SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2017 0032

IN THE MATTER of the Will and Estate of MING ZHENG TANG (also known as TANG MING ZHENG and JAMES TANG), deceased

BI XIA ZHANG (also known as ZHANG BI XIA) Applicant

JUDGES:	KYROU and McLEISH JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	13 June 2017
DATE OF JUDGMENT:	30 June 2017
MEDIUM NEUTRAL CITATION:	[2017] VSCA 171
JUDGMENT APPEALED FROM:	*Re Tang* [2017] VSC 59 (McMillan J)

WILLS – Application for letters of administration with will annexed – Whether handwritten note made by deceased in China an informal will under Victorian law or a valid will under Chinese law – Note a valid will under Chinese law – Appeal allowed – *Wills Act 1997* ss 9, 17.

WILLS – Testamentary capacity – Applicable standard of proof – *Briginshaw v Briginshaw* (1938) 60 CLR 336 – *Evidence Act 2008* s 140(2).

PRIVATE INTERNATIONAL LAW – Choice of law – Deceased an Australian citizen domiciled in China – Will made in China – Will disposed of part of deceased's personal estate – No real estate – Whether validity of will governed by Australian law or Chinese law – Whether intestacy provisions of Australian law or Chinese law apply – Whether Victoria appropriate forum.

EVIDENCE – Proof of foreign law – Whether expert evidence necessary – *Evidence Act 2008* s 174.

PRACTICE AND PROCEDURE – Partial intestacy – Assets in Victoria and China – Effect of order of Supreme Court of Victoria granting letters of administration in respect of a will that disposed of only part of deceased's personal estate in Victoria.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Ms S Aufgang	Xianyi Tan

KYROU JA
McLEISH JA:

Introduction and summary

1 This is an application for leave to appeal against a decision of a judge of the Trial Division dismissing an ex parte application by the applicant, Bi Xia Zhang, for a grant of letters of administration with the will annexed in relation to a handwritten note written by her deceased son, Ming Zheng Tang, in Shanghai on 14 November 2014 ('Note').[1]

2 The deceased, who was an Australian citizen residing in China, died on 26 November 2014 in the Shanghai First People's Hospital from a cardiac arrest. He was 41 years of age.

3 The Note was written in Chinese on a small piece of paper. It was addressed to the applicant and signed by the deceased. No one witnessed his signature. The English translation of the Note is as follows:

> Mama:
>
> In Australia, I only have two bank accounts with Westpac. One account is the one you regularly deposit $50 every month, and the other one is a three-year term deposit account. Both account bankbooks are at your place. Remember, the money in both accounts is for your personal use only. Take care!
>
> Tang Ming ZHENG
>
> Date: 14/11/2014

4 The deceased's estate consisted of a personal estate of $179,307.77 in Victoria and a personal estate of $415,115.50 in China. The Victorian assets comprised a savings account with Westpac Bank with a credit balance of $27,469.58, a term deposit with Westpac Bank in the amount of $121,838.19 and a motor vehicle valued at $30,000. The Chinese assets comprised deposits with financial institutions and a Cartier wrist watch. The deceased's only liability was a credit card debt of $6,599.63 in China.

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1 *Re Tang* [2017] VSC 59 ('Reasons').

5 The deceased was survived by: his father, Mr Tang Sr, who died recently;[2] his wife, Yufan Fan, from whom he was separated but not divorced; and the applicant. The applicant and Mr Tang Sr were divorced. The applicant lives in Melbourne while Mr Tang Sr lived in China.

6 In support of her application for a grant of letters of administration with the will annexed, the applicant filed submissions dated 10 October 2016, and affidavits sworn by her on 29 October 2015 ('first affidavit'), 27 May 2016 ('second affidavit') and 7 October 2016 ('third affidavit'). She also filed documents entitled 'Consent of Beneficiary' signed by Ms Fan and Mr Tang Sr dated 2 February 2016 and 16 February 2016 respectively, consenting to the application.

7 The applicant's submissions identified three possible characterisations of the Note, namely, that the Note constituted:

(a) an informal will pursuant to s 9 of the *Wills Act 1997*;

(b) a valid will executed in a foreign place, pursuant to s 17 of the Wills Act; or

(c) a deathbed gift by the deceased to the applicant, which was made absolute upon his death.

8 The judge determined the proceeding on the papers on 24 February 2017. She dismissed the proceeding on the following principal bases:

(a) At the time of his death, the deceased's domicile was China and therefore the Chinese law of succession applied to his movable assets.

(b) The applicant had not adduced expert evidence to prove the content of the Chinese law of succession and therefore the Court could not determine the content of that law or whether the Note constituted a will under that law.

(c) China is the appropriate forum for determining whether the Note constituted a will under the Chinese law of succession.

(d) If Victorian law were applicable, the applicant would not be able to establish that the Note constituted an informal will pursuant to s 9 of the Wills Act.

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[2] See n 4 below.

(e) The applicant was required to satisfy the Court, in accordance with the principles in *Briginshaw v Briginshaw*,[3] that the deceased had testamentary capacity at the time the Note was written, and had failed to do so.

(f) The Note did not constitute a deathbed gift.

9 By her application for leave to appeal, the applicant has sought to impugn a number of the judge's findings, including those set out in (b), (c) and (e) above. She has not sought to challenge the findings set out at (a), (d) and (f) above.

10 For the reasons that follow, the application for leave to appeal will be granted and the appeal will be allowed.

Facts and relevant evidence

11 The deceased was born in China on 29 May 1973 and came to Australia in 1990. He became an Australian citizen in 1997.

12 The deceased married Ms Fan, a Chinese resident, on 6 February 2003 in Melbourne. Later that year, they moved to China where they obtained employment. They subsequently separated. The deceased remained in China. Every year, he visited Australia for about two weeks at Christmas and sometimes for a week around Easter.

13 The deceased had a history of heart problems, including a heart attack in 2007 when he was 34 years of age.

14 On 10 November 2014, after experiencing acute chest pain, the deceased was admitted to the hospital. A medical report from the hospital dated 27 November 2014 described the deceased's condition on admission as 'conscious alert but felt weak, semireclining position'.

15 The applicant travelled from Melbourne to Shanghai to be with the deceased.

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3 (1938) 60 CLR 336 ('*Briginshaw*').

