

SUCCESSION LAW: EXAM NOTES – WEEKS 1-10

WEEK 1

Half - one parent in common (blood relative)

Step - no parents in common (non-blood relative)

Emergence of Succession Law System

- State was the dominant tenant – could take away land – for instance to build a hospital
- Feudalism – from 1066 to Middle Ages (England)
- Primogeniture – land should stay in male hands
- Male tenant & King – relationship: dependence & subordination
- Fielty – oath: bound to your lord through it
- If provide military services King would guarantee protection – conditional ownership of land (still have this)
- Indirect relationship – King didn't have direct access to people
- 13th & 14th C – growth of medieval towns – development of end of feudalism
- Feudalism imported from France – allowed inheritability
- William the Conqueror arrived in England – gave land to his generals – oath of fielty
- King didn't want to fail farmers so instead of taking land back – tenancy – trust for granting a military force
- Courts – religious – run by Church – wanted the compulsory third that would go to the Church
- King's court for admitting the heir; ecclesiastical courts for personal property
- Equity – State of Uses (beginning of trusts) – people wanted to put land in trusts – trustee had to look after property for benefit of beneficiaries
- People rebelled so King allowed the Statute of Wills
- Reform occurred – Henry the 2nd – new Civil Procedure & Royal Courts
- Growth of writs – Feudal times if had complaint of negligence (what it is now called) – put writ in particular form (ie action on the case) – if it went along same formula as a former writ may be given a writ – inheritance law developed in a similar manner
- Ancestral estate would go to the next male – had to keep it in the family – sons kept land in tact
- 1832 Act in UK – until then only males could vote
- Death duties – 90% tax as inheritance
- Peasants – umiogeniture – sons received equal portion
- Change in intestacy – surviving spouse receives more under succession act
- Intestacy – not a will or not a valid will (partial intestacy)
- Can't put family out of your estate
- Women designating pieces of property to go to certain people – ie daughter receive jewellery, boys receive land
- Women didn't have any right to inherit property until later
- Married Women's Property Act – could own property, could contest for a share
- Economic situations re family farmers – women getting fair share of family farm become acceptable
- Wives could get compulsory 1/3 – dower – law until abolished in 1860s

- 1916 – Testamentary Act
- Intestacy laws – who should inherit in case of will not being made – connection through blood lines – if no surviving relatives goes to the crown
- Crown as dominant land holder still with us
- Social trends changing – no longer illegitimate children

What is Succession Law?

- Succession law: the transmission of property rights from one holder to other persons.
- Universal Succession: the system where what is owned (including any liabilities) by the deceased passes directly and immediately to the heir
 - ⇒ John Locke’s theories of property: Used to justify/rationalise the dispossession of Aboriginal people of land. The perceived failure that Aboriginal people did not ‘mix their labour with the soil’.
 - ⇒ Immanuel Kant: rights of property could only exist within civil society. The State could regulate or extinguish children’s rights to inheritance. Kant viewed that laws were commands that should be obeyed even if they were immoral and at the same time one would have a duty to try and change immoral laws.
 - ⇒ Jeremy Bentham: wanted to create laws that automatically make the members of a society virtuous – principle – ‘the greatest good for the greatest number’.
 - Utilitarianism: creating the greatest happiness for the greatest number of people.
 - ⇒ John Stuart Mill: separated the right of inheritance from the right to make a bequest.
- Dower: protected a widow by providing her a life interest in one-third of the land of which her husband had possess when he died.
- There are some substantial area of property that the deceased cannot leave away from certain family members unless they have forfeited their right in some way.
- Testamentary freedom: the ability of an individual to decide what will happen to their property after death by means of a will or testament.
- Will: is a declaration of the testator’s (its maker’s) intention in relation to matter that the testator wishes to take place on his/her death – a matter of intention, the ability of the testator to properly form that intention (the testator’s capacity to make the will) may be an issue.
- Deciding capacity → assess the ability of the testator to recognise the competing moral claims of possible beneficiaries.
- Forced succession: systems that prescribe who will take the property after death regardless of the desires of the original owner of property.
- *Mabo v Queensland (No 2)* where the HCA by majority rejected the application of the label ‘terra nullius’ to the colony of NSW. This rejection helped recognised native title to land. Native title is defined by customary law thus it imports Aboriginal customary law into Australian common law, although in a limited way.
- *Probate and Administration Act 1898* (NSW)
- Intestacy law – no opportunity for the deceased to say how they would wish to leave their property.
- The concept of leaving a will for Aboriginals is very uncommon – hence there is intestacy.
- The law applying to immovable property is determined according to the *lex situs* or the law of the location of the property for intestacy: *Re Ralston* [1906] VLR 689.
- Where the deceased has died intestate the law of the domicile will normally be applied: *Pipon v Pipon*.

- Will regarded as formally valid if it was so regarded by the law of the deceased's nationality, habitual residence or place where the will was executed at the date of death or the date of execution of the will.

Indigenous inheritance

- Consider the position under Aboriginal customary law and to show the conflicts that may arise between traditional expectations and the position under the common law.
- Customary obligations flow from kinship relationships

Islamic Law

- Connections with property in Islamic countries. Distribute property in accordance with Islamic law, and to do this in a way that will not conflict with common law in Australia.
- Inheritance law: rigid insistence on dividing the inheritance according to particular blood relationships to the deceased.
- Major source of law – Qur'an. Shi'a inheritance law gives women who inherit greater rights than Sunni.

Civil law systems – Italian inheritance law

- It does not allow freedom of testation.
- Succession may be by universal title (to all or part of the estate in general) or Particular title: as a legatee
- Person succeeds by universal title is the heir – is responsible for debts and assets of the deceased, unless the heir takes the benefit of inventory.
- Heir nominates assets and the then creditors are entitled to priority over assets.

