

Succession Law Notes

LAW 2523

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1. Wills

1.1 General information about a will

1.1.1 General definition of a will

- The legal document in which the wishes of person are expressed upon their death.
- "A written declaration providing for disposition of property to take effect on the maker's death. A will may appoint an executor: to administer the testator's estate; to discharge liabilities; and to distribute the property as directed to the beneficiaries." - *Douglas-Menzies v Umphelby* [1908] AC 224 .

1.1.2 General elements of a will

- It must dispose of the property
- It operates only as a declaration of intention
- It takes effect only on death

1.2.3 Parties to a will

- Testator: owner of the will
- Executor: administrator of the will, named in the will
- Administrator: administrator of the will, not named in the will, appointed by the Probate Court.
- Beneficiaries: recipients of the wishes of the will

1.2.4 Process of executing a will: Probate

- Where a person dies leaving a will appointing an executor, the executor must apply to the Supreme Court for probate.
- Probate is a court order and is a legal recognition of the executors authority to deal with the deceased's property.
- Usually no issue, grant is dealt with administratively by the Registrar of Probates.
- When probate is granted, the executor can collect in the deceased's estate and distribute it according to the terms of the will.

1.2.5 Process of executing a will without an executor

- The grant is called "letters of administration with the Will annexed".
- The Probate Court appoints a person to carry out the terms of the will.

1.2.6 If there are two wills

- A later will impliedly revokes an earlier will to the extent that it is inconsistent
- If the later is totally inconsistent with the earlier, the earlier is revoked completely
- Determine the extent of inconsistency
- Even if there is partial inconsistency, can impliedly revoke the whole of the earlier will if that appears to be the intention - *Rider*

1.2 Is the will valid?

1.2.1 Did the testator have the capacity to create a will?

- Are they an infant (Under 18) If yes,
 - They can apply to the court for an order authorising the minor to make, alter or revoke a will in terms approved by the Court – *s 6 Wills Act*
 - If the minor is married (2) or contemplating (3) (must be solemnised), they can create a will *s 5 Wills Act*
 - Case study: *Application of M* (2000) 50 NSWLR 401
 - 17 year old who had never known his father and had only intermittent contact with his mother had been cared for by his grandparents and later his aunt.
 - Inherited considerable assets under his grandmothers will and decided that he would leave a legacy to his mother and the residue to his cousins with whom he had been raised.
 - Leave was granted for a minor to make a will in these terms.
- Do they have mental capacity?
 - Generally

- Must be of “sound mind, memory and understanding” - **Banks v Goodfellow (1970)** LR 5 QB 549, 565
- Requirements - **Banks v Goodfellow with Bull v Fulton**
 - 1 Do they fully know what a will is and understand its effects?
 - 2 Do they have a general understanding of the extent of property being disposed of?
 - 3 Are they able to comprehend and appreciate the claims to which the testator ought to give effect?
 - Have they considered who the beneficiaries should be?
 - 4 No insane delusion
 - An insane delusion in this context is usually defined as a belief in something, which no rational person could believe in.
 - There must be no insane delusion which has influenced the testamentary document itself
 - **Bull v Fulton** – Testator executed 26 wills. 20 were prepared by her nephews, solicitors. Had the insane delusion that her signatures on documents prepared by her nephews were fake despite evidence presented to her. This had a direct bearing on provisions of the will, therefore it was invalid.
 - General insane delusion is not sufficient for mental incapacity.
 - **Banks v Goodfellow** – testator believed that a man who died was still alive. Daughter argued this was insane delusion and his will should be invalid. The will was valid, as it did not directly affect the testamentary document itself.
- If there is mental incapacity – **Monger v Taylor**
 - Apply to the Supreme Court for a will to be made on behalf of a person who lacks testamentary capacity – **s 7 Wills Act**
 - It is to be exercised where a will or a new will is considered necessary to avoid a person’s property being distributed contrary to his or her presumed intentions
 - Does not allow the court to review the reasonableness of earlier wills made by someone who once had mental capacity but now does not.
- If mental incapacity only affects part of the will
 - That part may be severed – **Estate of Bohrmann**
 - Note: NSW SC declined to follow this in **Woodhead v Perpetual Trustee**
- Cases involving mental capacity
 - **O’Connell v Shortland** – testator made a will 3 days before dying of cancer. Some medical evidence that proved a build up of drugs may have led to paranoid delusions. Judges opinion was that this by itself fell far short of a doubt substantial enough to defeat the grant of probate. I am

1.2.2 Is there *Animus Testandi* (Intention to make a testament or will)?

- General test
 - From the acts of the testator, did they intend to make a disposition of property to take effect on their death?
 - The testator must know of the contents and approve
 - The testator must approve it as a will
 - **Nichols v Nichols** – deceased used to make fun of lawyers to their solicitor friends. Said lawyers used too many words and wrote a brief will, claiming it’s as close to a will as they’d ever get. No intention here.
- Have there been any factors that compromise the free will of the testator?
 - Fraud
 - If a beneficiary has practised a fraud on the testator to influence a disposition in his or her favour, the disposition is invalid – **Robertson v Smith**