She attended the hospital on the morning of 14 November 2014. The applicant's observation of the deceased on that day, as described in her first affidavit, was that he 'looked quite well' and she 'expected him to make a full recovery'.

16 During the afternoon of 14 November 2014, the applicant left the hospital to do some shopping. When she returned, she found the Note. In the first affidavit, the applicant deposed as follows in relation to the Note:

> … I found the [Note] and asked the deceased why he had written it. He said that in case something happened to him he needed to make sure that I got the money held in the two bank accounts that he referred to in the [Note].

17 The deceased's medical condition deteriorated on 19 November 2014 and he was transferred to the Intensive Care Unit of the hospital. According to the hospital report, his blood pressure 'dropped to 80/50mmHg, shortness of breath got worse, laboratorial results showed progressive heart failure and hypoproteinemia.' The hospital report stated that the deceased was 'in the end-stage heart failure, cardiac shock' and that his condition progressively worsened. At 6.00 pm on 26 November 2014, the deceased suffered a cardiac arrest and he died at 9.43 pm that night.

18 Apart from the statement set out at [14] above, the hospital report did not contain any observations about the deceased's mental state while he was in the hospital.

19 In her third affidavit, the applicant deposed that, when she first saw the deceased at the hospital, he 'seemed alert and we were able to communicate as normal'. She said that she saw him every day until his death and that they 'were able to talk during those times as [they] had before'. She also said that, a couple of days before the deceased died, he offered to give her the PIN for his 'day to day' Westpac account. The applicant said that she asked him not to do so, as there were people present who could overhear their conversation.

Procedural history

20 On 30 October 2015, the applicant filed an originating motion seeking a grant of letters of administration with the will annexed. The Note was said to be the will.

The originating motion was supported by the first affidavit, whose exhibits included: the deceased's death certificate; a certificate establishing the relationship between the applicant and the deceased; and an inventory of the deceased's assets and liabilities in Victoria and China.

21 On 2 November 2015, the Registrar of Probates raised a number of requisitions which included the following:

(a) File an affidavit to support the contention that the Note could be regarded as a will and that the deceased intended it to be a will.

(b) Clarify whether the Note was validly executed as a will under Chinese law.

(c) File an affidavit identifying the relatives or next of kin who are entitled to share in the estate undisposed of by the Note.

(d) File consents from the persons who would be entitled to a share of the estate on intestacy.

(e) What was the deceased's marital status? Did he have a domestic partner or children surviving him? Did his father survive him?

(f) Did the deceased hold assets in the names Tang Ming Zheng or James Tang?

22 On 27 May 2016, the applicant filed her second affidavit, in response to the Registrar's requisitions. The affidavit relevantly stated:

(a) Mr Tang Sr was alive.[4]

(b) The applicant believed that the deceased and Ms Fan separated about 10 years ago.

(c) The applicant believed that the deceased did not have any other domestic partner at the date of his death.

(d) The deceased did not inform the applicant that he had children.

(e) In 2014, Ms Fan attended the funeral of the deceased but she was not accompanied by any child. In 2015, the applicant, Mr Tang Sr and Ms Fan attended various financial institutions together in China to determine the

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4 At the hearing of the application for leave to appeal, counsel for the applicant informed the Court that Mr Tang Sr died 'some months ago' and that the applicant was only informed of that fact one or two weeks before the hearing.

assets of the deceased and no mention was made by Mr Tang Sr or Ms Fan as to the existence of any children of the deceased.

23 The applicant deposed that, in November 2015, Ms Fan informed the applicant's solicitor that the deceased was the father of her son, who was born in May 2013. Ms Fan forwarded to the applicant's solicitor a copy of the child's birth certificate issued on 4 July 2013. The birth certificate records the deceased as the father of the child and that the child was born on 12 May 2013. The child's last name is Fan, after his mother. Ms Fan told the applicant's solicitor that she had planned to keep the existence of the deceased's son a secret. She asked him to keep it confidential and said that she did not intend to seek a larger proportion of the deceased's estate as a consequence of having the child.

24 A text message sent by Ms Fan to the applicant's solicitor on 8 March 2016 was exhibited to the second affidavit. The English translation is as follows:

> Solicitor: I have received the documents you sent.
>
> Ms Fan: Ok, that's good. Although I have [given] you the photocopy of my son's birth certificate, please keep it confidential for me, because I didn't mean to take up more shares of the heritage. Thank you.
>
> Solicitor: I am not your lawyer. By law, all the documents you provided must be submitted.

25 The applicant also deposed that she telephoned Ms Fan and asked her why she wanted to keep the existence of the child a secret. She deposed that Ms Fan said that she was worried that Mr Tang Sr would want to see the child and insist on changing its surname to Tang. As a result, the applicant did not inform Mr Tang Sr about the existence of the child. She deposed:

> I simply do not know if [Ms Fan's] son is my grandson or not. Therefore I do not know if my son had any children that survived him.

26 The applicant exhibited to the second affidavit two signed consent of beneficiary forms drawn by her solicitor and signed by Mr Tang Sr and Ms Fan. The applicant deposed that she believed that Mr Tang Sr and Ms Fan had sufficient command of

the English language to understand the documents. They are in similar terms, with the consent of Mr Tang Sr stating as follows:

> 1. I, Li Sheng Tang (also known as Tang Li Sheng), of [address], the father of the Deceased, Ming Zheng Tang (also known as Tang Ming Zheng and James Tang), do hereby consent to my ex-wife, Bi Xia Zhang (also known as Zhang Bi Xia), being [given] Letters of Administration by the Supreme Court of Victoria for the purpose of admitting to Probate the document signed by the Deceased on 14 November 2014 ('the Document').
>
> 2. I believe that the Deceased intended the Document to be his last Will which would dispose of his monetary assets in Australia.
>
> 3. To the best of my knowledge the Deceased had no other Will and, as a consequence, I understand that the rest of his assets will be disposed of according to the laws of intestacy or by agreement amongst his closest beneficiaries, being his wife Fan Yu Fan (also known as Rachel Fan), his mother Bi Xia Zhang and me, his father.

27 The applicant deposed that she was prepared to give an undertaking to the Court that if a DNA test showed that the deceased was the biological father of Ms Fan's son, she would 'ensure that he gets his proper share of the deceased's estate'.

