

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



Brown v The Scout Association of Australia, South Australia Branch Inc [2022] SASCA 104

Supreme Court of South Australia – Court of Appeal, Livesey P, Doyle JA, Bleby JA, 13 October 2022

Whether a subsequent note revoked a properly executed will.

Key words: Will, South Australia, Gift to Charity, Revocation, Intention to Revoke, Statutory Interpretation

1. This was an appeal against a decision concerning the proper construction of [s 12\(3\)](#) of the [Wills Act 1936](#) (SA) (the Act) and whether, by operation of that section, a note signed subsequently by the deceased, Colin William Brown, on 12 April 2016 (the 2016 note) revoked a prior valid will executed in July 2014.
2. By the 2014 will the deceased bequeathed his residential property at Glandore, South Australia (the property), to the respondent, Scouts SA.
3. The background to this gift was that the deceased had originally said in 2014 that he would leave the property to the appellant. He intended to leave \$10,000 to the respondent.
4. However, a friend of the deceased arranged for the deceased to meet with the then Chief Executive of Scouts SA. The deceased met the Chief Executive on 17 June 2014. The Chief Executive gave evidence that the deceased told him he wished to leave a pecuniary legacy to the appellant and the residue of his estate, including the property, to Scouts SA.
5. Arrangements were subsequently made for the deceased to meet with a bequests officer for Scouts SA, who referred him to a solicitor for the purpose of making a new will. The new will was executed in July 2014.
6. On 12 April 2016, the deceased told the appellant, his nephew, that he had changed his will such that the appellant would receive the property and all its contents.
7. Concerned that there was an earlier will, the appellant made a note of the discussion. Both the appellant and the deceased signed at the bottom of the 2016 note. However, the 2016 note did not satisfy the formalities required for revocation by [s 22](#) of the Act.

8. Thus, the question became whether the 2014 will could be prevented from being admitted to probate by section 12(3) of the Act.
9. The primary judge found that the deceased signed the 2016 note in order to deceive the appellant as to his testamentary intentions, so that it did not revoke the 2014 will. The background to this finding was that the relationship between the appellant and the deceased was not cordial, and the deceased had definitely decided not to leave the property to the appellant in 2014.
10. On appeal, the appellant contended that the 2016 note effectively revoked the 2014 will by operation of section 12 (3) of the Act. The issues were:
 - a. whether s12(3) requires only an inquiry into whether a document objectively expresses an intention to revoke a will, or whether it also permits an inquiry into the deceased’s subjective testamentary intentions; and
 - b. whether, on its proper construction, the 2016 note expressed an intention to revoke the July 2014 will within the meaning of s 12(3).

11. Section 12 (3) provides:

If the Court is satisfied that a document that has not been executed with the formalities required by this Act expresses an intention by a deceased person to revoke a document that might otherwise have been admitted to probate as a will of the deceased person, that document is not to be admitted to probate as a will of the deceased person.

12. The primary judge said that section 12 (3), in dealing with intention to revoke, permits consideration of the deceased’s actual subjective intention, in addition to the words on the face of the document. The Court of Appeal agreed, saying that ultimately, whether a document expresses an intention to revoke, as opposed to giving a narrative statement or recording past events, is a matter of interpretation of the document (at [81]).
13. The Court of Appeal found that the primary judge’s analysis was correct and his finding that the 2016 note only purported to record a past act, and therefore did not meet the requirements of section 12(3), should not be disturbed (at [81]).
14. An appeal against the costs order of the primary judge was also dismissed.

IMPLICATIONS



Under the South Australian wills legislation, revocation is dealt with in section 22 of the Act, but this is subject to section 12 (3):

Subject to [section 12\(3\)](#), no will or codicil or any part of a will or codicil is revoked otherwise than—

- (a) by marriage or the ending of a marriage as provided by this Act; or
- (ab) by commencing or ending a registered relationship under the [Relationships Register Act 2016](#); or
- (b) by another will or codicil executed in the manner required by this Act; or
- (c) by some writing declaring an intention to revoke the will or codicil or the part of the will or codicil and executed in the manner in which a will is required by this Act to be executed; or
- (d) by the burning, tearing or otherwise destroying the will or codicil or the part of the will or codicil by the testator or by some person in the testator's presence and by the testator's direction with the intention of revoking it.

Section 12(3) offers a broader concept of revocation, which in the Court of Appeal's view can be confusing because:

- a) Section 22(c) contains a requirement of execution. Section 12(3), operating as an exception to s 22(c), does not.
- b) Section 22(c) provides that the subsequent instrument, so executed, revokes the will. Section 12(3) by contrast, operates as a prohibition on the will being admitted to probate.
- c) Section 22(c) refers to writing 'declaring' an intention to revoke the will, while s 12(3) refers to a document that **expresses** an intention by a deceased person to revoke a will.

The appellant in this case relied on the use of the word 'expresses' as indicating a focus on the terms of the document itself, rather than on the underlying intention. The Court of Appeal did not agree (at [69]):

For these reasons, we reject the interpretation of [s 12\(3\)](#) for which the appellant contended. The words, 'a document ... expresses an intention by a deceased person to revoke' direct attention to the deceased's actual, subjective intention. Whatever was communicated on the face of the 2016 note, the primary judge was permitted to consider the deceased's actual testamentary intentions.

VIEW THE CASE



This case may be viewed at <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASCA//2022/104.html>

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