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DEATH

- Overview of the wills and Succession

- Historical overview

Because of the baby boomers generation, people that will die over the next 20 years hold more property than ever. Another issue is that people live longer, so they will go through mental and physical issues such as dementia. It can affect a person's capacity to make a will. Dementia is relatively unknown before the age of 75.

Two pieces of legislation are directly relevant to this area of law *Succession act 2006* (wills and testators provision) and the *Probate Administration Act*. Both pieces of legislation are not a codified law. Most of the relevant principles are based on Common law case law. 1837 Wills act United Kingdom- Bought together two branches of law and unified them. Historically land could not be left with a will, because it was granted from the crown. Nature of the grant could only be passed from eldest son to eldest son and so on and did so automatically on death for centuries. This was inconvenient because people didn't want to do this and got around this through the 'use' and furthermore created a trust. This affected the Crown's Revenue. Statute of Wills 1540- all the way to 1837. Chattels were passed differently, they could be passed to others on death. But the church got involved and developed provisions as to how property could be passed on death.

For many centuries there was the CL and laws by the church in which they claimed jurisdiction. All laws that deal with probate and administrative of estate are derived from the laws of the church. As a result, the church made a person leave a portion of the chattels provided a testament. So they bought those two branches together.

- **Death**

- ⇒ Death is important because it's the foundation of the jurisdiction
- ⇒ Without death they cannot distribute property.
- ⇒ It is essential to establish death in order to do so.

- Definition

Human tissue Act 1983 s33

When death occurs

For the purposes of the Law of New South Wales, a person has died when there has occurred:

- (a) Irreversible cessation of all function of the person's brain, or
- (b) Irreversible cessation of circulation of blood in the person's body

A practitioner will look at the body and determine death

- Proof;

- ⇒ Can be proved by fact, implication, or presumptions
- ⇒ Fact is direct evidence
- ⇒ Implication is not direct evidence but has inferences
- ⇒ Presumption is when there is no evidence to suggest death

- Fact

This coincides with the definition (s33 of the Human Tissue Act). The practitioner looks at the dead body and determines death.

- Implication

Implication is when there is no direct evidence but there are inferences. For example, an airplane crashes into the sea. There is no direct evidence of death however there is evidence to suggest that the airplane crashed into the sea and the person was on the plane. On the balance of probabilities, it is more probable than not that death has occurred.

Without a body, there is no direct evidence to suggest there is irreversible cessation of all function of the person's brain and circulation of blood in the person's body. In this instance, proof of balance of probabilities is essential in order to determine if death has occurred.

- Presumption

A presumption is used when there is no evidence to suggest death at all. This may be in cases where people have disappeared and there has been so much time that has elapsed that it will be unusual to expect that they are still living. It would be inconvenient if the property stayed the way it is until they show up again.

The courts developed a presumption as to when a person has been treated as they have died. However, it can be rebutted with evidence. This presumption includes that if a expected person that would have usually have been contacted if they were alive hasn't been contacted in 7 years then they are presumed dead. If they come back however, all the property must be given back.

Axon v Axon (presumption)

This is a family law case that is based on a legislation that has been repealed but has principles that are relevant

Facts: Mr and Mrs axon got married and had a certificate of marriage. In 1936 Mr Axon deserted Mrs Axon and had him arrested for doing so. Mr Axon did not like the procedure and didn't want to pay any maintenance. He argued that their marriage was valid. Mrs Axon was previously married to another man, Mr Hersh, who had also deserted her. She believed that Mr Hersh was deceased and therefore her previous marriage was not valid. She delivers her marriage certificate with Mr Axon which created the presumption that he was dead.

Issue: Could Mrs Axon rely on the presumption that Mr Hersh was deceased, therefore as a widow marry Mr Axon.

Held: page 404- point 6

Justice Dixon discussed the presumption of marriage and death.

"The facts relied upon by the respondent for this purpose were two, namely, that she had already married Mauro Herzich and that on the date of her marriage to the appellant Mauro Herzich was still alive. The first of the two facts was fully proved, and it was the second that raises the question on which the case depends"

When it is proved that a human being exists at a specific time the proof will support the inference that he was alive at a later time. If it appears there were circumstances of dangers in their life then the presumption would be overturned. The presumption of life is a presumption of probabilities. If you can prove someone is alive on one day, then you can presume they are still alive on a later day providing there is no evidence of illness or other suggestions that they might not be alive.