28 The applicant also filed a legal opinion dated 17 May 2016 in response to the Registrar's requisitions. The opinion was prepared by Ms Aufgang of counsel, who represented the applicant in the proceeding. The opinion annexed an extract from AsianLII (the Asian equivalent of AustLII) which set out an English translation of what was described as the Law of Succession of the People's Republic of China. That extract is summarised at [37]–[41] below.

29 On 1 June 2016, the Registrar advised that, as the deceased may have had an infant son surviving him, the matter had to be referred to a judge.

30 At a directions hearing on 24 June 2016, the judge raised with counsel for the applicant a number of difficulties with the evidence, including the absence of any evidence of the deceased's testamentary capacity when he wrote the Note.

31 On 12 October 2016, the third affidavit and written submissions were filed. The third affidavit exhibited the hospital report and correspondence between the

applicant's solicitor and the hospital in which the solicitor sought further information on the question of capacity. The hospital did not provide any further information.

32 In her written submissions, the applicant contended that, at the time of his death, the deceased's domicile was Victoria and therefore Victorian law applied to his movable assets.

33 Before discussing the judge's reasons for dismissing the proceeding, it is necessary to set out the statutory provisions that are relevant to the judge's decision.

Relevant Victorian and Chinese statutory provisions

Wills Act 1997

34 Section 7 of the Wills Act sets out the requirements for a valid will and s 9 gives the Court power to dispense with those requirements. The sections relevantly provide as follows:

> **7 How should a will be executed?**
>
> (1) A will is not valid unless—
>
> (a) it is in writing, and signed by the testator or by some other person, in the presence of, and at the direction of the testator; and
>
> (b) the signature is made with the testator's intention of executing a will, whether or not the signature appears at the foot of the will; and
>
> (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
>
> (d) at least two of the witnesses attest and sign the will in the presence of the testator but not necessarily in the presence of each other.
>
> …
>
> …
>
> **9 When may the Court dispense with requirements for execution or**

revocation?

(1) The Supreme Court may admit to probate as the will of a deceased person—

(a) a document which has not been executed in the manner in which a will is required to be executed by this Act; or

…

if the Court is satisfied that that person intended the document to be his or her will.

…

(3) In making a decision under subsection (1) … the Court may have regard to—

(a) any evidence relating to the manner in which the document was executed; and

(b) any evidence of the testamentary intentions of the testator, including evidence of statements made by the testator.

(4) This section applies to a document whether it came into existence within or outside the State.

…

35 Section 17 of the Wills Act sets out the circumstances in which a will that is executed in conformity with a foreign law is to be taken to be valid. It relevantly provides as follows:

17 General rule as to validity of a will executed in a foreign place

(1) A will is to be taken to be properly executed if its execution conforms to the internal law in force in the place—

(a) where it was executed; or

(b) which was the testator's domicile or habitual residence, either at the time the will was executed, or at the testator's death; or

(c) of which the testator was a national, either at the date of execution of the will, or at the testator's death.

…

The Chinese Law of Succession

36 The discussion at [37]–[41] below is based on a document titled 'Law of Succession of the People's Republic of China' ('Chinese Law of Succession') which was annexed to the opinion dated 17 May 2016.

37 The Chinese Law of Succession provides for two means of succession: Chapter II (Articles 9–15) provides for statutory succession in cases where a person dies intestate and Chapter III (Articles 16–22) provides for testamentary succession where a will exists.

38 Article 10 contains the following provisions for the distribution of an estate on an intestacy:

> The estate of the decedent shall be inherited in the following order:
>
> > First in order: spouse, children, parents.
> >
> > Second in order: brothers and sisters, paternal grandparents, maternal grandparents.
>
> When succession opens, the successor(s) first in order shall inherit to the exclusion of the successor(s) second in order. The successor(s) second in order shall inherit in default of any successor first in order.
>
> The 'children' referred to in this Law include legitimate children, illegitimate children and adopted children, as well as step-children who supported or were supported by the decedent.
>
> The 'parents' referred to in this Law include natural parents and adoptive parents, as well as step-parents who supported or were supported by the decedent.
>
> The 'brothers and sisters' referred to in this Law include blood brothers and sisters, brothers and sisters of halfblood, adopted brothers and sisters, as well as step-brothers and step-sisters who supported or were supported by the decedent.

39 Articles 13–15 set out rules for resolving issues that may arise between 'successors'. They provide as follows:

> Article 13
>
> Successors same in order shall, in general, inherit in equal shares.
>
> At the time of distributing the estate, due consideration shall be given to successors who are unable to work and have special financial difficulties.

> At the time of distributing the estate, successors who have made the predominant contributions in maintaining the decedent or have lived with the decedent may be given a larger share.
>
> At the time of distributing the estate, successors who had the ability and were in a position to maintain the decedent but failed to fulfil their duties shall be given no share or a smaller share of the estate.
>
> Successors may take unequal shares if an agreement to that effect is reached among them.
>
> Article 14
>
> An appropriate share of the estate may be given to a person, other than a successor, who depended on the support of the decedent and who neither can work nor has a source of income, or to a person, other than a successor, who was largely responsible for supporting the decedent.
>
> Article 15
>
> Questions pertaining to succession should be dealt with through consultation by and among the successors in the spirit of mutual understanding and mutual accommodation, as well as of amity and unity. The time and mode for partitioning the estate and the shares shall be decided by the successors through consultation. If no agreement is reached through consultation, they may apply to a People's Mediation Committee for mediation or institute legal proceedings in a people's court.

40 Article 17 sets out the requirements for a valid will. It provides as follows:

> A notarial will is one made by a testator through a notary agency.
>
> A testator-written will is one made in the testator's own handwriting and signed by him, specifying the date of its making.
>
> A will written on behalf of the testator shall be witnessed by two or more witnesses, of whom one writes the will, dates it and signs it along with the other witness or witnesses and with the testator.
>
> A will made in the form of a sound-recording shall be witnessed by two or more … witnesses.
>
> A testator may, in an emergency situation, make a nuncupative will, which shall be witnessed by two or more witnesses. When the emergency situation is over and if the testator is able to make a will in writing or in the form of a sound-recording, the nuncupative will he has made shall be invalidated.

41 Article 22 deals with testamentary incapacity and other circumstances in which a will is void. It provides as follows:

> Wills made by persons with no capacity or with limited capacity shall be void.

