

## Table of Contents

<b><u>Topic 1: Introduction.....</u></b>	<b>1</b>
Definitions.....	1
Devolution of Property .....	1
Public Trustee .....	1
Jurisdiction .....	2
<b>Wills .....</b>	<b>2</b>
Execution of Powers of Appointment.....	3
Appointment of Testamentary Guardian .....	3
Joint Tenancy .....	3
Joint Bank Account.....	3
Life Insurance & Nomination of Beneficiaries .....	4
<i>Donatio mortis causa</i> .....	4
Delivery of Subject Matter.....	4
Contracts to make Wills.....	5
Mutual Wills.....	5
Disclaimer of Benefit under a Mutual Will .....	6
Necessity to prove agreement for mutual Wills to operate .....	6
Divorce & Mutual Wills.....	6
Remarriage of Survivor .....	7
Delegation of Will maker .....	7
Secret Trusts .....	7
Half Secret Trusts.....	7
<b><u>Topic 2 – Grants, Personal Representatives &amp; Professional Liability.....</u></b>	<b>9</b>
<b>Applying for Probate &amp; Letters of Administration (LOA).....</b>	<b>9</b>
Information Transmissions of Title .....	9
Appointment of Executors.....	9
Implied Appointment as Executor .....	9

Delegation of Appointment of Executor.....	10
<b>Capacity to take out a Grant.....</b>	<b>10</b>
Infants .....	10
Persons suffering from mental or physical disability.....	10
Corporations .....	10
Bankruptcy & Insolvency .....	10
Criminals .....	11
Intermeddling .....	11
Transmission of the Office of Executor – The Chain of Representation.....	11
Multiple Executors .....	11
Personal Representative's powers to be exercised jointly .....	12
Cesser of Executor's right to prove.....	12
Renunciation of Executorship .....	12
Renunciation of Trusteeship .....	13
Differences btw Executors & Administrators .....	13
<b>Different kinds of Grants of LOA.....</b>	<b>13</b>
LOA with the will annexed ( <i>cum testament annexo (CTA)</i> ) .....	13
LOA ( <i>de bonis non</i> ) .....	13
Limited Grants of administration.....	13
<b>Grants of Limited Duration .....</b>	<b>13</b>
<i>Durante minore aetate</i> (during infancy) .....	13
<i>Durante absentia</i> (during absence) .....	13
During incapacity .....	14
<i>Pendent elite</i> (where there is a suit pending) .....	14
<i>Cessate</i> grant .....	14
<b>Grants of Limited Purpose .....</b>	<b>14</b>
The grant <i>ad colligenda bona</i> (for the collection of assets) .....	14

Grant <i>ad litem</i> (for the purposes of litigation) .....	14
Where will is mislaid, outside the jurisdiction or inadvertently destroyed.....	14
<b>Entitlement to Grant of LOA</b> .....	14
Order of Entitlement to LOA (where there is a will) .....	15
Order of Entitlement (intestacy) .....	15
<b>The Public Trustee</b> .....	16
Where nobody is applying for Grant .....	16
Where PR requires PT to act instead of them .....	16
Where there is an administration act.....	16
Simplified procedure for small estates .....	16
Powers in the <i>interregnum</i> btw the death & the issue of grant.....	16
Powers when acting in administration of an estate or trust .....	16
Powers to oppose grant.....	17
Appointment as guardian .....	17
Compromise of action on behalf of incapable person .....	17
Trustee companies.....	17
<b>Common form &amp; Solemn form Grants</b> .....	17
Caveats & contested proceedings .....	18
<b>Revocation of Grants</b> .....	18
Revocation of Grant in Solemn Form.....	18
Revocation of Grants in Common Form .....	19
The effect of revocations on PRs .....	19
Effect of revocations on third parties .....	19
Effect of revocation on distributees of estate .....	19
Citation of PRs.....	20
The Date of the Grant .....	20
Evidence relating to the law of Wills .....	20

Probate jurisdiction .....	20
Equity jurisdiction .....	20
<b>Proof of the Will .....</b>	<b>20</b>
The Re-sealing of Grants .....	21
<b>Personal Representatives – Their Duties, Powers, Liabilities &amp; Rights.....</b>	<b>22</b>
PRs & Trustees .....	22
Power to appoint successors .....	22
Liability for Debts.....	22
Limitation periods.....	22
Remuneration.....	22
Susceptibility of FPA claims .....	22
Nature of Beneficiaries' rights .....	23
Change of Role from PR to Trustee .....	23
The duty of PR to collect & call in assets .....	23
Advertising for Claims.....	23
Assets that do not pass to creditors .....	24
The duties of PR to exhibit an inventory & render accounts when req'd .....	24
The duty of PR to distribute estate as soon as may be .....	24
Effect of neglect of duties by PR .....	24
<b>The Powers of Trustees &amp; PR.....</b>	<b>24</b>
The Power of Sale .....	24
Investment Powers .....	24
Power to carry on a business.....	25
Power to litigate on behalf of estate .....	25
Incidence of costs of litigation .....	25
Power to hand over chattels to infant benefs or their guardian.....	25
Liability in contract.....	25

Liabilities of deceased Trustees .....	26
Divorce maintenance orders.....	26
<b>Torts committed by the deceased .....</b>	<b>26</b>
Survival of actions on death.....	26
Liability of PR incurred in admin of estate.....	26
Liabilities of PR in carrying on business forming part of estate.....	26
<b>Exceptions to personal liability of PR .....</b>	<b>26</b>
Exceptions .....	26
Identical contracts .....	26
Indorsement of bill.....	26
Liability of PR for their own defaults .....	27
<i>devastavit</i> .....	27
Fault must be shown to establish <i>devastavit</i> .....	27
Conflict of interest involving PR.....	27
Creditor's right of recovery.....	27
Advertised for claims as provided by statute .....	28
Did not advertise but had no notice of debt when benef paid .....	28
Did not advertise & had notice of debt when benef paid .....	28
PRs defences & other Protections .....	28
Liabilities inherited from the deceased .....	28
<b>General defences &amp; Protections re Liabilities incurred in admin estate.....</b>	<b>28</b>
Consent, concurrence, acquiescence, laches & limitation of action .....	28
No liability for default of co-Executor.....	28
Special relief re Leases & other grants of Land .....	29
<b>The right of PR to Commission .....</b>	<b>29</b>
<b>Solicitor's Professional Liability (will drafting &amp; estate planning) .....</b>	<b>29</b>
When may liability rise in tort? .....	29