"As time increases, the inference of survivorship may be become admissible, and after a period arbitrarily fixed at seven years, if certain

conditions are fulfilled, a presumption of law arises under which a court must treat the life as having ended before the proceedings in which the question arises”

In other words, this means that if you see someone alive on one day then you don't automatically assume they are dead on another day (logical). But after a certain time, the presumption of continuance of life isn't appropriate to apply. (e.g. cant go to Stephen James office in 50 years time and assumed he has stepped out for a cup of coffee)

“If at the time when the issue whether a man is alive or dead must be judicially determined, at least seven years have elapsed since he was last seen or heard of by those who in the circumstances of the case would according to common course of affairs be likely to have received communications from him or to have learned of his whereabouts, were he living, then in the absence of evidence to the contrary, it should be found that he is dead”

7 years is arbitrary so there is no significance in this number. If people who are expected to hear from the missing person don't hear from them, then the court will presume that he or she is dead.

“But the presumption authorizes no finding that he died at or before a given date. It is limited to a presumptive conclusion that at the time of the proceedings the man no longer lives”

This does not mean that they died on the 7th year or on the day they disappeared. This is critical if you have to establish that one person has lived longer than another person. It says nothing about the circumstances or date of the death.

Held:

“It follows that in the present case the disappearance in 1923 of Mauro Herzich gives rise to no presumption that he was dead on 6th January 1932. In fact the conditions were not fulfilled for presuming his death at the hearing before the court of summary jurisdiction when the order now in question as made. For, in the circumstances in which he left his wife, she was not a person with whom he would likely to communicate or who would be likely to hear of his whereabouts. He was in effect, a fugitive from her”

It was not enough to prove death in this case. She couldn't rely on the presumption of death because she was not a person who was expected to hear from him if he were alive.

- Order

- ⇒ This is when two or more people die in sufficient proximity where it might be reasonable that they might inherit from each other. E.g. Husband & wife both die in a car accident and die around the same time. People do die where order of death is relevant but not very apparent. No factual evidence of order of death.
- ⇒ Order of death is important because it assists with distributing estate after death. For example, there is a husband and wife and they own a family home as joint tenants and is worth \$1,000,000. If they die in a car crash and by implication they are deceased you may want to ask who died first. If they have no children and if the husband dies first his

property will go to his wife but and if the wife dies shortly after the wives parents get the whole \$1,000,000 & vise versa. Therefore there is a big significance to determine the order of death. Jointly held property does not fall part of one estate and goes straight through survivorship tenant. If two people Tenancy in Common, then the person who dies does not pass on his part on the surviving tenant.

- Importance
- Fact
Someone examines the body and is able to make a factual conclusion of who died first and who died second.
- Statutory Rule-
If facts wont let you establish order of death. You rely on this section. Its an arbitrary rule when the facts fail.

S 35 Conveyancing Act 1919- In all cases where two or more persons have died under circumstances rendering it uncertain which of them survives, the deaths shall for all purposes affecting the title to any property be presumed to have taken place in order of seniority, and the younger be deemed to have survived the elder.

In the case of the Joint tenancy of the husband and wife of the one million property, the husband is 2 years older and it is unclear who died first, then s35 is applied and it is assumed that the husband has died first so therefore the wives parents get the property.

Not a presumption because no evidence, so statutory rule is applied.

Re Plaister Case Perputual trustee company v crawshaw (s35)

This case deals when this section is to be appropriate applied as to the order of death. In terms of order of death, you must look at this case to see when s35 is applied

Facts: Man was in financial difficulty and was going through depression and killed himself and his family. He was the last one to die but not clear who he killed first. If he killed his wife first, then the wives property has gone to the daughter and then shares between the husband and wives relatives. If he killed the daughter first, the property would have gone to the wives family. The families then argued the order of the death in order to attain the property.

Issue:

Held: Justice Harvey- Lordship said 55- you had to determine the order of death based on circumstantial of evidence. So the position of the wound and the gun and draw a conclusion. You can apply s35 only when you have exhausted all avenues of factual evidence.