

## OVERVIEW

### 1. IS THERE A VALID WILL?

- What is a will (Topic 3)
  - Characteristics of a will
  - Boundaries of law of succession
    - Superannuation
    - Life Insurance Policies
    - Joint Tenancy
    - Deathbed Gifts
- Was the testator over 18? - s.5 Wills Act (Topic 4)
- Did the testator have testamentary capacity? (Topic 4)
  - Presumption of testamentary capacity where will is rational on its face and duly executed
  - BUT, if evidence to the contrary then onus shifts to the propounder to adduce evidence that the testator had testamentary capacity
  - Testamentary capacity = Banks v Goodfellow test
- Did the testator have testamentary intention (Topic 4)
  - Testator must have intended the document to be their last will
- Did the testator know and approve of the contents of the will? (Topic 4)
  - There is a presumption of knowledge and approval where the testator has capacity and the will is duly executed
  - Are there any suspicious circumstances?
  - Undue influence or fraud?
- Have the execution requirements of s 7(1) Wills Act been complied with? (Topic 5)
  - Requirements:
    - In writing
    - Signed by the testator
    - Signed in the presence of 2 or more witnesses
    - Attested by those witnesses
    - A will need not be dated, but dating is advised to provide certainty
- Do any of the exceptions apply to allow the formal will? (Topic 6)
  - Court's dispensing power
  - Incorporation of formal documents
- Statutory wills (Topic 4A)
  - Where the testator is alive but lacks testamentary capacity to create or alter their will, AND the laws of intestacy would not provide an appropriate distribution of property → court may authorise a "Statutory Will" - s 21 of the Wills Act
- How can a will be changed? (Topic 7)
  - An alteration to a will must be formally executed in the same manner as a will is required to be executed under the Wills Act – s 15 Wills Act
  - Revocation of a will
    - Marriage – s 13 WA
    - Divorce – s 14 WA
    - Revocation does not revive an earlier will - Re Moschoudis
    - Types of revocation
      - Express/Implied revocation in later will or codicil
      - Revocation by writing or dealing
      - Conditional revocation
  - Missing wills – presumption of destruction
  - Republication of a will
  - Revival of a will
  - Rectification of a will

➤ **Interpreting a Will** (Topic 8)

- Where there is no ambiguity in the words then no interpretation is necessary and words are given their normal meaning - [Re Rowlands](#)
- Where there is ambiguity in the meaning of the words, the court can use principles of construction and interpretation to resolve the ambiguity
  - Rules of interpretation
    - Ordinary meaning
    - Dictionary principle
    - Armchair principle
    - Words with more than one meaning
    - Technical words and phrases
    - Custom
    - Omission and ignoring words
    - Presumption against intestacy
    - False descriptions do not invalidate gifts
    - Ejusdem generis
    - Rule of despair
    - Rule against perpetuities
- Admissibility of evidence to prove testator's intention

➤ **Gifts by Will** (Topic 9)

- Classes of gifts
- Failed gifts
  - Ademption
  - Lapse and Survivorship
    - Principle of survivorship - [s 39\(1\) Wills Act](#)
    - Presumed order of death - [s 184 PLA Vic](#)
    - Statutory presumption of death
  - Exceptions
    - Charities
    - Statutory anti-lapse provisions
    - Establishing contrary intention
- Disclaiming a gift
- Satisfaction and Equitable Ademption
- Equitable election
- Forfeiture for Killing

➤ **Contracts Regarding Wills** (Topic 7)

- Contracts regarding wills are enforceable
  - Where there is a contract regarding distribution of property, this property still forms part of the estate and therefore the property may be subject to a claim for Family Provision - [Barns](#)
- Mutual wills

**2. WHERE THERE IS NO VALID WILL, THE LAWS OF INTESTACY WILL APPLY** (Topic 2)

➤ 4 scenarios:

1. Deceased survived by a partner and **no** children or other issue
  - The partner takes the entire estate: section [s 70J APA](#)
2. Deceased survived by a partner and at least one child or other issue
3. Deceased survived by multiple partners
4. Deceased not survived by a partner

➤ Definitions

- Relationships
- Living together

- Personal chattels
- Children and parents
  - See *Status of Children Act*
- Survivorship
  - Survivorship and unborn children
- Statutory Legacy → \$461,780

### 3. IS THE ESTATE SUBJECT TO A CLAIM FOR FAMILY PROVISION? (Topic 10)

- Eligible persons – *s 90 A&P Act*
  - Definitions
- Time Limits & Extensions
- Criteria in determining application
- Court orders of FP

### 4. What is the role, functions and duties of a PERSONAL REPRESENTATIVE? (Topic 11)

- Terminology:
  - Executors (wills)
  - Administrators
    - Where:
      - No valid will
      - Nominated executor disqualified or refuses to act
  - Trustee
    - Responsibility to take control of assets and administer them for the benefit of the beneficiaries
- Types of appointments
- Role of Executor & Administrator
- **Grants of Representation** (Topic 12)
  - 4 main types of grant
    - (i) Probate
    - (ii) Administration with the will annexed
    - (iii) General administration
    - (iv) A variety of limited grants
  - Pre-conditions to grant
    - Death
    - Deceased left property in jurisdiction
  - How will the will be admitted to probate?
    - Common vs Solemn form
  - Is the will subject to a Caveat?
    - Caveat procedure
  - Is the estate small (<\$100k) and therefore different rules apply? (see page 74)
- **Functions and Duties of Personal Representative** (Topic 13)
  - Funeral and disposal of body

## TOPIC 2: INTESTACY

### 1. IS THERE AN INTESTACY?

- Where the deceased dies **without executing a valid will**, their estate will be distributed through the laws of intestacy
- Partial intestacy
  - Where there is a valid will but not all property can be distributed validly