<b>Duty to Prepare a Will.....</b>	29
Duty to ensure testator has TC & no undue influence .....	30
<i>Legal Services Commissioner v Ford (2008) LPT 12.....</i>	30
<i>Calvert v Badenach (2015) TASFC 8.....</i>	30
Duty to ensure the Will gives effect to Testator's instructions .....	31
Duty to ensure the Will is validly executed & attested .....	31
Custodial duties .....	31
Limits of Liability .....	31
<b>Equity – Fiduciary Duties.....</b>	31
Conflict.....	32
<i>McGeogh v Hendriks (2007) NSWSC 311.....</i>	32
<i>Walker v Alessandro (2010) VSC 15.....</i>	32
Breach of Fiduciary Duty.....	33
<i>Dore (as exec of the will of WH Chenhall decd) (2006) QCA 494.....</i>	33
<b>Professional Rules: Australian Solicitors Conduct Rules 2012.....</b>	34
What is informed consent? .....	34
Concurrent liability .....	34
Risk Management .....	35
<b>Topic 3: Formal &amp; Mental Requirements for a Valid Will.....</b>	<b>36</b>
The Execution of Wills ( <b>\$10</b> ).....	36
What purposes do the formal requirements serve? .....	36
Evidentiary function.....	36
Channelling function.....	36
Cautionary function .....	36
Protective function .....	36
Formalities ( <b>\$10</b> ).....	36
"in writing" .....	37

"Signed" .....	37
Signature by another person on behalf of testator.....	38
Position of Signature.....	38
Excessive execution .....	39
"Acknowledged" .....	39
"in the presence of 2 or more witnesses present at the same time".....	40
Attestation & Subscription.....	40
Attestation .....	40
Subscription .....	41
Proof of Due Execution.....	41
<b>Court's Power to Dispense w/ execution requirements (s18)</b> .....	42
Limits.....	42
Court's jurisdiction to dispense with formalities .....	42
<i>Re Yu</i> (2013) QSC 322 .....	43
<i>Mellino v Wnuk</i> (2013) QSC 336 .....	43
Criteria .....	43
Will with only 1 witness.....	44
Testamentary intention – suicide cases.....	44
<i>Re Garris</i> (2007) QSC 181.....	44
<i>Hatsatorous v Hatsatouris</i> (2001) NSWCA 408.....	45
Courts will scrutinise evidence carefully.....	45
<i>Little v Hammond</i> (2007) QSC 183.....	45
Switched Wills.....	46
<i>Re Goward</i> (1997) 2 Qd R 54 .....	46
<i>Estate of Daly</i> (2012) NSWSC 555.....	46
Draft documents or Wills.....	47
<i>In the Will and Codicil of Lesley Cleland</i> (2009) QSC 109.....	47

Disqualification of Attesting Witness from Benefiting under Will ( <b>s11</b> ).....	47
Exceptions .....	48
<i>Aplin v Stone</i> (1904) 1 Ch 543 .....	49
<i>Re Andrews</i> (1980) Qd R 317 .....	49
<i>Estate of Bravda</i> (1968) 1 WLR 479; (1968) 2 All ER 217.....	49
Disqualification of Interpreters/Translators from Benefiting under the Will ( <b>s12</b> ).....	49
Exceptions .....	49
Effect of Failure of Disposition of Property ( <b>s33G</b> ).....	49
Can disqualification be avoided by relying on a substitution clause? .....	50
<i>Re Rowney</i> (1992) QSC 66.....	50
The Rule in <i>Jones v Westcomb</i> (1711) Prec Ch 316; 24 ER 149 .....	50
<i>Verrall v Jackson</i> (2006) QSC 309.....	50
<b>Solicitor's Liability in Negligence</b> .....	50
Disqualification of an Attesting Witness or spouse of an Attesting Witness .....	50
Failure to prepare the will promptly.....	51
Failure to advise of need to sever JT .....	51
Failure to produce documents in a reasonable time.....	51
Limits.....	51
<b>The Incorporation of Documents by Reference</b> .....	51
Privileged Wills.....	51
<b>Topic 4: Capacity &amp; Intention.....</b>	<b>53</b>
Satisfactory State of Mind .....	53
Often pleaded in the alternative .....	53
<i>Nicholson v Knaggs</i> (2009) VSC 64.....	53
Testamentary Capacity .....	53
The meaning of Testamentary Capacity .....	54
<b>The Test of Testamentary Capacity</b> .....	54

Lucid intervals .....	54
Delusions.....	55
Time for Determining Mental Capacity .....	55
Proof of Incapacity .....	56
<i>Bailey v Bailey (1924) 34 CLR 558 – guidance on onus</i> .....	56
<b>The Solicitor's Duty at the Bedside.....</b>	<b>57</b>
<b>Testamentary Capacity – <i>animus testandi</i> .....</b>	<b>57</b>
Knowledge & approval.....	58
Suspicious circumstances.....	58
Fraud & undue influence .....	59
Undue influence.....	59
Fraud .....	60
<i>Re Kelly (1929) SASR 262</i> .....	60
<i>Wilkinson v Joughin (1866) LR 2 Eq 319</i> .....	60
To establish fraud .....	60
<b>Rectification – Correcting Testator's Mistake (§33)</b> .....	60
Unintentional revocation clauses .....	61
Misdirected codicils .....	61
<i>Goods of Gordon (1892) P 228</i> .....	62
Omission of dispositive material.....	62
<i>Goods of Boehm (1891) P 247</i> .....	62
<i>Re Morris (1971) P 62</i> .....	62
Omission of non-testamentary material from Probate.....	63
Costs of Proceedings.....	63
<b>Court-Authorised Wills.....</b>	<b>63</b>
Minor .....	63
Person lacking testamentary capacity .....	64

Execution .....	64
Safeguards .....	64
<b>Inspection of Contents of Will of deceased by Interested Persons (s33Z)</b> .....	65

## Topic 1 – Introduction

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**Law of Succession** = the redistribution of property on death; almost exclusively a matter of State or Territory law

**Freedom of Testation** = all adults possessing the requisite mental capacity are permitted by law to indicate (by a will) who shall succeed to their property (Mackie p8)

**Testamentary** = matters pertaining to wills

**Devise** = where a provision in a will leaves realty to a beneficiary

**Bequest** = where a provision in a will leaving personalty

**Legacy** = a bequest for a sum of money (the beneficiary of it is a legatee)

Bequest & legacy are often interchangeable in practice

During the time of administration of the estate, beneficiaries are said to have no more than a right to go to the court and insist that the administration be duly carried out by the PR

- They have rights of action, but not rights of property: *Commissioner of Stamp Duties (Q) v Livingstone* (1964) 112 CLR 12; (1965) AC 694
- *Re Schilling* (1995) 1 Qd R 696 – it was held that a benef had no right to apply for an account until their beneficial interest had been crystallised

