Succession

Wills Act 1970 (WA)

- Statutory provisions found in *Wills Act 1970* (as amended), **Part VII –Rules as to formal validity of wills**, sections 20 and 21

20. General rules as to formal validity

(1) A will is taken to be properly executed if its execution conforms to the internal law in force in the place —
  (a) where it was executed;
  (b) that 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.

(2) The following wills are also taken to be properly executed —
  (a) a will executed on board a vessel or aircraft, if the will has been executed in conformity with the internal law in force in the place with which the vessel or aircraft may be taken to have been most closely connected having regard to its registration and other relevant circumstances;
  (b) a will, so far as it disposes of immovable property, if it has been executed in conformity with the internal law in force in the place where the property is situated;
  (c) a will, so far as it revokes a will or a provision of a will that has been executed in accordance with this Act, or that is taken to have been properly executed by this Act, if the later will has been executed in conformity with any law by which the earlier will or provision would be taken to have been validly executed;
  (d) a will, so far as it exercises a power of appointment, if the will has been executed in conformity with the law governing the essential validity of the power.

- Domicile is where you intend to live
- Immovable property usually refers to real estate

21. Ascertainment of system of internal law

(1) If the internal law in force in a place is to be applied to a will, but there is more than one system of internal law in force in the place that relates to the formal validity of wills, the system to be applied is determined as follows —
  (a) if there is a rule in force throughout the place that indicates which system of internal law applies to the will, that rule must be followed;
  (b) if there is no rule, the system of internal law is that with which the testator was most closely connected either —
    i. at the time of the testator's death, if the matter is to be determined by reference to circumstances prevailing at the testator's death; or
    ii. in any other case, at the time of execution of the will.

(2) In determining whether a will has been executed in conformity with a particular internal law, regard must be had to the formal requirements of that law at the time of execution, but account may be taken of a later alteration of the law affecting wills executed at that time, if the alteration enables the will to be treated as properly executed.

(3) If a law in force outside this State is applied to a will, a requirement of that law that special formalities must be observed by testators of a particular description or that the witnesses to the execution of a will must have certain qualifications, is to be taken to be a formal requirement only, despite any rule of that law to the contrary.

Will and Formalities

Definitions of a Will in the *Wills Act 1970*:

4. Terms used

will includes a codicil and any testamentary instrument or disposition.

41. Content of application under section 40

will, in paragraphs (f) and (g), includes a document that is a will by operation of Part X.

- This means a will includes an informal will

48. Recognition of wills
statutory will means a will executed by virtue of a statutory provision on behalf of a person who, at the time of execution, lacked testamentary capacity, and includes an alteration to and a revocation of a statutory or other will.

- A will is a written declaration providing for disposition of property by a living person to taking effect on death. A will is a legal document by which a person, the testator (male) or testatrix (female), makes provision for an executor or to be appointed to administer his or her estate after his or her death, to discharge liabilities and to distribute the property as directed to beneficiaries as specified.

Formalities
- A will must be executed in accordance with statutory formalities. These are set out in section 8 of the *Wills Act*.

8. Execution generally
Subject to sections 17 and 20 and Parts XA, X and XI, a will is not valid unless —
(a) it is in writing;
(b) it is signed by the testator or signed in the testator's name by some other person in the testator's presence and by the testator's direction, in such place on the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as the testator's will;
(c) the testator makes or acknowledges the signature in the presence of at least 2 witnesses present at the same time; and
(d) the witnesses attest and subscribe the will in the presence of the testator but no publication or form of attestation is necessary.

- You need to sign at the bottom of the page! If you sign it at the bottom, then you acknowledge that everything you've read above is what you have agreed to
- Part X and XI allow for an informal will

Codicil to a Will

- **A codicil** is a document supplementary to a will made earlier which is executed by a testator with the intention of adding to, altering, revoking, explaining or confirming a will, provision or part of a will. As a subsidiary testamentary instrument, a codicil must be executed with the same formalities as a will and when so executed becomes part of the will and must be proved with the will: ***Green v Tribe* (1878) 9 Ch D 231 at 238; *Re Elcom* [1894] 1 Ch 303 at 309, 312, and 314**. A codicil specifically referring to a will may have the effect of *republishing* the will or *reviving* an earlier revoked a will.

Requirements for a will

- The two essential requirements are that the document be **testamentary**, in the sense that it does not take effect until death (*Whyte v Pollock* (1882)) and that it be **executed in accordance with the relevant statutory requirements**.
- The execution of a document as a will does not make it testamentary.
- It will not be testamentary if it has any operation before the death of the testator. If the document takes effect immediately upon its execution even though the benefits conferred by it are not to be enjoyed until after the death of the donor, the document is not testamentary: *Bird v Perpetual Trustees*; *Re Bubnich* (1965). On the other hand, any part of it which is severable and which has no operation until after the death of the testator may be testamentary, while the remainder is not: *Re Anziani* (1930).

- A person may provide for succession after his death by someone to some part of his property. This is not necessarily the same as testamentary succession, as **a will effects the voluntary transmission on death of an interest which up to death belongs absolutely to the testator:** *Russell v Scott* (1936) 55 CLR 440 at 454; [1936] ALR 375 .
- A bare nomination of an executor without him or her getting any legacy or anything to be done by the executor, and without any effective dispositive provisions, is sufficient to make a document a will: *Fell v Fell* (1922) 31 CLR 268; 29 ALR 31; 23 SR (NSW) 285 at 276-277 per Isaacs J.
- A will may consist of **more than one document:** *In the Will of Cullen* (1907) 7 SR (NSW) 29; 24 WN (NSW) 23 . In *In The Will of Patrick Murphy* (1919) 19 SR (NSW) 357 a soldier who died on active service signed a document saying that his last will was in the hands of his wife. A document in the possession of his widow, in the handwriting of the deceased, was attested by two witnesses and purported to be his will, however it had not been signed by the testator. The two documents together were found to be "a complete will disposing of both realty and personalty". **Documents**