WEEK 2

The Boundaries of Succession Law

- Succession law is concerned with:
 - a) How and to whom property passes on death
 - b) Competing themes – testamentary freedom (common law jurisdictions) vs forced heriship (civil law jurisdictions)
 - c) Australia: testamentary freedom & ways in which that freedom is undermined or underpinned
- A will:
 - a) Expresses wishes as to what happens on or after death of willmaker
 - b) Revocable by willmaker until death
 - c) Ambulatory – no effect until death – only affects property owned at death
 - d) Unitary – sum of all unrevoked testamentary instruments constitutes a will
- New will – clause at the beginning 'I revoke all previous wills'
- Since 2008 – wills partially revoked when you get divorced
- Codicil – annexure/addition/amendment to a will – generally affirms rest of the will & changes one thing – become quite rare now
- If client has capacity issues & want to make a small change judicial advice that it is more prudent to do a codicil
- Peter Brock case – can't delegate to someone else how to distribute your estate
- *Yasbek v Yasbek* – suicide note in soft copy on a laptop was admitted to probate

What a will specifies

- A will usually sets out
 - a) Revocation clause
 - b) Appointment of an executor
 - c) Disposition of property
- A will may also set out
 - a) Wishes as to disposal of body
 - b) Appointment of guardian of minor children
 - c) Powers of executors and trustees
- Wishes are not binding – executor has right to decide whether buried or cremated
- Trustee Act 1925 sets out inadequate powers so most drafted wills set out specific drafted clauses
- Property that can be disposed by will includes
 - a) Property (real and personal, tangible and intangible) owned by the will maker
- Intangible includes chose in action – debt (executor has ability to call debt in); IP can be disposed of by will

Joint tenants, super, life insurance

- Joint tenancy property – if one person dies automatically passes by survivorship regardless of will
- Jointly held assets don't come into an estate until death of the last co-owner of jointly held assets
- Can hold bank accounts jointly in shares – this is more rare though
- Superannuation – particular kind of trust asset – generally does not pass with what your will says – what happens with super when you die depends upon trust terms of super fund
- Superannuation – pass to dependents (strictly defined in super industry supervision legislation) or can go into estate (determined by what is in will in the absence of children)
- Life insurance – expectation that money payable on death – can make nomination as to whom it is paid to – most often held within super – hold of policy if generally trustee of super fund – death benefits have components of life insurance

Testamentary and inter vivos transactions

- Testamentary = voluntary transmission on death of property which up to death belonged absolutely and indefeasibly to the deceased (intended to operate from the moment of death)
- Inter vivos is intended to operate from the moment the gift is made (during the life of the giver/donor)
- *Nichols v Nichols* – deceased a solicitor, at a dinner party he decided to demonstrate how we could write a will simply, he had consumed lots of alcohol but signed the document and his signature was witnessed – court accepted that it was intended as a demonstration; he was not in a state of mind where there was an intention that it was to take effect as his will
- Formalities for testamentary docs – in writing, signed, witnessed

Russell v Scott (1936) 55 CLR 440

Facts

- Katie Russell, wealthy spinster (single) had money deposited in a savings account – used to pay expenses
- Nephew Percy Russell help with her affairs & Katie agreed to open a joint account which Percy managed
- Katie advised bank that money in her account after her death would go to Percy
- In will Katie left residue of the estate to Percy Russell & Percy Scott in equal shares
- Percy Scott sought declaration that money in joint account formed part of estate of Katie Russell

Trial History

- First instance: Nicholas J held balance of account did not belong to Percy Russell as the benefit that Katie intended for him was testamentary in nature – Percy Russell appealed

Judgment

- **Starke J**
 - A testamentary disposition can only be made by will.
 - A person who deposits money in a bank on a joint account vests the right to the debt or chose in action in the persons in whose names it is deposited, and it carries with it the legal right to title by survivorship (*Standing v Bowring* (1885); *Re Shields*; *Corbould-Ellis v Dales* (1912)...)
 - The vesting of the right and title to the debt or chose in action takes effect immediately, and is not dependent upon the death of either of the persons whose names the money has been deposited.
 - Therefore, it was not a testamentary deposition.
- **Dixon and Evatt JJ:**
 - The aunt and nephew upon opening the joint account became jointly entitled at common law to a chose in action.
 - At common law this chose in action passed/acrued to the survivor.
 - The right at law to the balance standing at the credit of the account on the death of the aunt was thus vested in the nephew.
 - Require a definite intention that the balance of the bank account should belong to the survivor.
- **McTiernan J** agreed that the appeal should be allowed.
- Two questions the court asked:
 1. Is the person entitled at law or in equity to an interest?
 2. Is the manner of the entitlement really in the nature of a testamentary transaction and therefore arguably invalid because of the lack of compliance with the formalities for wills?
- Opening a joint bank account not testamentary in nature – conferred an interest immediately in someone else – he could have used the account he just didn't

Creation of a joint bank account

- Not testamentary as it confers an interest immediately – see *Russell v Scott* (above)

Nominations re super or life insurance

- A contract to pay money on the happening of a future event – *Baird v Baird*
- Nomination of life insurance - a contract to create an inter vivos trust of future property – *McFadden v Public Trustee*
- Life insurance and pension schemes: the person joining the scheme can nominate another person to take what is known as the death benefit if insured dies in defined circumstances.
- Terms of the agreement between the insured and life insurance firm – provide framework for the nomination.
- Nomination could be part of a complex arrangement involving superannuation and death benefits for participating members.
- Not testamentary