The doctrine of relation back – enables administrator *inter alia* to sue to protect the estate from wrongful injury during the interregnum, but gives rise to a distinction btw execs & admins

- Since execs derive their authority from the will they need probate to prove their authority
- Administrators need LOA
- *Ingall v Moran* (1944) 1 KB 160 – it was held that an executor is competent to issue proceedings in that capacity before obtaining a grant but the administrator is not

### **Devolution of Property** (Preece, p10)

- **Section 45(1)** – devolution of property upon death vests in the executor(s) and if no executor then the PT
  - NSW – property devolved upon death to PT & thereafter to PR only when probate/LOA is made: *ss44, 61 Probate & Admin Act 1898 (NSW)*
- **Section 72** deals with issues of when a document needs to be served upon deceased's estate (Preece p9)

### **Public Trustee** (Preece, p11)

- Any acts lawfully done to or by the PT before the appointment of an administrator are as valid and effectual as if they had been done by, to, or in regard to, the administrator: *s45(4A); Dykes v Gerke* (1962) 62 SR (NSW) 496

#### **45 Devolution of property on death**

- (1) The property to which a deceased person was entitled for an interest not ceasing on his or her death (other than property of which the deceased person was trustee) shall on his or her death and notwithstanding any testamentary disposition devolve to and vest in his or her executor and if more than 1 as joint tenants, or, if there is no executor or no executor able and willing to act, the public trustee.
- (2) Upon the court granting probate of the will or letters of administration of the estate of any deceased person the property vested in his or her executor or in the public trustee under the provisions of subsection (1) shall devolve to and vest in the person to whom the grant is made and if more than 1 as joint tenants.
- (3) Where at any time a grant is recalled or revoked or otherwise determined the property of the deceased vested at that time in the person to whom the grant was made shall be divested from the person and shall devolve to and vest in the person to whom a subsequent grant is made, and during any interval of time between the recall, revocation or other determination of a grant and the making of a subsequent grant the property of the deceased shall devolve to and vest in the public trustee.
- (4) The title of any administrator appointed under this Act to any property which devolves to and vests in the administrator shall relate back to and be deemed to have arisen upon the death of the deceased as if there had been no interval of time between the death and the appointment.
- (4A) However, all acts lawfully done by to or in regard to the public trustee before the appointment of an administrator shall be as valid and effectual as if they had been done by to or in regard to the administrator.
- (5) For the purposes of this section, and notwithstanding the provisions of the *Trusts Act 1973*, section 16, an executor includes an executor by representation under the provisions of section 47 of this Act.
- (6) While the property of a deceased person is vested in the public trustee under this section, the public trustee shall not be required to act in the administration of the estate of the deceased person or in any trusts created by the will of the deceased person, or exercise any discretions, powers, or authorities of a personal representative, trustee or devisee, merely because of the provisions of this section.
- (7) Nothing in this section affects the operation of an Act providing for the registration or recording of any person as entitled to any estate or interest in land in consequence of the death of any person notwithstanding that there has been no grant in the estate of the deceased person.

## 72 Service

In any case where any person desires to effect within a prescribed time service of any proceedings against, or of any notice or other document required or permitted to be served in respect of the estate of a deceased person and that person is uncertain as to the person upon whom application for directions is made to it within the time prescribed for service, direct the mode of service in that case and, if it thinks fit, allow an extension of the time within which service may be effected.

**Jurisdiction** (Preece, p12)

- SCQ has jurisdiction over all matters concerning the estate of deceased persons: s6
- District Court has jurisdiction up to its monetary limits (re admin of estates) but has no jurisdiction over grants & associated matters: s68(1)(vii) *District Courts Act 1967 (QLD)*
- Movable property – the applicable law is the person's domicile (*lex domicilli*)
- Immovable property – applicable law is the place where the immovable property is situate (*lex situs*)

**WILLS** (Preece p18 & Mackie p17)

Primary function – revocable disposition of property intended to take effect on death

**Section 8** declares what property that may be disposed of by will

A will may be in any form (it must be duly executed in the manner prescribed in Ch 4)

- Formal requirement – in writing
- *Re Sheppard (1893) 5 QLJ 116* – what was eventually held to be a will was apparently a contract btw father & son
- *Re Marsden (1860)* – the will took the form of an order secured on a savings bank
- *Bartholemew v Henley (1820)* – where it took the form of a cheque to take effect after death
- *Bagot's Executor & Trustee Co v Bathern (1982)* – it took the form of a letter
- *Re Cowin (1968)* – it took the form of letters of instruction to prepare a will

If it is not clear from reading the instrument that it is intended to be testamentary, extrinsic evidence is admissible to show the intention: *Goods of Slinn (1890)* – in the form of a deed poll

- A will has no effect in disposing an interest in property until the testator dies: *Attorney-General (UK) v Jones (1817) 3 Price 368; 146 ER 291; Re Thompson (1906) 2 Ch 199* at 202
- *Re Reid (1893) 5 QLJ 120* – a doc which stated one of the dispositions was irrevocable except by consent of the person in whose favour it was made was held to be a power of appt rather than a will
  - Griffith CJ held that irrevocability was not 'surplusage' but an essential part of the doc & that the instrument was not testamentary in character & not entitled to be admitted to probate
- Conditional will – for a conditional will to be valid the condition must be included in the will which must expressly state that the will is conditional: *Corbett v Newey (1996) 2 All ER 914*
- A document which has as its only object the revocation of all former wills & testamentary dispositions made by them does not count as a will but s13(d) has a provision for the revocation of a will by such a document
  - The doc of revocation will not be admitted to probate
  - LOA will be granted with the Registrar SCQ merely noting its existence of the revoking instrument: *Toomer v Sobinska (1907) P 106*

**Execution of Powers of Appointment** (Preece, p22)

- Power of appt – given by a deed or will where a nominated person (donee) may direct an interest in property to devolve any one or more of a specified category of persons (objects)
- If this category includes the donee of the power, it is a *general power of appointment*
- If it does not include the donee, it is a *special power of appointment*
- The Act distinguishes btw general & special powers in ss 5B, 33J & 59(1)

