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Introduction and Functions of a Will

The law of succession is concerned with the redistribution of property on death.

Fred's will:
I leave $100,000 to my children A and B but nothing to C for he never visited me, never let me see his grandchildren and told me he wanted nothing.
I leave $100,000 to my son D, but only if he gets his tattoos removed and is baptised a Catholic within 3 months of my death. – you can put conditions in will.
Noting to wife because of the affair 30 years ago. I never forgot.
The rest of my estate ($1 million) is to go to my dog, to be administered by my neighbour Bob. When my dog dies, Bob gets the rest.

Universal succession v Freedom of testation

Freedom of testation is the doctrine whereby an adult possessing the requisite mental capacity is permitted by law to redistribute their property upon death, by a legal document called a will.
Universal succession is a **type of forced succession** where society dictates (or the law dictates) where the persons property will go regardless of the testator's wishes.

Who might be against pure testamentary freedom?
If the law of succession is concerned with the redistribution of property on death, then what is property? Capitalism v Communism; can you own bodily fluids?

Who/what can own property?
Married women (*femes covert)* – By marriage the husband and the wife are one person in law i.e. the existence of the woman is suspended during marriage or at least incorporated and consolidated into that of the husband; under whose wing, protection and cover, she performs everything, and she is thus called, in our law – French; a *feme covert.* A married women had no legal personality – she has no ability to own the property, can she give the property away (18th century).
Pets
You can have more than one 'spouse' in succession law.

Testator is a person who makes a will.
Realty refers to an interest in land.
Personalty refers to all other forms of property other than investments in land.
Where there is a provision in a will leaving realty to a beneficiary, that provision is called a **devise** and that beneficiary is a **devisee.**
A provision in a will leaving personalty can be called a **bequest** and a bequest of a sum of money is called **a legacy** and the beneficiary the **legatee.**
A person who dies having made a will is said to have died **testate;** one who dies without having made a valid will is said to have died **intestate.**
An executor is the person appointed in the will to administer the estate.
Beneficiary is a person who takes a benefit either under a will or under the intestacy rules.

History

History of the Courts: Courts of **probate** v Courts of **construction**
The Court of Probate is responsible for deciding whether an instrument is testamentary or not and for the appointment of administrative where there is no executor.
The Court of Construction is responsible for deciding matters of interpretation and matters arising from the actual administration of the estate.

Probate/Grant of Probate is a document issued by a court certifying that a will has been proved a valid. It authorises the executor named in the will to administer the estate.
If the deceased dies **intestate,** interested parties (surviving spouse/children etc.) would apply to the court for a **grant of letter of administration:** the letters appoint an administrator to administer the estate.

Grant of representation: Generic name that covers both grants (pronate and letters of admin): **s 5** of the ***Succession Act 1981*** **(Qld).**
The executors or administrators are called **personal representatives.** They realise the deceased assets, pay any debts and distribute the remaining to those entitled.

Most wills are **proved in common form** by submitting the will with appropriate supporting documentation to the Office of the Supreme Court.

If there is a dispute, then it may be necessary for the court to hear the matter formally before issuing a grant. Once the court hears the matter, it issues a grant in **solemn form** and that matter cannot be litigated again.

Section 45(1)-(3): Devolution of Property on Death

Extraterritorial Jurisdiction: Moveable property: *lex domicilli.* immoveable property: *lex situs;*

The functions of a Will

Primary Function of a will is that it is a **revocable** disposition of property intended to take effect on death.
A **will** is the main document by which a testator dispose of their estate. A **codicil** refers to a **testamentary instrument** supplementary to a will. (For example, you win a boat, write down on a piece of paper that you leave the boat to Johnny and you attach it to the will.)

Section 18 details property that may be disposed of by will.
Section 10 sets out how a will must be executed:

- Must be in writing, but can take any form: e.g. cheques, letters, pencilled writings on the wall of the testators house.

A will is **always revocable** and can be **conditional;** e.g. see s 13.

Other, secondary functions of a will:

- Appointment of personal representatives (PRs);
- **Execution of powers of appointment;**
- Appointment of trustees and the enlargement of powers; Some wills will create a trust.
- Appointment of a testamentary guardian (**Part 5A, Division 1);**

A **power of appointment** is a term used to describe the ability of the testator to select a person who will be given the authority to dispose of certain property under a will.

Powers of appointment are divided into two broad categories:

1. **General powers of appointment**
   - This is where the donee of the power is also an object of the power.
   - *I, Barry, leave my estate to Linda, to give to anyone that she may select.*
2. **Special powers of appointment**
   - This is where the donee is not also the object.
   - *I, Barry, leave my estate to my children to be distributed amongst them as Linda (donee) sees fit.*

The Succession Act distinguishes between the two appointment in sections 5B, 33 and 59(1).

