent adults, are not met,” he said.

However, he warned that the decision in Peek v Wheatley[2025] NSWSC 554 is a reminder of the material costs – financial and emotional – and lengthy delays that can be triggered by a failure to strictly comply with the statutory requirements to make a valid will.

“The case is a stark reminder to all advisers of the material damage that can be caused in failing to proactively work to ensure clients have up-to-date and fully legally documented estate plans,” he said.

“Importantly, similar requirements, although generally largely mandated by trust deeds, are also relevant in wider holistic estate planning areas, for example, for superannuation fund members wishing to make enforceable binding death benefit nominations.”

The Peek case involved a last will and testament recorded in the notes app of an iPhone, which was ultimately found to have failed to establish a valid testamentary document.

Burgess noted a growing number of cases where courts have recognised informal wills, such as testamentary directions not formally documented, as legally valid.

He cited examples, including a case where directions written in pencil on a plasterboard wall were accepted as a valid will, with the court allowing a photo of the wall, rather than the wall itself, to be submitted for probate. In other instances, couples who prepared "mirror" wills had mistakenly signed each other's documents, yet the courts still ruled the wills valid.

However, he said in the Peek case, the final decision was that the statement of “testamentary intention” on the iPhone did not meet formal legal requirements to be a valid will.

In this case, the deceased (Colin Peek) left a digital note on his iPhone titled “the last will of Colin L Peek”, setting out how his estate should be divided, which was created only days before his death.

Burgess continued that a friend and lawyer of Peek acted on behalf of the primary beneficiary under the iPhone note will. The primary beneficiary was another friend of the deceased who was entitled to more than $10 million if the iPhone will was valid. The solicitor also stood to receive an entitlement of over $300,000 if the electronic note was held to be valid.
In contrast, the family, who would inherit under the state-based intestacy regime if the iPhone note was held to be invalid, argued successfully that the note was simply a "working document" and never intended to amount to a final (informal) will.

"In confirming that the deceased had not intended the document in the notes section of his iPhone to operate as his will, the court relevantly noted the following key points," Burgess said.

"Firstly, that lawyers need to be acutely aware of the risk posed to the administration of justice where they choose to act in proceedings and the lawyer also has a personal interest in the outcome of the case (Barrak Corporation Pty Ltd v Kara Group of Companies Pty Ltd [2014] NSWCA 395).

"Additionally, in this case, the relevant lawyer had a clear conflict between his personal interests and his overriding duty to the court and the administration of justice, as he had a personal interest in the outcome of these proceedings, was a material witness, and was acting for a party in the proceedings."

The court, while not commenting on whether the lawyer had engaged in professional misconduct, specifically highlighted that the decision to discuss with another key witness how they would each testify in relation to certain evidence was improper and seriously undermined the probative value of the evidence of both of them.

"The key element in this case was whether the deceased intended the iPhone note to be his last will," Burgess said.

"[The court] had to take into account the document itself, evidence of the manner in which the document was created, and the testamentary intentions of the deceased. As well, it had to consider evidence of statements made by the deceased and the fact that the relevant intention need not exist at the time of the document's creation so long as the document was subsequently adopted by the deceased as their final will through words or conduct (Kemp v Findlay[2025] NSWCA 46)."

He added that the court's ruling emphasises that great care must be taken in determining whether a deceased intends a document to form their will.

"Many people write out proposals for their wills on pieces of paper headed 'will' but often these are no more than thoughts, not testamentary intentions, and certainly not intended to be wills (National Australia Trustees Ltd v Fazey[2011] NSWSC 559)," he said.

"Ultimately, it was held that the note had elements pointing both for and against the existence of the requisite intention and thus it was important to have regard to the wider context in which the note was created."

The court noted in its decision that this wider context supported the conclusion that the note was not intended to be the deceased's will.

“The court came to this conclusion for a number of reasons, including that despite an ongoing and long relationship with the lawyer, there was no evidence of the deceased issuing instructions for drafting of a formal will along the lines of the note,” Burgess said.

“As well, there was evidence of text messages and phone calls by the deceased to the lawyer shortly after the note was drafted, and the lawyer provided no evidence, despite requests in the hearing, as to the content of these communications. This meant the court assumed the content to be unhelpful to support a conclusion that the note was intended to be a valid testamentary document.”

Burgess added that the failure by a party to call or give evidence that could cast light on a matter in dispute can be taken into account in determining whether that party has discharged its onus (Jones v Dunkel [1959] HCA 8, Blatch v Archer (1774) 1 Cowp 63 and Australian Securities and Investments Commission v Rich [2009] NSWSC 1229).

“The above factors meant the iPhone note was rejected by the court as an attempted will, as the text messages and emails were deleted from the iPhone by the friend and lawyer following the death of the deceased. Evidence about how the iPhone was managed after death left the court without confidence that it had been provided all the relevant communications by the deceased, his friend and his lawyer regarding the purpose of the note,” he said.

“The court had difficulty accepting the reliability of the evidence of the lawyer when he acted as a solicitor in the proceedings and prepared all the evidence for the friend, despite the conflict of interest and duty to the court. Therefore, the court held that the estate be administered in accordance with the intestacy regime – and the costs of the proceedings would be borne by the friend who claimed the iPhone note was intended to be a will.”