**Appointment of Testamentary Guardian** (Preece, p24)

- A parent or guardian of a child may (by will) appoint any person as a guardian of a child: s61C
- However this appt will have no effect if the appointor is not the parent or guardian immediately before the death of the appointor: s61C(2)
- The appt takes effect on death of appointor if there is no surviving parent of the child at that time: s61D(2)
- If there is a surviving parent, the appt does not take effect until the death of the last surviving parent: s61D(3)(b) UNLESS the will shows that the appointor intended the appt to take effect on the appointor's death: s61D(3)(a)
- A testamentary guardian has all the powers, rights & responsibilities for making decisions about long-term care, welfare & development of the child that are ordinarily vested in a guardian: s61E(1)
- They have daily care authority for the child (as defined in s61E(3)) if there is no surviving parent or order: s61E(2)
- If there is more than 1 guardian they must act jointly: s61F
- There are provisions governing an application to SCQ where the person who has appointed the guardian has died before the appt has taken effect (s61G) or by a surviving parent asking for an appointment to be revoked: s61H

**Joint Tenancy** (Preece, p26 & Mackie p23)

- Partnership assets are held in joint tenancy: s35(2) *Property Law Act 1974* (Cth)
- JT are said to be hold the property "per my et per tout" (*Pelham v Pelham* (1955) SASR 53 at 57 per Mayo J) = each JT holds nothing exclusively and yet holds the whole together with her or his fellows
- The survivor acquires the interest at the creation of the JT, not at moment of death of other JT: *Earl of Zetland v Lord Advocate* (1878) 3 AC 505
- JT in property can be severed unilaterally: s59 *Land Title Act 1994* (QLD)

**Joint bank account** (Preece, p27 & Mackie p23)

- Leading Australian case – *Russell v Scott* (1936) 55 CLR 440 (p27): HCA held the nephew was entitled to the balance in the bank account he held jointly with his aunt
- Where JT bank account is created, the beneficial interests will be established by intention of persons creating it or by authority under which it was created

- Their intention may take the form of an expressed statement made by one or more of them, or it may be inferred from the manner in which the account was created or operated & it may be varied: *Calabrese v Miuccio* (1984) 1 Qd R 430
- Where evidence of intention is unclear, certain rules are applied & presumptions made: *National Trustees Execs & Agency Co (A/asia) v Trainor* (1974) VR 49 at 55-56 per Page J

#### **Life Insurance & Nomination of Beneficiaries** (Preece, p31 & Mackie p21)

- The contract is not testamentary
- The insured's death is merely the event which makes the insurer's promise to pay the designated beneficiary operative: *Williams v Federal Commissioner of Taxation* (1950) 81 CLR 359 at 379 per Williams J
- **Life Insurance Act 1945 (Cth)** placed limitations (subject to bankruptcy law) on the extent that moneys payable under life insurance can be used in the payment of the insured's debts: ss92-94

#### **Donatio mortis causa** (Preece, p31 & Mackie p25)

- A gift in anticipation of death
- It does not have to be executed in the manner prescribed for wills
- 3 essentials for the constitution of a donation mortis causa:-
  - The gift must be in contemplation of death
  - There must be a delivery of the subject matter of the gift or a transfer of the means or part of the means of getting at the property or a transfer of the indicia of title
  - The gift must be conditional upon the death of the donor: *Dufficy v Mollica* (1968) 3 NSW 751 at 758
- A general contemplation of death is not sufficient to support a donation mortis causa – something more specific is necessary although it need not amount to an expectation of immediate death: *Smallacombe v Elder's Trustee & Executor Co Ltd* (1963) WAR 3 at 4-5 per Hale J

#### **Delivery of Subject Matter** (Preece, p32)

- Delivery of chattel with requisite intention satisfies the requirement
- Delivery may be made before or after the expression of intention to make the gift: *Re Weston* (1902) 1 Ch 680 at 684; *Harneiss v Public Trustee* (1940) 40 SR (NSW) 414; *Dufficy v Mollica* (1968) 3 NSW 751
- Constructive delivery will suffice (eg. Handing over a key for enabling donee to exercise dominion over subject matter): *Re Weston*
- *Woodward v Woodward* (1991) – UKHC held donation of MV was accomplished by handing over 1 set of keys without logbook
- *Re Beaumont* (1902) – A cheque drawn in favour of donee & presented to bank for payment after donor's death is not donation
- Where donor decides to transfer title of chattels by deed – the execution of the deed is not sufficient on its own – the deed must be delivered or constructively delivered to the donee: *Anning v Anning* (1899) 21 NSWLR (Eq) 13 at 17

- It may be affected by a POA as long as subject matter vested in the donee as a result of the exercise of that power before death of donor: *Re Craven's Estate (No 1)* (1937) Ch 423
- Choses in action may be subject of donatio

#### Contracts to make wills (Preece, p34 & Mackie p29)

- For any promise to leave property to be effective it must be coupled with an express or implied promise not to revoke the provision made (because of the inherently revocable nature of wills)
- Where a promise is made to leave a **general legacy** (eg. \$5K) the promisee may claim the amount promised as a debt owing by the estate: *Schaefer v Schuhmann* (1971) 46 ALJR 82; *Hammersley v De Biel* (1845) 12 Cl & Fin 45
- Where a promise is made to leave **specific property** the promisee is in a stronger position
  - The contract may be enforceable & promisee can demand the asset be transferred
  - If promiser deals with property in manner inconsistent with the promise made, promisee can treat contract as repudiated & sue for anticipatory breach
  - The promisee may intervene before property reaches hands of bona fide purchaser for value without notice & restrain promisor from disposing of it: *Schaefer*
- Where promise is made to leave **residue** the promisee is postponed to the general creditors
- If there are rights under a contract & a different provision is made for promisee by the promisor's will, promisee will need to elect btw those rights & benefit of the will if it appears it was not intended for both to be taken: *Schaefer*
- *Schaefer v Schuhmann* (1971) – also shows that the promise must be performed before any claims for FPA can be entertained at least where promise relates to a specific asset, giving promisee a secured interest in the specific property
  - Unless the promise is to leave residue then this may mean after payment of all lawful claims against the estate including FPAs
- A promisee may not be able to show existence of a contract (perhaps because the promise made was too uncertain or **Statute of Frauds 1677** evidentiary requirements were not met)
  - Promisee may still be able to claim a sum of \$ on **quantum meruit** for services rendered (*Stinchcombe v Thomas* (1957) VR 509) or entitlement to a specific property or an interest in property by way of **constructive trust** (*Ogilvie v Ryan* (1976) 2 NSWLR 504) – Preece p36
- A promise not to revoke or alter a will is a valid contract – Mackie p33

#### Mutual Wills (Preece, p37 & Mackie p35)

- Usually made by 2 ppl mutually & economically dependent on e/o who wish to pool their resources during their lives but also wish for whatever remains after death to go to specified beneficiaries
- How much of their estates is to be bound is a matter for agreement btw the parties
- *Re Green* (1951) – the wills were mutual as to half the parties' estates but free of obligation as to the other half: *Pratt v Johnson* (1958)