Will Substitutes

Some people avoid using wills because there is the potential for inconvenience, delay and expense in the winding up of an estate; or they may seek to avoid possible family law provision claims. You cannot stop some people (family) from receiving something from the estate, even if you have a contract. As a testator you cannot completely wipe the people out.

1. Creation, inter vivos, of life interests and remainders

- A disposition of property to trustees upon trust for their life and, upon their death, the property is to divest to another.
- Not a will as it takes effect immediately upon the execution of the trust.
- Creating a trust when you are alive.

2. Joint tenancy

- Survivorship – when one joint tenant dies, the interest passes to the other joint tenant. You can't leave your share to someone in the will. The other party take the property by survivorship.
- If it is tenancy in common then you own your share and you can leave in the will, however if you have joint tenancy then you can't leave the property in the will, it goes to the other joint tenants.
- *Land Title Act 1994* (Qld), s 59: Severing joint tenancy.

3. Joint bank accounts

- It allows the surviving party the immediate access to the bank account.
- If spouses have joint bank account, and one dies, then the other one owes the bank account.
- If one partner has majority bank accounts in their name and the majority of the money goes into one bank account and there is no will then the spouse cannot access the bank account -> public trustee …
- Was it really joint bank account or was it just the account that the other party had access to?

4. Life insurance and superannuation and the nomination of beneficiaries

- **Life insurance (*Williams v Federal Commissioner of Taxation* (1950) 81 CLR 359)** and **superannuation schemes (*McFadden v Public Trustee of Victoria* [1981] 1 NSWLR 15)** are considered to be **immediately binding contractual instruments** in which a trust is created in relation to future property, in the event that certain events may occur.
- ***Life Insurance Act 1995* (Cth), s205. –** Restrictions on payment. (Paying out the debt of the deceased)

- **Superannuation:** Binding Death Benefit Nomination– no nomination? Death benefit in the superannuation.

5. *Donationes mortis causa*

- Death bed wish – binding gift outside of the will.
- Three requirements:
    1. The gift must be in contemplation of death;
    2. There must be a delivery of the subject matter of the gift or a transfer of the means or part of the means of getting at the property or a transfer of the indicia of title; and
    3. The gift must be conditional upon death of the owner.
    - ***Dufficiy v Mollica* [1968] 3 NSWLR 751 at 758.**
    - **Section 59, class 4** (it has to be pretty rare) **– payment of the debts! EXAM**

6. Contracts to make wills

- The problem is where a person is promised something, and it's not in the will or its been revoked, then only the final will, if it exists, will be admitted to probate. **If there is no will, then the promisor is considered intestate.** But if there is a contract, then that will be **enforced at law and equity.**
- Potential problem when enforcing the contract under the contract law is the intention. Was there intention – it must be rebutted.

Avoiding Will Requirements

1. Rule against the delegation of will-making power

- A testator may not delegate to another the power that the law confers to make a will. This is primarily because a will must represent the testator's 'mind, memory and understanding' and if it does not it cannot be admitted to probate as a will.
- There must be the intention that the will is the final distribution of the assets. And if someone is doing that for someone else then was there really intention?

2. Secret and half secret trusts

- A trust that involves obtaining the consent of a beneficiary under a will to hold the benefit as trustee for a person not mentioned in the will.
- **Equity will then enforce such a trust** if it has the three requirements of intention, communication and acceptance: see ***Blackwell v Blackwell*** [1929] AC 318.
- Where a secret trust is totally silent as to the existence of a trust, a half secret trust occurs where the will provides that the legatee is to hold the property on trust, but does not specify the terms of the trust or the beneficiary.
- Something has to be written in the will; an asset that is not disposed of in the will goes to the residuary clause, which will say all the rest of my assets to be split two ways between blah blah …
- The name doesn't have to be written in the will; it could be somewhere in the envelope.
- Secret trust is totally silent as to existence in the will.
- In the will you leave the will to your brother and then the brother is the trustee of the car for someone else; nobody knows except for the brother – because he was told and he accepted.
- Half secret trust – people know that the money is going to someone and that someone will do something with the money, but people don't know what.

Mutual Wills

The situations where an agreement has been reached between two or more people regarding the disposal of their property by wills, and they have executed a will in line with that agreement.
It mostly happens because of the second marriage.
The will is revokable until one of the parties dies. Once one party dies, the will cannot be revoked and it is sent into stone.
***Birmingham v Renfrew* (1937) 57 CLR 666.** Family provision: ***Barns v Barns* (2003) 214 CLR 169 –** the testator and his wife made a will that the property goes to the surviving one and then to their son. They had adopted daughter – went to HC and said that the family provision could be overridden in these situations.

Joint Wills

Two or more persons use the one document to set out their testamentary wishes. Joint wills should be avoided because they cause a lot of problems. It is better to have your own will.