> Wills shall manifest the genuine intention of the testators; those made under duress or as a result of fraud shall be void.
>
> Forged wills shall be void.
>
> Where a will has been tampered with, the affected parts of it shall be void.

Judge's decision

42 The judge determined that the deceased's domicile was China and therefore the validity of the Note must be determined under Chinese law.[5] As the applicant does not seek to challenge this finding, we will not set out the judge's reasons for it.

43 The judge concluded that, in the absence of expert evidence to establish the content of China's law of succession, she was not able to rely on the extract from AsianLII that was annexed to the opinion dated 17 May 2016.[6] She conducted her own research on China's law of succession. The text of the law in the sources she consulted was relevantly the same as the text in AsianLII. Notwithstanding this, the judge stated that she was not able to reach any conclusion about the content of the Chinese law of succession or on whether the Note satisfied the requirements for a will under Chinese law. She also concluded that China, and not Victoria, was the appropriate forum for determining whether the Note satisfied those requirements and succession issues generally.

44 The judge's reasons for the conclusions set out at [43] above were as follows:

> The ascertainment of what law applies to the [applicant's] application is a question of fact in Australian courts. As the learned authors of *Cross on Evidence* state:
>
> > The existence, the nature and the scope of the rules and principles of law of a foreign jurisdiction are issues of fact to be decided by the judge on which evidence is receivable; on the other hand, the effect of the application of those rules and principles, as so ascertained, to the particular facts and circumstances of the case before the court is a question of law for the court of the forum, on which evidence is not receivable.
>
> The necessary caution with which foreign municipal law must be treated by

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5 Reasons [78].

6 See [28] above.

judges accustomed to the application of Australian law is elaborated upon by Gummow and Hayne JJ in a choice of law case[7] that involved the interpretation of a statute in China:

> The courts of Australia are not presumed to have any knowledge of foreign law. Decisions about the content of foreign law create no precedent. That is why foreign law is a question of fact to be proved by expert evidence. And it is why care must be exercised in using material produced by expert witnesses about foreign law. In particular, an English translation of the text of foreign written law is not necessarily to be construed as if it were an Australian statute. Not only is there the difficulty presented by translation of the original text, different rules of construction may be used in that jurisdiction.

No expert evidence was called by the [applicant] to establish the nature and the scope of the rules and principles of the law in China applicable to this proceeding. An English translation of the Chinese succession law was exhibited, however, it does not provide a sufficiently clear indication, especially absent the benefit of expert evidence, as to how the [Note] would be treated under Chinese law or, if it is not a testamentary document under Chinese law, the correct intestacy procedure to be followed.

…

The Court's understanding of the scope of the rules and principles of the law in China applicable to this proceeding is limited as it has not been provided with any expert evidence on this issue. As a result, the Court makes no findings as to the application of the law in China or to its existence but simply sets out the result of its research on the issue.

…

There is no doubt that the deceased was an [Australian] citizen but his domicile of choice and habitual residence was undoubtedly China. … Consequently … the validity of the [Note] must be determined under Chinese law. In my view, the forum for dealing with the validity of the [Note] is China, with Chinese laws determining the distribution of the estate of the deceased, both in China and Australia.

It is possible that the [Note] does comply with the internal law of China as one of the formal requirements for a will is: 'A testator-written will is one made in the testator's own handwriting and signed by him, specifying the date of its making.' However, no expert evidence was adduced on this point and, from a common law perspective, it would be unusual that a document purporting to deal only with approximately one quarter of a deceased's assets located in another jurisdiction would be considered a will. Further, evidence as to testamentary capacity would have to be adduced and this too is governed by the law of the deceased's domicile. In any case, without expert evidence on these issues, the Court is not able to conclude the appropriate principles of Chinese law to be applied in this regard. Therefore, the [applicant's] submission that the [Note] ought be admitted to probate by virtue of the fact that it was validly executed under Chinese law has no force.

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7 *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331, 370 [115].

> Assuming that, in line with Victorian law, the [Note] does not constitute a will under Chinese law, the deceased's estate would be distributed according to the intestacy provisions under Chinese law. The deceased's assets at the date of his death in China and Australia comprised movable property, namely, cash and securities in various accounts, a wristwatch in China and a motor vehicle in Australia, presently used by the [applicant]. Almost three quarters of the value of the estate of the deceased is located in China. …
>
> Accordingly, on this basis and in accordance with the conclusion that the deceased was domiciled in China, it is readily apparent that Victoria is not the appropriate forum to determine issues of succession and inheritance in respect of the estate of the deceased.[8]

45 Notwithstanding that the judge found that the validity of the Note as a will had to be determined in accordance with the requirements of Chinese law, she also considered the requirements for a valid will under Victorian law.

46 The judge found that the Note did not satisfy the requirements set out in s 7 of the Wills Act.[9] She then considered whether the Note could be admitted to probate as an informal will under s 9 of the Wills Act. She stated that the following factors must be satisfied before the Court will admit an informal document to probate under s 9:

(a) there must be a 'document';

(b) the document must express or record the testamentary intentions of the deceased; and

(c) the deceased must have intended that the document be his or her will.[10]

47 The judge held that requirement (a) was satisfied because the Note was a document as defined in s 38 of the *Interpretation of Legislation Act 1984*, in that it was capable of carrying a definite meaning, namely, that set out in the English translation.[11] She considered requirements (b) and (c) together and concluded that they were not satisfied for the following reasons:

> The [applicant] deposed that the deceased wrote and signed the [Note] when

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8 Reasons [42]–[45], [78]–[81] (citations omitted).

