

## PROBATE LAW: The making of a will

### 1. Testamentary Capacity

- A testator must have sound mind, memory and understanding, aka testamentary capacity at the time the will is executed. Probate will not be granted if capacity is in doubt.
- As a matter of law, only minors lack capacity: s9. Otherwise, capacity is a matter of fact.
- Test for capacity: Banks v Goodfellow
  - 1. That a testator understand the nature of the act and its effects
  - 2. That the testator understands the extent of the property that is to be disposed. Only requires a general recollection.
  - 3. That the testator ought to comprehend and appreciate the claims that ought to be given effect.
  - 4. The testator be of 'no disorder of the mind' that shall poison his affections, pervert his sense of right or prevent the exercise of natural faculties.
- A person is not incapacitated just because they are moved by capricious, frivolous, mean or bad motives.
- Delusions are only relevant to incapacity if they are connected with the dispositions of the will: Tipper v Moore.

### 2. Testamentary Intention

- The testator must have the intention to make a will.
  - Knowledge and approval, an awareness and appreciation of a specific instrument: d'Eye v Avery
  - Intention to be the final disposition
- Challenging intention:
  - An unexplained change of testamentary direction
  - No apparent estrangement of the testator from a disinherited beneficiary
  - Control of the testator by a favoured beneficiary
  - Preparation of the will by persons known to the beneficiary, rather than the testator
- Mistakes can be omitted to represent intention of the testator: s33
- Unintentional revocation clauses can be omitted: Will of Page
- Executing the wrong will: signing each other's will by accident. Can still be valid, if there's substantial compliance, but this requires signature: Re Goward. However, s18 now applies, and this removes the requirements for substantial compliance with the formalities of execution.

## PROBATE LAW: The execution of a will (chapter 4)

### 4. Formalities

- **S10 sets out formalities**
- 1. In writing: includes any mode of representing words in a visible form: Acts Interpretation Act.
- 2. Signed:

- The signature must be made with the intention of executing the will: s10(7)
- An inadvertent mark is not a signature (unconscious): *Dodd v Lang*
- The testator is not obliged to sign the will personally: s10(2)(b)(ii): Can be signed by 2 witnesses instead of a testator.
- Doesn't have to be signed at the bottom: s10(6)
- 3. Acknowledged:
  - Signature must be made or acknowledged by the testator in the presence of 2 or more witnesses present at the same time: s10(3) This means the testator can sign it alone, and then acknowledge their signature to the witnesses.
  - At least 2 of the witnesses must attest and sign the will in the presence of the testator, but not necessarily together: s10(4)
  - The witnesses don't need to know the document being attested is a will: s10(5)
- 4. Proof of due execution
  - It is presumed things have been properly done.
  - Proof of due execution can be done by an attestation clause: s10(9)

## 5. Section 18: The dispensing power

- Court may dispense with execution requirements for will, alteration or revocation. The person must have the intention for the document to form part of the will: s18(2)
  - The court can consider any evidence of the person's testamentary intention, or to the way in which the document or part was executed: s18(3)
- There must be a document, it must embody the intentions of the deceased, the evidence must satisfy the court that the testator intended the document, without more, to operate immediately as their will: *Re Will of Pangias*. Must look at the content of the documents generated to assess

## 6. Disqualification of witness

- When an interested witness may benefit from a disposition: s11
- Applies where a beneficiary attests to the execution of a will (is a witness): s11(1)
- The disposition is void to the extent it concerns the interested witness: s11(2)
- This doesn't apply if there are at least 2 other witnesses who are not interested witnesses, or where all the persons who would benefit directly from the avoidance of the disposition consent in writing to the distribution

## 7. Incorporation of documents by reference

- Informal documents may be included in the probate of a duly executed will if:
  - The document was in existence at the date of the execution of the will *and*;
  - The document was referred to in the will, and the document can be identified.