A. Probate Law: The Making of a Will

Testamentary Capacity

A testator must have 'sound mind, memory and understanding' or **testamentary capacity, at the time the will is executed**. Probate will not be granted if testamentary capacity is in doubt.
Testamentary capacity is the capacity to make a will and to make a distribution of the assets at your death.

As **a matter of law,** only minors (under 18) lack testamentary capacity (**s9**). There are some exceptions under section 9.
Otherwise testamentary capacity is a **matter of fact.**

You can still show that you have a testamentary capacity under the law, even though you might have some mental illness under some other law.

Statutory will: sections 21 – 28.
Court can also authorize a minor to make, alter or revoke a will: **s 19.**

Banks v Goodfellow **(1870) LR 5 QB 549:**
The testator in this case was confined to an asylum and later, when released, he still had his own believes and was under delusions. He had a will, where the property was going to his sister, who has since died. He wanted to make a new will, his property to going to his niece. Sometimes if you can show that the latest will is not valid it then reverts back to the old will.

In that case Chief Justice Cockburn put forward a **test for testamentary capacity** setting out four requirements:

1. That the testator **understands the nature** of the act and its **effects.**
2. That the testator **understands the extent** of the property that is to be disposed. This only needs to be a general recollection of the types of property to be disposed.
3. That the testator be able to **comprehend and appreciate the claims** that ought to be given effect. This does not mean that these 'moral claims' need to receive a benefit under the will.
4. That the testator be of **'no disorder of the mind'** that **'shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties.'**

Boughton v Knight **[1873] LR P & D:**
The law does not say that a man is incapacitated from making a will if he proposes to make disposition of his property moved by **capricious, frivolous, mean or even bad motives.**

Delusions:
'… delusions are only material to the question of testamentary capacity if they are **connected with the dispositions** of the will': ***Tipper v Moore*** **(1911) 13 CLR 248** at 250 per Griffith CJ.

Thus, the following were held to be delusions invalidating wills:
A testator gave a daughter only a small gift out of a large estate because he thought she was 'Satan's special property': ***Dew v Clark*** **[1826] 3 Add 79.**
The testator believed herself to be the Holy Ghost and left her estate to a man she believed to be God the father: ***Smith v Tebbitt*** **(1867) LR 1 P & D 398.**

In the past, the testator could be as nasty and mean as they wanted to when making a will as long as they had the capacity. But now we have family provisions.
If a person has delusions only about one child, for example, thinking they're dead when they are not, then the rest of the will can still be valid, the invalid part is just the part of the will regarding that one child.

Proving Incapacity

1. A **non-contentious proceeding,** where a **grant in common form** is sought; and
2. A **contentious proceeding,** where a **solemn grant** is sought. **–** There might be some issue that needs to be litigated.

Bailey v Bailey **(1924) 34 CLR 558** at 570-574:
Onus of proof is on the propounder of the will/executor (the person who claims that the will is valid) to repudiate the allegation. However, if the will is **rational on its face,** a presumption arises that the testator was mentally competent to make the will. When they read the will and the will is rational then the presumption is that the testator had testamentary capacity. Thereafter, the matter is determine upon **the balance of the whole of the evidence,** taking into account, but not limited to, the following circumstances such as extreme age, sickness, rational and irrational provisions, exclusions and non-exclusions, etc.

The Courts have said that just because you're old doesn't mean that you don't have mental capacity.

Frizzo v Frizzo **[2011] QCA 308:** Applegarth J refers to the case of *Banks and Goodfellow* and explains it.

Avoiding challenges to testamentary capacity

A person making a will that may disappoint family members should try to set the minds of the members of the family at rest by being entirely above board about the intention. The testator should employ **an independent solicitor** to ensure that the instructions are taken and the will executed in a manner that could not arouse suspicion.

If the **testator is ill,** it is good practice to obtain the opinion of a medical practitioner as to capacity: ***Oates v Baker Estate*** **(1993) 80 BCLR 393.**

Obviously, the court will prefer evidence of a doctor and solicitor involved in the matter, however the **court retains the role of determinant of mental capacity.** E.g. see ***Middlebrook v Middlebrook*** **(1962) 36 ALJR 216.**

Update it regularly. I.e. is everyone still alive and does to the property still exist?

Testamentary Intention

In order to make a valid will, the testator must have the **intention** to make it – ***animus testandi*** – when he or she executes the will.
Thus both **capacity** and ***animus testandi*** are required:

- **Capacity:** the ability to do something.
- **Intention:** Knowledge and approval (which can be equated with *animus testandi*). An awareness and appreciation of a specific instrument: ***d'Eye v Avery*** **[2001] WTLR 227.**

Reasons to think that the will was not final; Nichols case – will was written as a joke. Things can be admitted to probate even without signature and witnesses.

Challenging testamentary intention

The knowledge and approval of the testator is presumed unless there are factors that may indicate otherwise.