- Wife of the proponent of the will convinced the testator to take out life insurance and execute a will in which her and her husband were sole beneficiaries – while planning to poison him.
- Undue Influence
 - Where the will of the testator is coerced into doing that which they do not desire to do.
 - Has there been coercion? – **Wingrove v Wingrove**
 - It may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble that very little pressure will be sufficient to bring about the desired result.
 - The mere talking to someone at a certain stage of illness and pressing something on them may fatigue the brain, that the sick person may be induced to do anything, for quietness' sake
 - Onus of proof is on the person alleging undue influence
- Have there been suspicious circumstances?
 - Has a solicitor or other person who has prepared a will taken a benefit under it? – **Wintle v Nye**
 - Solicitor took the bulk of the elderly testators estate – house of lords held they had not been vigilant and jealous
 - The onus is on such a person to establish knowledge and approval by the testator and the court takes a very strict view that it must be “vigilant and jealous” in scrutinising all circumstances.
- Has there been a mistake?
 - If so, general power of rectification on the Court, in terms wider than most other jurisdictions – **s 25AA(1) Wills Act**
 - Application must be made within 6 months of grant of probate or letters of administration – **s 25AA(2) Wills Act**
 - **Wesley v Wesley** – Testator named his nephews and nieces except one. Clear his intention was to spread the estate equally. Will was rectified to include “other nieces and nephews”.
 - **Mortensen v State of NSW** - “rectification is available for mistakes, not for lack of vision or perception of knowledge”

1.2.3 Are there offensive words in the will?

- The Court of Probate has the jurisdiction to exclude words from a will if they are “offensive”
 - Are the words in the opinion libellous and gratuitously offensive? – **Estate of Adler**
 - Are the words “scandalous, offensive and defamatory”? – **Sir Joshiaj Symon**
 - Are the words blasphemous? – **Edgar Whitelaw**
 - “I commit my soul to hell” was blasphemous at the time. Unsure on use now.
- Discretionary jurisdiction

1.2.4 Have the formal requirements been met? – **s 8 Wills Act**

- Presumption of regularity
 - If the will is regular on the face of it and apparently duly executed and attested, there is a presumption that the formal requirements under s 8 have been followed.
- Is the will in writing? - **s 8**
 - What is writing?
 - Any visible form in which words may be reproduced or represented – **Acts Interpretation Act SA s 4**
 - Handwriting, printing, typing or photocopying are included but not tape recording or video.
 - The writing need not be on any conventional surface
 - A computer file containing a will – **Re Trethewey**
 - On the wall of their home – **Estate of Slavinskyj**
- Has the will been signed by the testator? – **s 8(a)**

- Can also be signed by someone else on behalf of the testator's presence under their direction
 - No objection that the testator's hand being guided by another as long as the testator is aware of what they are doing – **Summerville v Walsh**
- Testator's initials or mark, stamped name or thumb print
- Does the signature by the testator intend to authenticate the will? – **s 8(b)**
 - Even if it's only half the initials or signature, it is valid – **In Male**
 - Position of signature
 - "On the face of the will or otherwise that the testator intended by the signature to give effect to the will"
 - **Wood v Smith**
 - Wrote on the paper "My Will by Percy" at the top, intending this to be his signature. Issue was that he signed first then wrote the will. He told the witnesses that he intended this to be his signature. Since there was evidence that he intended this to be his signature to authenticate the document, this suffices.
- Has the signature been made in the presence of 2 or more witnesses at the same time? – **s 8(c) Wills Act**
 - Who can be a witness?
 - Beneficiaries and spouses can be witnesses to the will – **s 17**
 - Executors and creditors can be witness to the will – **ss 18, 19**
 - Blind people cannot be witnesses
 - NOTE: Will not void by incompetency of witness – **s 16 Wills Act**
- Have the witnesses signed and attested the will? – **s 8(d) Wills Act**
 - Initials or a mark and they may sign anywhere on the will
- Have the signatures of the witnesses been made in the presence of the testator? – **s 8(e) Wills Act**
 - If the testator acknowledges that the document is their will to the witnesses, it doesn't matter that they have not seen the testator sign it.
 - They must sign the will after the acknowledgement though.
 - But not necessarily in the presence of each other
 - "Presence" connotes
 - Physical aspect of "sight-line"
 - The witnesses must both either see, or be in a position where they have the opportunity of seeing, the testator sign or acknowledge
 - Cases - Must be in line of sight
 - **Shires v Glascok** – Witnesses signed in an adjoining room in the wall of which was a broken window through which the testator might have seen or looked – valid
 - **Casson v Dade** – There was a window in the carriage through which the testator could have looked – valid
 - **Couser v Couser** – She went to the other end of the room to make coffee, 10ft from testator. "She could see if she had chosen to look around – I find it almost inconceivable to think that out the corner of her eye during the coffee making she saw nothing that went on"
 - **Norton v Bazett** – witnesses signed in an adjoining room with the door open but from where the testator was sitting, he could not have seen them and would have had to move.
 - Aspect of "awareness" of what is going on
- Alterations
 - Alterations must be executed in accordance with s 8 to be valid – **s 24 Wills Act**
 - No alteration in a will has any effect unless executed as a will – **s 24 Wills Act**
- If the requirements under s 8 have not been met
 - An application can be made to the Supreme Court to admit an application to admit to probate a document which fails to comply with the s 8 requirements – **s 12(2) Wills Act**