- An agreement to make a mutual will is revocable by notice given to the other party (*Bigg v QLD Trustees Ltd* (1990) 2 Qd R 11) & may be varied during the lifetime of both parties (*Re Cleaver* (1981) 1 WLR 939)
- However once 1 dies leaving a will as per terms of their agreement, the other party is bound by law, even if the will of the survivor is later varied or revoked in breach of the agreement (probate court ignores the agreement & equities to which it gives rise)
- Equity will oblige the survivor's PR to hold the estate which devolves to them on trust for the objects prescribed by the agreement: *Dufour v Pereira*
- *Re Dale* (1994) Ch 31 – it was held the principle is binding even though survivor takes no benefit under the will of the first to die
- *Birmingham v Renfrew* (1937) 57 CLR 666 (see quote at pg38)
- Mutual wills & FPAs – p39

#### Disclaimer of Benefit under a Mutual Will (Preece, p40)

- It is the death of the first to die which imposes the obligation & that thereafter both estates are bound
- The survivor may choose not to expend any benefit conferred by the will of the other party but cannot be released from the obligation

#### Necessity to prove agreement for mutual wills to operate

- Those claiming to be beneficiaries under an agreement to make mutual wills must prove the agreement (incl the agreement not to revoke the particular testaments): *Bigg v QLD Trustees Ltd* (1990) 2 Qd R 11 at 14 per McPherson J
- If the fact of the agreement does not appear from the will then it may be shown through extrinsic evidence: *Birmingham v Renfrew* (1937) 57 CLR 666; *Nowell v Palmer* (1993) 32 NSWLR 547
- Just because 2 people execute similar wills at the same time does not carry a presumption of mutuality: See *Re Oldham* (1925) 1 Ch 75; *Gray v Perpetual Trustee Co Ltd* (1928)
  - o ...although it has been said to be a 'relevant circumstance': *Re Cleaver* (1981) 1 WLR 939 per Nourse J at 944

#### Divorce & Mutual Wills

- **Section 15** provides that where parties to a mutual will agreement are subsequently divorced, the divorce revokes any beneficial disposition of any property made by the will in favour of the testator's spouse

**15 Effect of divorce or annulment on a will**

(1) A testator's divorce or the annulment of a testator's marriage revokes—

- a disposition to the testator's former spouse made by a will in existence when the divorce or annulment happens; and
- an appointment, made by the will, of the former spouse as an executor, trustee, advisory trustee or guardian; and
- any grant, made by the will, of a power of appointment exercisable by, or in favour of, the testator's former spouse.

*Note—*  
*For wills made before the commencement of section 7 as inserted by the Succession Amendment Act 2006, see section 7(4) and (5).*

(2) However, a testator's divorce or the annulment of a testator's marriage does not revoke—

- the appointment of the testator's former spouse as trustee of property left by the will on trust for beneficiaries that include the former spouse's children; or
- the grant of a power of appointment exercisable by the testator's former spouse only in favour of children of whom both the testator and the former spouse are parents.

(3) Subsection (1) does not apply if a contrary intention appears in the will.

(4) If a disposition, appointment or grant is revoked by this section, the will takes effect as if the former spouse had died before the testator.

(5) In this section—

annulment, in relation to a testator, means—

- the granting of a decree of nullity in relation to the testator's marriage by the Family Court of Australia; or
- the annulment of the testator's marriage under the law of a place outside Australia, if the annulment is recognised in Australia under the *Family Law Act 1975* (Cwlth).

divorce, in relation to a testator, means—

- the taking effect of a divorce order for the testator under the *Family Law Act 1975* (Cwlth); or
- the dissolution of the testator's marriage under the law of a place outside Australia, if the dissolution is recognised in Australia under the *Family Law Act 1975* (Cwlth).

former spouse, in relation to a testator, means the person who was the spouse of the testator immediately before the divorce or annulment.

spouse includes a party to a purported or void marriage.

**Remarriage of Survivor** (Preece, p41)

- Where a survivor remarries, any will made is revoked
- It appears that the promised rights of the benefits under a new will are not lost because the trust obligation subsists (of which the revoked will is evidence): *Re Green* (1951) 1 Ch 148 at 155 per Vaisey J recently confirmed in *Re Goodchild* (1996) 1 WLR 694
- However the new spouse will have rights to claim family provision

**Delegation of Will Maker** (Preece, p41)

A testator cannot delegate the power to make their will because:-

- A will must represent the testator's "mind, memory & understanding" & if it doesn't then it cannot be admitted to Probate
- When the will is executed, the requirements under the Act must be observed
  - Those requirements allow for the appt of an agent to sign on behalf of testator
- **Section 33R** deals with when a person may delegate power to dispose of property by a will:-

33R When a person may delegate power to dispose of property by a will

A power or a trust, created by will, to dispose of property is not void on the ground that it is a delegation of the testator's power to make a will, if the same power or trust would be valid if made by the testator, by instrument, in the testator's lifetime.

**Secret Trusts** (Preece, p43)

- This is where property can be disposed of upon death without complying with the rule requiring writing
- Consent must be obtained of a benef under a will to hold the benefit as trustee for a person not mentioned in the will at all
- Equity will enforce the trust although the benefit is not expressed in writing in the will – it is a secret trust
- Sufficient evidence must be adduced by the benef under the trust to satisfy the court: *Voges v Monaghan* (1954) 94 CLR 231
- See also *Blackwell v Blackwell* (1929) AC 318 at 334-5 per Lord Sumner about what a benef must show
- As long as the trustee consents, the identity of the benef need not be communicated during the testator's lifetime (eg. It may be sealed in an envelope to be opened after testator's death: *Re Boyes* (1884) 26 Ch D 531; *Re Keen* (1937) Ch 237)
- Provided the trustee consents, the testator can informally change their mind at any time by communicating to the trustee: *Guest v Webb* (1965) VR 427
- If testator cancels a direction but trustee learns of this only after death, the trustee should not obey the direction but should hold property on resulting trust for the estate of the testator

**Half Secret Trusts** (Preece, p44)

- Sometimes property is left by will to someone who is designated as trustee by it but there is no indication in the will as to the ID of the benef
- Legatee/devisee cannot take any benefit personally – but as long as testator communicated to the trustee the trusts on which the property is to be held before or at the time of

execution of the will, the trust will be enforced: *Re Keen* (1937) Ch 237; *Guest v Webb* (1965) VR 427; *Re Bateman's Will* (1970) 1 WLR 1463