9 Reasons [38].

10 Reasons [39], [59].

11 Reasons [60].

> he was in hospital. It was not made in the presence of the [applicant] or in the presence of any other person. His signature was not witnessed by any person and no evidence was placed before the Court that the handwriting was, in fact, that of the deceased. The [applicant] deposed that the deceased told her he had made the [Note], 'in case something happens'.
>
> …
>
> A testamentary document is an important document. It is a document that operates with legal effect in respect of the posthumous distribution of a testator's property, as well as other administrative matters upon a testator's death. A formal will, inter alia, appoints an executor or executors, may include wishes as to funeral or burial or other arrangements, purports to distribute all assets owned by a testator to beneficiaries, includes a residuary clause, is signed by the deceased and attested by witnesses.
>
> However, the [Note] purports to deal with less than one quarter of the total value of the deceased's assets and it does not deal with all of his assets in Victoria. In Victoria, the deceased also owned a motor vehicle valued at approximately one quarter of the value of the combined total of the bank accounts. Importantly, it purports to benefit the [applicant] in circumstances where the [applicant] is the only person who has provided the evidence in the application. The [Note] does not consider any other people who may have a claim on the deceased's estate; namely, his father and his allegedly estranged wife. In addition, there is the possibility of the deceased being the father of Ms Fan's child although the hearsay evidence of Ms Fan is that he did not know of the child's existence.
>
> The [Note] also appears to express a wish that the [applicant] use the money in an unspecified bank account for her own purposes although when she may do so is unclear. Precatory documents do not evidence a will or a deceased's testamentary intention and cannot be admitted to probate.
>
> On the balance of probabilities, I am satisfied that the [Note] is not a document that the deceased intended to be his will. Accordingly, the [applicant's] application for a grant of letters of administration pursuant to s 9 of the Act is dismissed.[12]

48 The judge also considered the issue of testamentary capacity. She concluded that the applicant had the onus of establishing, in accordance with the principles in *Briginshaw*,[13] that the deceased had testamentary capacity at the time the Note was prepared. Her reasons were as follows:

> The [applicant] bears the onus of proof on the balance of probabilities. Although in every civil case, the standard to be applied is uniform, in each case the nature of the issues and the consequences flowing from the facts once proven, will necessarily affect the process by which reasonable satisfaction is

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12 Reasons [64], [66]–[69] (citations omitted).

13 (1938) 60 CLR 336.

attained. This feature of the civil standard of proof is stated in the judgment of Dixon J in *Briginshaw v Briginshaw*.

In probate cases involving informal testamentary documents, the *Briginshaw* principle must be applied with care, as Habersberger J stated in *Fast v Rockman*:

> The person seeking to propound an informal will must establish the requisite elements on a balance of probabilities. Furthermore, because of the nature of probate, the consequences of any findings that may be made and the inability to hear any evidence from the deceased as to his actual intentions, the Court needs to evaluate the evidence with great care in accordance with the *Briginshaw v Briginshaw* principle.

The *Briginshaw v Briginshaw* principle dictates that reasonable satisfaction should not be attained by 'inexact proofs, indefinite testimony, or indirect inferences'.

Where an informal testamentary document satisfies the requirements of s 9 of the [Wills] Act, a grant of representation could still in theory be refused where a testator lacked testamentary capacity, did not know and approve of the will, or was affected by undue influence in making the will. If the deceased lacked the capacity to make a will, then the Court could not be satisfied that the deceased intended the document to be his or her will. If a testator did not know and approve of the document, then the Court could not be satisfied that he intended the document to be his will. If the testator was unduly influenced in the sense recognised by the Courts of Probate, such that his will were overborne, then the Court could not be satisfied that he intended the document to be his will.[14]

49 The judge held that, in circumstances where there was no contradictor to the application or independent counsel appointed by the Court and the applicant's affidavit evidence could therefore not be tested by cross examination, some statements made by the applicant could not be readily accepted.[15] In relation to the issue of testamentary capacity, the judge said the following:

> Statements as to certain critical events that occurred where no other person was present, such as [the applicant's] discussions with the deceased while she was with him in hospital, must be treated with caution as they cannot be corroborated.[16]

50 The judge considered the hospital report and said that what it records 'stands in stark contrast to the [applicant's] assessment of her son's condition on 14 November

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14 Reasons [24]–[27] (citations omitted). In a footnote, the judge stated that the *Briginshaw* standard of proof is set out in s 140 of the *Evidence Act 2008*.

15 Reasons [29]–[30].

16 Reasons [30].

2014, namely, that she expected he would make a full recovery.'[17]

51 The judge concluded that the applicant had not satisfied her that the deceased had testamentary capacity at the time the Note was written for the following reasons:

> Testamentary capacity requires that a testator is *compos mentis*, is aware of the extent of his assets, aware of those whom he seeks to benefit and aware of those who may have a claim on his bounty. Statements by the [applicant] that she expected … her son to make a full recovery when she saw him on 14 November are not sufficient to establish his testamentary capacity and the [hospital report] does not address the issue. [The hospital report] demonstrates that the deceased was extremely ill during the whole time he was in hospital, that he was not responding to treatment and had been suffering heart attacks on an almost daily basis since he was admitted to emergency. Assuming that the deceased wrote the [Note], there is no evidence as to his state of mind at that [time] other than statements made by the [applicant] after the event, which are incapable of corroboration. The evidence does not establish to the requisite standard that the deceased had testamentary capacity as at 14 November 2014.[18]

Grounds of appeal

52 The grounds of appeal are in the following terms:

> 1 Her Honour failed to take into account a material consideration, being section 174 of the *Evidence Act 2008*, by requiring the need for expert evidence when considering Articles of the Law of Succession of China relevant to the acceptance and interpretation of the [Note] as a Will and the correct disposition of the estate's assets in the event of a partial or complete intestacy.
>
> 2 Her Honour misdirected herself that the only forum to determine the validity of the [Note] as a Will is China, by apparently requiring a finding of validity to be made in the foreign court as a consequence of [the deceased's] domicile. Her Honour overlooked the power and/or procedures pursuant to section 17 of the *Wills Act 1997*, which enables the validity in Victoria of a Will executed in a foreign place.
>
> 3 Her Honour applied a wrong principle of law by apparently elevating the required standard of proof to the *Briginshaw* standard for the purposes of determining testamentary capacity.
>
> 4 Her Honour applied a wrong principle of law by reversing the onus of proof required under Chinese law with regard to testamentary capacity.

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17 Reasons [21].

18 Reasons [65].

5 Her Honour misdirected herself that there was no evidence before the court that the [Note] was in the handwriting of the Deceased.

6 Her Honour took into account irrelevant considerations regarding the extent of the beneficiaries named and the assets disposed of in the [Note] in her finding that the Deceased had not intended the [Note] to be his Will.

7 Her Honour's finding that the [Note] appears to express a wish that [the applicant] use the money in an unspecified bank account for her own purposes although when she may do so is unclear is not supported by the evidence.

