LAWS829 SUCCESSION LAW

WEEK TWO THE BOUNDARIES OF THE LAW OF SUCCESSION

THE BOUNDARIES

- A **will** is an expression of the will or intention, the extent of which it can bind others being a question of legal definition and principle
    - Certoma defines a will broadly as a 'declaration of intention with regard to matters which the testator desire to take place on, or after, death'
- A will has no effect until the testator dies, thus being a mere declaration of intention and, as a corollary of this, it may be revoked at any time up until the death of the testator (even if a promise is made not to revoke it)
- It also has effect in relation to any property owned by the testator at the time of death – eg if the testator owns a collection of books at the time of making the will, the collection of books the will refers to will include all the books owned by the testator *at the time of death* (the ***ambulatory nature*** of wills)
- A will is **unitary** – the sum of all *unrevoked* testamentary instruments constitutes the will (recall that normally when someone creates a will, it initially says *"I revoke all previous testamentary dispositions"*)
- A will usually sets out:
    - A revocation clause – although it does not necessarily have to;
    - Either:
        - An appointment of an executor, and/or
        - A gift/disposition of some property
- A will *may* set out:
    - Wishes as to the disposal of the body (this is not binding, however, and the executor has a right to make this decision as to burial/cremation/organs available for donation)
    - Appointment of guardian of minor children
    - Powers of executors and trustees

WHAT PROPERTY CAN BE DISPOSED OF BY WILL?

- Real and personal property, tangible and intangible property owned by the willmaker can be disposed of by will – recall that there is no longer the need to dispose of personalty/realty separately

- However, note the following types of property which cannot necessarily be disposed of by will:

    - ***Jointly held assets*** – this is not disposable by will, as the doctrine of survivorship means that the property passes to the remaining joint owner, even if the will states otherwise

    - ***Assets held on trust*** – this is not disposable by will, as it is held on trust for another beneficiary. The trust will not fail for want of a trustee, as another trustee will just be appointed.

        - Where the legal title was in the deceased, it will still vest in the legal personal representative; however, beneficially the asset will not form part of the estate

        - Conversely, if the beneficial title was in the deceased while the legal title was elsewhere, the beneficial title will form part of the estate

    - ***Assets owned by private companies*** – this is not disposable by will, although share/s owned in a company can be so disposed

    - ***Superannuation –*** this will ordinarily not pass in accordance with the provisions of a will, but will be determined in accordance with the Superannuation Trust Deed, and the relevant superannuation legislation

    - ***Life insurance –*** this is normally held within superannuation, and thus will likely pass in accordance with the relevant superannuation legislation

TESTAMENTARY V *INTER VIVOS* TRANSACTIONS

- A testamentary transaction is intended to operate from the moment of death, whereas an *inter vivos* gift is intended to operate from the moment the gift is made

    - Such transactions are *voluntary* transmissions, on death, of property, which up to death belonged absolutely and indefeasibly to the deceased (*Russell v Scott*)

- Further, the person who is doing the act of creating the testamentary document must have *intended* it to be a testamentary document (rebuttable by evidence)

❖ The following transactions need to be explored, to see if they are legally perceived as testamentary or *inter vivos* transactions:

- Creation of joint bank account
- Nominations re super or life insurance
- Death bed gifts (*donationes mortis causa*)
- Contracts involving wills
- Covenant for disposition on death

SCENARIO #1: CREATION OF JOINT BANK ACCOUNT / JOINTLY OWNED PROPERTY

❖ Any property held in joint tenancy is held by the parties until the death of one of them, in which case survivorship operates to leave the survivor the whole property

- Although death is a relevant event in the state of the ownership of property, it does not make the nature of the ownership (and particularly the interest of survivorship) testamentary in nature, so as to require it to comply with the laws for the formal validity of wills

❖ In ***Russell v Scott* (1936)**, Katie Russell, a wealthy spinster, had money deposited in her own name in the Commonwealth Savings Bank. She had become forgetful, and concerned about her ability to manage her financial affairs. Her nephew, Percy Russell, helped her with her affairs. The bank suggested that an account be opened in both of their names. Miss Russell also advised the bank that any money standing in credit in the account when she died was to be her nephew's. In her will, Miss Russell left the residue of her estate to Percy Russell and Percy Scott, in equal shares. Percy Scott sought a declaration that the moneys standing to the credit of the joint account formed part of the estate of Miss Russell.

- It was held that the creation of a joint bank account is <u>not</u> testamentary, as it confers an interest immediately (despite Percy Russell not actually using the bank account during the lifetime of his aunt, and using it only for her benefit)

- Thus, the credit balance in the account did not form part of Katie's estate, as the transaction was not testamentary in nature