- Notification of the benefit after the will has been executed will not suffice
- Half secret trusts are less flexible than wholly secret trust in this respect
- Anything remaining in the trustee's hands after performance of the trust must be held on a resulting trust for the testator's estate
- Trustee cannot retain surplus funds (trustee can with secret trust: *Irvine v Sullivan* (1869))
- *Re Colin Cooper* (1939) Ch 811 – testator left legacy of \$5K on half secret trust – testator doubled the amount in a later will but failed to communicate that fact to trustee – it was held the trustee held \$5K on the trusts communicated but balance on a resulting trust for testator's estate

## Index

### **A**

Acknowledged (execution) .....	43
<i>Ad colligenda bona</i> grant (for collection of assets).....	15
<i>ADT v ALT</i> .....	A35
<b>Ademption</b> .....	<b>106</b>
Exceptions .....	106
Compensation .....	107
Adopted children/parents .....	101
Advertising for claims.....	25
<i>Allgood v Blake</i> .....	A33
<b>Alterations</b> .....	<b>86</b>
Invalid alterations.....	87
Interlineations .....	87
Obliterations.....	87
Amount of relief ordered (FPA) .....	139
"and" construed as "or" conjunctively or disjunctively (construction).....	121
<b>Applying for Probate or LOA</b> .....	<b>9</b>
Appointment of executors .....	9
Delegation of appointment of executor.....	10
Implied appointment as executor .....	9
Informal Transmissions of Title .....	9
Appointment of executors .....	9
Appointment of testamentary guardian .....	3
<b>Appropriateness requirement</b> .....	<b>74</b>
<i>Hausfield v Hausfield</i> .....	A34
<b>Armchair rule</b> .....	<b>122</b>
<i>Allgood v Blake</i> .....	A33

Assets that do not pass to creditors.....	26
Attestation (formalities) .....	44
Aunts & uncles (intestacy) .....	100
Avoidance of intestacy (construction) .....	121

## **B**

Bankruptcy & insolvency (to get grant) .....	11
<i>Banks v Goodfellow</i> .....	A2, A7
Bedside wills (Solicitor's duty) .....	61
Beneficiaries	
Construction .....	126
The nature of their rights .....	25
Benjamin Order .....	108
<i>Biggs v QLD Trustees Ltd</i> .....	A9
<i>Bona vacantia</i> .....	100
<b>Breach of fiduciary duty (Solicitor)</b> .....	<b>37</b>
Brothers & sisters (intestacy) .....	100
<i>Bull v Fulton</i> .....	A2, 59

## **C**

<i>Calvert v Badenach</i> .....	A3, 139
<b>Capacity to take out a grant of Probate/LOA</b> .....	<b>10</b>
Infants.....	10
Persons suffering from mental or physical disability .....	10
Corporations.....	10
Bankruptcy & insolvency .....	10
Criminals.....	11
Intermeddling.....	11
Transmission of the Office of Executor – the Chain of Representation.....	11

Multiple executors .....	12
Categories of gifts (definitions) .....	102
Caveats & contested proceedings.....	19
Cautionary function (execution).....	40
<i>Cessate grant</i> .....	14
Cessor of Executor's right to prove .....	12
Channelling function (execution) .....	40
Charged or mortgaged property (s61) .....	116
Chain of Representation.....	11
<b>Child (FPA)</b> .....	<b>127</b>
Step-child.....	128
Illegitimate child .....	128
Child <i>en ventres a mere</i> .....	128
Infant children & mentally incapable persons .....	128
Children of deceased brothers & sisters (intestacy) .....	100
Children of deceased aunts & uncles (intestacy) .....	100
Citation of PRs .....	21
Classes of assets & payment of debts in solvent estates.....	114
Codicils (misdirected) .....	66
Common form (grant) .....	18
Conditional revocation (doctrine of dependent relative revocation).....	90
Conflict (fiduciary duty – Solicitor) .....	35
<b>Construction</b> .....	<b>118</b>
3 certainties.....	118
General principles.....	119
Of Codicils.....	121
Of residuary clauses .....	121
<b>Contracts to make wills</b> .....	<b>5, 81</b>

Context (construction) .....	120
<b>Core test (statutory wills) .....</b>	<b>74</b>
<i>Van de Meulen v Van de Meulen</i> .....	A34
Corporations (to get grant) .....	10
Correcting errors (construction) .....	120
<b>Costs</b>	
Rectification proceedings.....	67
FPA proceedings.....	139
<b>Court-authorised wills</b> .....	<b>67</b>
<b>Court's power to dispense with execution requirements (s18)</b> .....	<b>46</b>
Criminals (to get grant) .....	11
<b>Criteria for determining applicant's rights</b> .....	<b>132</b>
<i>Singer v Berghouse</i> .....	A26
Relevant factors.....	132
A moral duty.....	133
Crown (intestacy) .....	99
<i>Bona vacantia</i> .....	100
<b>D</b>	
<i>Day v Collins</i> .....	A33
Death in common catastrophe (s65) .....	108
<b>De facto (meaning of) under intestacy</b> .....	<b>93</b>
Defences & other protections (PR) .....	31
Liabilities inherited from the deceased.....	31
Defences & protections re liabilities incurred in administration of estate .....	31
Consent, concurrence, acquiescence, laches & limitation of action.....	31
No liability incurred for default of co-Executor.....	31
Special relief re leases & other grants of land.....	31

Delegation of appointment as executor.....	10
Delegation of will maker .....	7
Delivery of the subject matter.....	4
<b>Delusions .....</b>	<b>59</b>
Demonstrative legacy.....	104
Dependent (FPA) .....	128
Dependent relative revocation .....	90
<b>Destruction of will</b>	
Inadvertent destruction .....	15
Revocation by destruction .....	90
Presumption of destruction .....	90
Devolvement of Property.....	1
Description of beneficiaries (construction) .....	126
Descriptions of property (construction).....	125
Difference btw executors & administrators.....	13
Difficulties in establishing btw specific & residuary gifts .....	105
Disclaimer of benefit under mutual will.....	6, 109
Disentitling conduct ( <b>s41(2)(c)</b> ) .....	138
Statements made by testator.....	138
<b>Dispensing requirements (<b>s18</b>) .....</b>	<b>46</b>
Dispositive material (omission of) .....	66
<b>Disqualification</b>	
Of interpreter/translator.....	53
Exceptions .....	53
Of murderers.....	110
Of interested witness .....	51
Exceptions .....	52
Solicitor's negligence .....	54