Ground 1: Absence of expert evidence on Chinese law

53 Section 174 of the *Evidence Act 2008*, which is referred to in Ground 1, provides as follows:

> **174 Evidence of foreign law**
>
> (1) Evidence of a statute, proclamation, treaty or act of state of a foreign country may be adduced in a proceeding by producing—
>
> (a) a book or pamphlet, containing the statute, proclamation, treaty or act of state, that purports to have been printed by the government or official printer of the country or by the authority of the government or administration of the country; or
>
> (b) a book or other publication, containing the statute, proclamation, treaty or act of state, that appears to the court to be a reliable source of information; or
>
> (c) a book or pamphlet that is or would be used in the courts of the country to inform the courts about, or prove, the statute, proclamation, treaty or act of state; or
>
> (d) a copy of the statute, proclamation, treaty or act of state that is proved to be an examined copy.
>
> (2) A reference in this section to a statute of a foreign country includes a reference to a regulation or by-law of the country.

54 The applicant accepted the results of the judge's research in relation to the applicable Chinese law and submitted that, since that research and the contents of the Chinese Law of Succession found on the website 'AsianLII' coincide, they should be considered a 'reliable source' for the purposes of s 174(1)(b) of the Evidence Act.

While the applicant accepted that expert evidence would not have been unhelpful, she submitted that in this case it was not necessary. In these circumstances, the applicant submitted that the judge erred by not considering s 174 of the Evidence Act.

55 The applicant relied on excerpts from an article by James McComish entitled 'Pleading and Proving Foreign Law in Australia'[19] in which he stated the following:

> The rules governing proof of foreign law in Australia are more liberal than many would assume. In all Australian jurisdictions except Victoria, foreign statutes can be proved without the necessity for expert evidence. … The practical consequence of these provisions is that, in a great many cases, foreign law can be adequately proved without any need for expert testimony. Given this, it is somewhat surprising that leading texts nonetheless portray expert testimony as being the primary mode of proof. The correct view is that the statutory provisions have the leading role in most cases and that expert testimony has a gap-filling and subsidiary function. As Ryan J said, referring to the provisions of the *Evidence Act 1995* (Cth):
>
> > If … the text of a presumably relevant statute of that country or an authoritative statement in a legal text book or other authority appears to suggest with sufficient precision the effect of the law in question, the court or tribunal is entitled, in the absence of contradictory expert evidence, to make a finding accordingly …[20]
>
> …
>
> [Section 174 of the Evidence Act] has been interpreted liberally: for example, foreign statutes have been proved simply by reference to internet sites.[21]

56 The applicant noted that the adoption of the Uniform Evidence Act by Victoria after the publication of the McComish article, meant that the exception for Victoria stated in the article no longer applied.

57 The applicant also relied on *Mokbel v The Queen*[22] where this Court stated that s

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19 James McComish, 'Pleading and Proving Foreign Law in Australia' (2007) 31 *Melbourne University Law Review* 400.

20 *Applicants in V 722 of 2000 v Minister for Immigration and Multicultural Affairs* [2002] FCA 1059 [33].

21 James McComish, 'Pleading and Proving Foreign Law in Australia' (2007) 31 *Melbourne University Law Review* 400, 424–6 (citations omitted).

22 (2013) 40 VR 625 ('*Mokbel*').

174 of the Evidence Act is 'plainly intended to be permissive'.[23]

58 The applicant submitted that the English translation of the Chinese Law of Succession provides a sufficiently clear indication as to how the Note should be treated under Chinese law and what the correct intestacy provisions are under Chinese law. In particular, the applicant contended that the Note, on its face, appears to meet the description in Article 17 of a testator-written will, that is, one 'made in the testator's own handwriting and signed by him, specifying the date of its making'.[24]

59 The applicant argued that even though the Note only deals with some of the deceased's assets, it could still be treated as a valid will under Chinese law and be admitted in Victoria as a valid will pursuant to s 17(1)(a) or (b) of the Wills Act. According to the applicant, the rest of the deceased's assets would then be dealt with under a partial intestacy.

60 The applicant submitted that, contrary to the judge's views expressed at para 44 of her reasons,[25] the correct intestacy procedures to be followed are sufficiently clear. The applicant referred to the fact that the Chinese order of inheritance, or statutory succession, in the event of intestacy is governed by Article 10 of the Chinese Law of Succession, which gives the same inheritance rights to those 'first in order', being spouse, children and parents.[26]

61 The applicant contended that, as a result of not considering s 174 of the Evidence Act and its permissive character, the judge fell into error by making no findings as to the content or application of the law of China. As a consequence, so it was said, the judge failed to make a finding regarding the validity of the Note as a will pursuant to s 17 of the Wills Act, despite her observation that it is possible that the Note does

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23 *Mokbel* (2013) 40 VR 625, 634 [24]. The Court noted that there was nothing to indicate specifically that any of the conditions in s 174 were met in that case.

24 See [40] above.

25 See [44] above.

26 See [38] above.

comply with the internal law of China by virtue of the operation of Article 17 of the Chinese Law of Succession.[27]

62 The applicant submitted that if the judge had considered s 174 of the Evidence Act, she ought not to have required expert evidence. According to the applicant, this would have enlivened recognition of the Note as a valid will pursuant to s 17 of the Wills Act.

63 In our opinion, Ground 1 is made out.

64 In the light of s 174 of the Evidence Act, expert evidence is not the only means by which the content of a foreign law can be proved to the satisfaction of an Australian court. It appears that, as the judge did not refer to that section, she was under the misapprehension that, in the absence of expert evidence, it was not open to her to make a finding on the content of the Chinese law relating to succession.

65 Given the risk of error — and perhaps even abuse — it is understandable why, in many cases, strict proof of foreign law, through expert evidence, may be required.[28] However, this was not such a case. This is because the judge conducted her own research on the applicable Chinese law and the text of the Chinese law of succession that was yielded by that research coincided with the text upon which the applicant relied. In accordance with s 174(1)(b) of the Evidence Act, the judge should have been readily satisfied that the text was 'a reliable source of information' about the applicable Chinese law.

66 It follows that the judge erred by not accepting the text of the Chinese Law of Succession as an accurate statement of the applicable Chinese law, in accordance with s 174(1)(b) of the Evidence Act.

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27 Reasons [79]. See [44] above.

28 *Mokbel* (2013) 40 VR 625, 633 [22], 634 [26].