Distribute estate asap .....	26
<b>Divorce</b>	
Divorce & mutual wills .....	6
Divorce maintenance orders .....	28
Doctrine of dependent relative revocation.....	90
<i>Donatio mortis causa (gift in anticipation of death)</i> .....	4, 115
Draft documents or wills .....	51
<i>Durante absentia</i> (during absence) .....	14
<i>Durante minore aetate</i> (during infancy) .....	14
During incapacity.....	14
Duties of Solicitor (will-drafting & estate planning) .....	32
Duty to ensure testator has TC & no undue influence.....	33
<i>LSC v Ford</i> .....	33, A3
Duty to ensure will gives effect to testator's instructions .....	34
Duty to ensure will is validly executed & attested.....	34
Duty to prepare a will.....	32
<b>E</b>	
Election .....	113
Eligible applicants (FPA) .....	127
<i>Enoch v Public Trustee</i> .....	A21
Entitlement (to grant of LOA) .....	15
<i>Enventresa mere</i> .....	128
Equitable ademption .....	113
Equitable estoppel (FPA) .....	136
<i>Equity – fiduciary duties (Solicitor)</i> .....	35
Equivocation (construction) .....	123
<i>Charter v Charter</i> .....	A33, 123

Erasures (construction) .....	120
Evidence of surrounding circumstances (construction) .....	122
Evidentiary function (execution) .....	40
<b>Exceptions</b>	
To ademption .....	106
To disqualification of interpreter/translator.....	53
To disqualification of witness.....	52
To personal liability (PR) .....	29
To lapsing .....	107
<b>Extensions to time limit (FPA)</b> .....	130
<b>Execution of wills</b> .....	40
Execution & powers of appointment .....	3
Executor's Commission.....	31
<b>Extrinsic evidence (admissibility) to determine intention.....</b>	122
<b>F</b>	
<b>Factors (for determining FPA claim)</b> .....	132
<b>Failure</b>	
Of disposition of property .....	53
Of legacies & devises.....	106
To advise of need to sever JT .....	55
To prepare will promptly.....	55
To produce documents in a reasonable time.....	55
Under equitable doctrines .....	112
<b>Family Provision</b> .....	127
Fiduciary duties (Solicitor) .....	35
<i>Ford v LSC</i> .....	A3, 33
<b>Forfeiture Rule</b> .....	110

<b>Formalities (execution) .....</b>	<b>40, A1</b>
"in writing" .....	40
Signed .....	41
Acknowledged .....	43
Presence of 2 witnesses .....	44
Attestation & subscription .....	44
Proof of due execution.....	45
Fraud.....	63, 64

## **G**

<b><i>GAU v GAV</i>.....</b>	<b>A5</b>
General legacies .....	103
<b>Gifts in anticipation of death (<i>donation mortis causa</i>) .....</b>	<b>4, 115</b>
Gifts with an offensive condition (FPA) .....	137
Grandparents (intestacy) .....	100
Grant <i>ad litem</i> (for purposes of litigation) .....	15
Grants of limited duration.....	14

## **H**

<b><i>Hatsatouris</i> .....</b>	<b>A2</b>
<b><i>Holdway v Acuri Lawyers</i> .....</b>	<b>A21</b>

## **I**

<b>Illegitimacy .....</b>	<b>101, 128</b>
Implied appointment as Executor .....	9
<b>Incorporation of documents by reference .....</b>	<b>55, 86</b>
Indigenous estates.....	101
<b>Infants</b>	
Capacity to get grant .....	10

FPA.....	128
Informal Transmissions of Title .....	9
Inserting material accidentally omitted (construction) .....	120
Insolvent estates (s57).....	116
Inspection of will (s33Z).....	69
<b>Interest on gifts.....</b>	<b>104</b>
Intermeddling .....	11
<b>Intestacy.....</b>	<b>93</b>
In writing (execution) .....	40
<b>J</b>	
Joinder & Representation of parties (FPA).....	129
<b>Joint tenancy.....</b>	<b>3</b>
Joint bank account.....	3
Joint wills .....	85
<b>K</b>	
Knowledge & approval .....	62
<b>J</b>	
<b>Lapse .....</b>	<b>107</b>
Common law exceptions .....	107
Statutory lapse where there is issue (s33N) .....	108
Maintenance of spouse or issue during 30 days following death (s49A) .....	108
Death in a common catastrophe (s65) .....	108
<b>Letters of Administration (different kinds of) .....</b>	<b>13</b>
LOA with the will annexed.....	13
LOA ( <i>de bonis non</i> ) .....	13
Liability in contract (PR & Trustee) .....	28

<b>Liability in tort.....</b>	<b>29</b>
By the deceased .....	29
By PR in admin of estate.....	29
By PR in carrying on business forming part of estate.....	29
Exceptions to personal liability (PR) .....	29
Liability of deceased Trustees .....	28
<b>Liability of PR for their own defaults.....</b>	<b>29</b>
<i>devastavit</i> .....	29
conflict of interest .....	30
creditor's right of recovery.....	30
Life insurance & nomination of beneficiaries .....	4
Limited grants of administration.....	14
Limited purpose grants.....	15
Litigation grant (grant <i>ad litem</i> ) .....	15
<b>Lucid intervals.....</b>	<b>58</b>

## **M**

Maintenance of spouse or issue during 30 days following death ( <b>s49A</b> ) .....	108
Marshalling .....	116
Mentally incapable persons (FPA).....	128
<b>Minor (wills made for) .....</b>	<b>57</b>
Misdirected codicils.....	66
Mislaid will.....	15
Moral duty (FPA) .....	133
Mortgaged or charged property ( <b>s61</b> ) .....	116
<b>Multiple executors .....</b>	<b>12</b>
<b>Mutual wills .....</b>	<b>5, 83</b>
Divorce & mutual wills .....	6

Remarriage of survivor .....	7
------------------------------	---

**N**

Neglect of duties by PR.....	26
<b>Next of kin (intestacy) .....</b>	<b>99</b>
of half blood .....	100
<i>Nicholson v Knaggs</i> .....	A8
<b>Nil capacity .....</b>	<b>73, 74</b>

**O**

<b>Obliterations.....</b>	<b>87</b>
Omission of	
Dispositive material.....	66
Non-testamentary material from probate .....	67
Undersigned insertions .....	120
<b>Order of entitlement (to grant of LOA).....</b>	<b>16</b>
<b>Order of payment of debts in solvent estates.....</b>	<b>114</b>
<b>Order of taking (intestacy) .....</b>	<b>99</b>

**P**

<i>Pendente elite</i> (where there is a suit pending) .....	14
Parents (intestacy) .....	100
<b>Payment of debts in solvent estates .....</b>	<b>114</b>
Payment of interest on gifts.....	104
Payment of general (pecuniary) legacies .....	116
Pecuniary legacies .....	104
<b>Personal Representatives .....</b>	<b>24</b>
Power to appoint successors.....	24
Liability for debts.....	24