Grounds 2 and 5: Appropriate forum and deceased's handwriting

67 The applicant submitted that given the operation of s 17 of the Wills Act, the judge misdirected herself by finding that the forum for dealing with the validity of the Note was China and that Victoria was not the appropriate forum to determine issues of succession and inheritance in respect of the deceased's estate.

68 The applicant contended that the judge erred in deciding the issue of forum on the basis of the deceased's domicile, as this is only relevant to the distribution of his movable assets on intestacy. According to the applicant, domicile did not determine the forum for issues in respect of the deceased's estate because, if it did, there would be no point to s 17 of the Wills Act. The applicant noted that: although the deceased was an Australian citizen, he had been living and working in China for about 10 years; the Note was executed in China; and the deceased died in China. In those circumstances, so it was said, if it can be shown that the Note conforms to the internal law of China then both limbs (a) and (b) of s 17(1) are satisfied.

69 The applicant argued that the judge misdirected herself in finding that there was no evidence before the Court to establish that the Note was in the deceased's handwriting.[29]

70 The applicant referred to her statement in the first affidavit that she asked the deceased why he had written the Note and submitted that it can be inferred from that statement, and the deceased's response, that the applicant correctly recognised the handwriting as that of the deceased.[30] The applicant also referred to the signature on the Note, which she said was 'not dissimilar' to the signature that appears on the deceased's passport, which was in evidence before the judge. She submitted that it could be inferred from the whole of the evidence that the deceased wrote and signed the Note, and that accordingly, the Note satisfied Article 17 of the Chinese Law of Succession and should be considered on its face to be a valid will.

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29 See [47] above.

30 See [16] above.

71 We agree with the applicant's submission that, in deciding that China was the appropriate forum for determining whether the Note was a valid will under Chinese law, the judge gave too much weight to her finding that the deceased's domicile was China. In doing so, the judge failed to determine the question of forum by reference to all relevant considerations, including the wording of the relevant Chinese law, the degree of complexity involved in interpreting and applying that law, the location of the assets which are the subject of the Note and the location of the beneficiary to whom those assets were gifted by the Note.

72 We note that the applicant resides in Victoria, the assets gifted by the Note are located in Victoria and the applicant is the sole beneficiary in respect of those assets and a major beneficiary of the deceased's intestate estate. In these circumstances, prima facie Victoria is an appropriate forum for determining — in accordance with s 17 of the Wills Act — the validity of the Note as a will under the Chinese Law of Succession. There is nothing in the wording of that law, nor any factors peculiar to the deceased, his family situation, the nature of his estate or the identity of any potential beneficiaries of his estate, that displaces that prima facie position.

73 From a review of the Chinese Law of Succession, it is readily apparent that the Note will be a valid will under that law if it complies with the requirements of a 'testator-written will' in Article 17. That article provides that such a will 'is one made in the testator's own handwriting and signed by him, specifying the date of its making'. It is evident on the face of the Note that it specified the date that it was made. The only issues are whether it was in the deceased's own handwriting and whether the signature it bore was his signature.

74 We agree with the applicant's submission that the judge erred in stating that there was no evidence in relation to these issues. In her first affidavit, the applicant gave evidence that she asked the deceased why he had written the Note and he responded: 'in case something happened to him he needed to make sure that [the

applicant] got the money held in the two bank accounts'.[31] The clear inference from this evidence is that the applicant recognised the writing and signature on the Note as that of the deceased and that he acknowledged that he wrote and signed it. As the deceased's mother, the applicant was undoubtedly in a position to recognise his handwriting and signature.

75 It follows that the judge erred in concluding that China was, to the exclusion of Victoria, the appropriate forum for determination of whether the Note was a valid will under the Chinese Law of Succession. It also follows that the judge should have determined that issue in accordance with s 17 of the Wills Act.

76 For the above reasons, Grounds 2 and 5 are made out.

Grounds 3 and 4: Onus and standard of proof for testamentary capacity

77 The applicant submitted that the judge erred in applying the '*Briginshaw* standard of proof' in assessing the deceased's testamentary capacity. She contended that the case of *Fast v Rockman*[32] upon which the judge relied for the applicability of the '*Briginshaw* standard' concerned testamentary capacity in the context of the admission to probate of an informal will under s 9 of the Wills Act, and that the '*Briginshaw* standard' is not applicable to valid wills.

78 The applicant referred to *Giarrusso v Veca*[33] in support of the submission that the propounder of a will must satisfy the Court that the testator had testamentary capacity to make the will on the balance of probabilities rather than to the '*Briginshaw* standard'. According to the applicant, by contrast, the standard required to prove a lack of testamentary capacity is the '*Briginshaw* standard'.[34]

79 The applicant contended that, in the present case, testamentary capacity could be

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31 See [16] above.

32 [2013] VSC 18 [48].

33 [2015] VSCA 214 [27] ('*Giarrusso*').

34 The applicant referred to *Montalto v Montalto* [2016] VSC 266 [28].

inferred because the Note on its face was rational[35] and accurately described the Westpac bank accounts. The applicant also referred to her first affidavit in which she stated that she was able to talk with the deceased while he was in the hospital and submitted that the evidence demonstrated that he was alert and able to conduct sensible conversations such that there was a prima facie case supporting his capacity. The applicant also relied on the fact that the hospital report described the deceased on admission as 'alert' and did not contain any indication of mental incapacity.

80 The applicant argued that Article 22 of the Chinese Law of Succession[36] reverses the onus of proof regarding testamentary capacity. This was said to be because it is concerned with how a will may be voided. As such, so it was said, it requires proof that there is no capacity or limited capacity in order for a will to be void, as opposed to proof that the deceased had capacity.

81 The applicant submitted that there was no evidence before the judge which suggested that the deceased had 'no capacity' or 'limited capacity'.

82 In our opinion, Ground 3 is made out.

83 At the outset, we note that *Briginshaw* and its statutory successor in s 140(2) of the Evidence Act[37] do not impose a new civil standard of proof. Rather, they stipulate that the nature and quality of the evidence that must be adduced before a court can be satisfied that a fact is established on the balance of probabilities will be affected by the seriousness of the allegations involved and their consequences.[38] Accordingly, it

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35 The applicant referred to *Re Estate of Griffith* (1995) 217 ALR 284, 295.

36 See [41] above.

37 Section 140(2) provides:

> Without limiting the matters that the court may take into account in deciding whether it is … satisfied [that the case of a party has been proved on the balance of probabilities], it is to take into account–
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> (a) the nature of the cause of action or defence; and
>
> (b) the nature of the subject-matter of the proceeding; and
>
> (c) the gravity of the matters alleged.

38 *Briginshaw* (1938) 60 CLR 336, 362.

is more accurate to refer to the '*Briginshaw* principles' rather than the '*Briginshaw* standard'.

84 We also note that the judge's observations about the applicable standard of proof were made in the context of her consideration of whether the Note should be admitted to probate as an informal will under s 9 of the Wills Act. However, read in context, the judge's reasons indicate that her conclusion that the applicant had not established that the deceased had testamentary capacity when he wrote the Note also influenced her decision to decline to find that the Note was a valid will under s 17 of the Wills Act. As the applicant is not seeking to challenge the judge's decision in relation to s 9 of the Wills Act, it is not necessary for us to consider whether the *Briginshaw* principles apply to the issue of testamentary capacity when an informal will is propounded. We will confine our remarks on the applicability of those principles to the issue of testamentary capacity when a will which complies with the formal requirements for validity is propounded.

85 It is well established that the propounder of a will has the onus of satisfying the Court on the balance of probabilities that the relevant will is valid, including that the testator had testamentary capacity to make the will.[39] The *Briginshaw* principles do not apply to the propounder. Those principles may, however, apply to determining whether a caveator or any other person who opposes the grant of probate has discharged an evidential burden that may have shifted to him or her due to the nature and seriousness of the allegations upon which he or she has relied to impugn the will.[40] For example, an allegation of undue influence will attract the *Briginshaw* principles.[41]

86 In the present case, there was no opposition to the grant of letters of administration with the will annexed and there was no allegation of undue influence or, indeed, lack of testamentary capacity. As the only question regarding

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39 *Giarrusso* [2015] VSCA 214 [27].

40 *Giarrusso* [2015] VSCA 214 [27].

41 *Giarrusso* [2015] VSCA 214 [27].

testamentary capacity was whether the applicant, as the propounder, had established testamentary capacity, the judge was required to decide that question on the balance of probabilities without regard to the *Briginshaw* principles.

87 Had the judge done so, there would have been no proper basis for her to conclude that the applicant had not established testamentary capacity. The deceased was in hospital due to a physical illness, namely, heart problems. There is no evidence that these problems affected his cognitive skills or that any medication he was taking affected his lucidity.

88 The applicant's evidence about the conversations she had with the deceased indicate that he was in control of his mental faculties. He was able to include details of his Westpac bank accounts in the Note and was able to remember his PIN in relation to the savings account. The hospital report contains no indication that the deceased suffered from any non-physical impairment.

89 Put simply, on the evidence before the judge, there was no basis for any doubt to be entertained about the deceased's testamentary capacity at the time he wrote the Note.

90 In relation to Ground 4, if the correct construction of Article 22 of the Chinese Law of Succession is that it presumes testamentary capacity unless lack of capacity is established, then it must follow from our discussion of Ground 3 that such a presumption has not been displaced. Likewise, if on its proper construction Article 22 does not contain any presumption, it follows from that discussion that the deceased was not a person 'with no capacity or with limited capacity' for the purposes of that article. In these circumstances, it is not necessary for us to decide whether the judge — who did not refer to Article 22 — impermissibly reversed the onus of proof.

Grounds 6 and 7: Findings regarding the Note

91 The applicant submitted that the judge erred by taking into account in her

consideration of whether the Note was a will, the fact that it did not deal with all the deceased's assets or all his potential beneficiaries. The applicant submitted that it is trite law that a testator can name a single beneficiary of a will and leave that person a single asset without listing all other assets. According to the applicant, those considerations cannot be determinative factors on the question whether a document is intended to be a will.

92 The applicant also submitted that, in characterising the Note as precatory, the judge ignored the deceased's statement that the money in the Westpac accounts was to be used 'in case something happened to him'. According to the applicant, it can be inferred that the deceased was speaking of the time after his death. The applicant contended that, as the deceased had two Westpac bank accounts in Victoria, there could be no ambiguity as to which Westpac bank accounts were referred to in the Note. Accordingly, so it was said, the judge's characterisation of the bank accounts as 'unspecified' was contrary to the evidence.

93 We agree with the applicant's submissions. The fact that the Note did not deal with all the deceased's assets and only benefitted one potential beneficiary does not, in the circumstances of this case, indicate that he did not intend the Note to be a will. Similarly, in the circumstances of this case, it can readily be inferred that the Note was not precatory but was intended to be a testamentary instrument in respect of two bank accounts which were sufficiently identified by it. Accordingly, Grounds 6 and 7 are made out.

Conclusion

94 For the above reasons, the application for leave to appeal will be granted and the appeal will be allowed.

95 As the judge determined the proceeding on the papers, this Court is in as good a position as the judge to decide it instead of remitting it to the judge.

96 Having regard to the conclusions we have already set out, we are of the opinion

that the evidence is sufficient to warrant a finding, under s 17(1)(a) and (b) of the Wills Act, that the Note is a valid will under Article 17 of the Chinese Law of Succession.

97 We note that, under Article 10 of the Chinese Law of Succession, the persons entitled to the deceased's intestate estate are his spouse, children and parents. Ms Fan and Mr Tang Sr have consented to letters of administration with the will annexed being granted to the applicant. It is not clear whether the deceased is the father of Ms Fan's son. If it is subsequently established that he is, on the basis of Ms Fan's text message dated 8 March 2016 to the applicant's solicitors[42] and her earlier statements to the solicitors,[43] we are satisfied that Ms Fan has provided sufficient consent to the application on behalf of her son.

98 Accordingly, the Court will order that letters of administration with the will annexed be granted to the applicant. Pursuant to this order, the applicant will be able to distribute the assets referred to in the Note to herself. The balance of the deceased's estate — comprising the motor vehicle in Victoria and the assets in China — will fall to be distributed in accordance with the intestacy provisions of the Chinese Law of Succession.

99 In oral submissions, the applicant's counsel informed the Court that the applicant will, if necessary, apply to have the order of the Court re-sealed in China and thereby obtain authority to administer the balance of the deceased's estate in accordance with the intestacy provisions of that law.

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42 See [24] above.

43 See [23] above.