<b>Limitation periods .....</b>	<b>24</b>
<b>Remuneration.....</b>	<b>24</b>
Nature of Benef's rights.....	25
<b>Advertising for claims.....</b>	<b>25</b>
<b>Assets that do not pass to creditors .....</b>	<b>26</b>
<b>Distribute estate asap .....</b>	<b>26</b>
Effect of neglect of duties by PR .....	26
Defences & other protections .....	31
Liabilities inherited from the deceased.....	31
<b>Persons suffering from mental or physical disability (to get grant).....</b>	<b>10</b>
<i>Pike &amp; Anor v Campbell</i> .....	A15
<b>Posthumously born individuals (<i>enventresa mere</i>) .....</b>	<b>100</b>
<b>Power to dispense with execution requirements (§18) .....</b>	<b>46</b>
Powers of appointment.....	1
Powers of trustees & PR.....	26
Pre-empted capacity (statutory wills) .....	73
Presence of 2 witnesses (execution) .....	44
Presumption of destruction .....	90
<b>Presumption of survivorship (§65) .....</b>	<b>108</b>
Principle of rateability (§59(2)).....	114
<b>Principles of construction .....</b>	<b>119</b>
Privileged wills .....	56
Professional liability (Solicitor) in will-drafting & estate planning .....	32
<b>Proof of due execution (formalities) .....</b>	<b>45</b>
Proof of incapacity.....	60
Proof of the will .....	22
Property (construction) .....	126
Property that is mortgaged or charged (§61).....	116

<i>Prosper v Wojtowicz</i> .....	A14
Protective function (execution) .....	40
<b>Public Trustee</b> .....	<b>1, 16</b>
Where nobody has applied for grant .....	16
Where PR requires PT to act instead of them .....	16
Simplified procedure for small estates.....	16
Powers to oppose grant .....	18
Appointment as guardian.....	18
Compromise of action on behalf of incapable person.....	18
<i>Public Trustee v Smith</i> .....	A6
Punctuation (construction) .....	120
<b>R</b>	
<b>Rectification</b> .....	<b>65</b>
Unintentional revocation clauses.....	65
Misdirected codicils.....	66
Omission of dispositive material .....	66
Omission of non-testamentary material from probate .....	67
Costs of proceedings .....	67
<i>Re DJ</i> .....	A5
<i>Re Fenwick</i> .....	A35
Remarriage of survivor (mutual wills) .....	7
Remuneration.....	24
<b>Renunciation</b>	
of executor .....	13
of trustee .....	13
<b>Republication of wills</b> .....	<b>91</b>
Resealing grants .....	23

**Residuary clauses**

The construction of residuary clauses.....	121
Conflicting residuary clauses .....	122
Residuary estate .....	105
Residuary gift.....	105
<b>Revocation.....</b>	<b>88</b>
By Marriage .....	88
Exceptions .....	88
By divorce .....	89
By later will or codicil in proper form.....	89
By some writing declaring an intention to revoke .....	89
By destruction .....	90
Conditional revocation.....	90
<b>Revocation clauses (unintentional) .....</b>	<b>65</b>
<b>Revocation of grants .....</b>	<b>19</b>
Revocation of grant in solemn form.....	19
Revocation of grant in common form .....	20
The effect of revocation on PRs .....	20
The effect of revocation on TPs.....	21
Citations of PRs.....	21
Probate jurisdiction .....	22
Equity jurisdiction.....	22
Risk management (Solicitor) .....	39

**S**

<i>Sadler v Eggmolese</i> .....	A4
Satisfaction (equitable doctrine) .....	112
Between parent & child.....	112

of legacies by legacies .....	112
of debts by legacies .....	112
Commercial debts.....	112
Non-commercial debts.....	113
Satisfactory state of mind .....	57
Secret trusts.....	7
Half secret trusts .....	7
<i>Shorter v Hodges</i> .....	A2
Signed (execution).....	41
<i>Singer v Berghouse</i> .....	A26
Small estates & PT (simplified procedure) .....	16
Solemn form (grants) .....	18
Solicitor's duty	
At the bedside .....	61
FPA.....	139
<i>Holdway v Acuri Lawyers</i> .....	A21
<b>Solicitor's liability in negligence .....</b>	<b>54</b>
Disqualification of an attesting witness or spouse of attesting witness.....	54
Failure to prepare will promptly .....	54
Failure to advise of need to sever JT .....	55
Failure to produce documents in a reasonable time .....	55
Limits .....	55
<b>Solicitor's professional liability in will-drafting &amp; estate planning .....</b>	<b>32</b>
Breach of fiduciary duty .....	37
Conflict .....	35
Professional rules .....	38
Informed consent .....	39
Concurrent liability .....	39

Risk management .....	39
Specific legacies/devises .....	102
<b>Spouse</b>	
Meaning of (intestacy) .....	93
FPA.....	127
<b>Spouses dying together .....</b>	<b>101</b>
Statutory lapse where there is issue ( <b>s33N</b> ) .....	108
<b>Statutory time limits (FPA) .....</b>	<b>129</b>
<b>Statutory wills.....</b>	<b>68, 70</b>
Requirements .....	70
2-stage process.....	70
Requirements for leave .....	71
Rules of evidence .....	71
<i>Re Fenwick</i> .....	A35
<i>ADT v ALT</i> .....	A35
<i>Re MPL</i> .....	A36
The core test.....	74
Appropriateness requirement.....	74
Utility of statutory will applications .....	79
Step-child (FPA) .....	128
Subscription (formalities) .....	44
Substitution clauses.....	54
Suicide .....	A2
Suspicious circumstances .....	62
Switched wills .....	50
<b>T</b>	
Technical words (construction) .....	119

<b>Testamentary capacity .....</b>	<b>57, 61</b>
Meaning.....	58
The test.....	58
Time for determining TC.....	59
Proof of incapacity.....	60
Knowledge & approval.....	62
Suspicious circumstances .....	62
Fraud & undue influence.....	63
Time for determining mental capacity .....	59
<b>Time limits for FPA .....</b>	<b>129</b>
Extensions.....	130
Transmission of the office of executor – the Chain of Representation .....	11
Trustee companies .....	18
Type or relief ordered (FPA) .....	139
<b>U</b>	
<b>Undue influence.....</b>	<b>63</b>
Unintentional revocation clauses.....	65
<b>W</b>	
<b>Wills .....</b>	<b>2</b>
Will outside the jurisdiction .....	15
For minors .....	67
For persons lacking TC.....	68
Inspection of.....	69
Republication of .....	91
Revival of revoked wills.....	92