### 2. WHICH SCENARIO APPLIES?

5. Deceased survived by a partner and **no** children or other issue
  - The partner takes the entire estate: section [s 70J APA](#)
6. Deceased survived by a partner and at least one child or other issue
7. Deceased survived by multiple partners
8. Deceased not survived by a partner

#### SCENARIO 1 – Deceased survived by a partner and no children or other issue

- The partner takes the entire estate – [s 70J APA](#)

#### SCENARIO 2 – Deceased survived by a partner and at least one child or other issue

- This is the **most complicated scenario** because there needs to be a **balancing between the interests of the surviving partner and the surviving children**
- The main concern under the old law was that a partner was often not able to continue living in their family home
  - New legislation was introduced to overcome these concerns

#### ➤ New Legislation

- If all of the children are also children of the partner, the partner is entitled to the whole of the intestate's residuary estate - [s 70K](#)
  - Rationale: children will eventually inherit from surviving parent
- If estate **not worth more than statutory legacy** (currently \$461,780), then the partner is entitled to the whole of the estate - [s 70L](#)
  - 2017: \$451 909
- If **at least one of the intestate's children is not the child of the partner and the estate is worth more than the statutory legacy (currently \$461,780)**, then [s 70L](#) applies:
  - The partner is entitled to:
    - The personal chattels
    - The amount of the statutory legacy → currently \$451 909
    - Interest on the statutory legacy from date of death
    - Half of the balance of the residuary estate
  - All of the children of the intestate (including children of the partner) share the other half of the balance of the residuary estate in equal shares.

### SCENARIO 3 – Deceased survived by multiple partners

- Examples:
  - Intestate still technically married to ex-partner, but one partner starts new relationship
  - Deceased in multiple de-facto relationships
- **Same principles apply** as set out in the first and second scenarios....
  - [s.70Z](#) - more than one partner and no issue
  - [s.70ZA](#) - more than one partner and child to one of those partners
  - [s.70ZB](#) - more than one partner AND at least one child that is not the child of those partners
- **EXCEPT** The partner's entitlements are shared between the multiple partners as follows:
  - (i) in accordance with a distribution agreement; or
  - (ii) in accordance with a distribution order; or
    - A party may apply to the court for order
  - (iii) in equal shares in accordance with section [70ZE](#)
    - Eg. multiple partners get **same overall amount that one partner would have received in scenario 1 or 2**, however the amount is divided between them equally
- **Distribution Agreement: [s 70ZC](#)**
  - The partners of an intestate deceased may enter into a written agreement regarding how the intestate's residuary estate will be distributed between them
- **Distribution Order: [s 70ZD](#)**
  - Any partner can apply to the Court for an order
  - The Court may order a distribution between the partners in **any way the Court considers just and equitable**, and can include any conditions the Court considers appropriate.

### SCENARIO 4 - Deceased **not** survived by a partner

- **Hierarchy of next of kin**
  - If **surviving children** [or other issue]
    - Then all children entitled to share equally [s 70ZG](#)
      - If any children have predeceased the intestate then any grandchildren take the child's share per stripes (grandchildren get their parents share if the parent is deceased). Same from great-grandchildren.
  - If **no surviving children or other issue**:
    - Then parents to share equally [s 70ZH](#)
  - If **no surviving children or parents**:
    - Then siblings to share equally [s 70ZI](#)
    - Nephews and nieces can take by representation. But not great nieces or nephews.
  - If **no surviving children, parents or siblings**:
    - Then grandparents to share equally [s 70ZJ](#)
  - If **no surviving children, parents, siblings or grandparents**:
    - Then aunts and uncles (and cousins by representation [take the share on behalf of the person entitled who has deceased]) to share equally [s 70ZK](#)
    - Query what happens if intestate leaves cousins but all aunts and uncles have predeceased.
  - If there is still no one entitled → then estate passes to Crown (*bona vacantia*)
- **"Half" relations**

- The Act refers to “brothers” and “sisters” but does not distinguish between full and half siblings
  - This used to be set out in [s 52\(1\)\(f\)\(vii\)](#) (which stated there was no distinction between full blood or half-blood relations) but that was repealed and has not been replaced
  - From this we presume a reference to siblings/aunts/uncles includes full and half siblings

### ➤ Setting a limit on next of kin

- **Victorian Law Reform Commission Report**
  - Next of kin inquiries can be time consuming and expensive
    - [West v Weston](#)
  - Need for National consistency – Vic was not in line
  - More remote next of kin could make an application
    - to the Minister for Finance under the Financial Management Act 1994 (Vic) OR
    - could make a family provision application (but requires dependency)
  - Cases involving remote next of kin are rare and the additional costs and time taken in locating them are not justified.
  - Of estates administered by State Trustees < 5% involve next of kin who are more remote than the deceased person’s first cousins
  - Recommended: Next of kin who are entitled to inherit on intestacy should be limited to children of the deceased aunts and uncles (the deceased person’s first cousins)
    - This was implemented in section [70ZK](#) and [70ZL](#) of the Victorian A & P Act

## 3. DEFINITIONS OF RELATIONSHIPS

### Definition of partner

#### ➤ [s.70B](#) definitions

- partner of an intestate means the person’s spouse, domestic partner or registered caring partner at the time of the intestate's death
- **Purpose of the section**
  - [Re Sigg](#):
    - to ensure that people who are domestic partners are not denied rights merely because they had not formally become married to each other.
    - Also seeks to prevent discrimination on the grounds of gender preference by ensuring that people who are living together in a same sex relationship have the same rights as a heterosexual couple would have.

#### ➤ [s.3\(1\)](#) DEFINITIONS

- **domestic partner**
  - registered or unregistered domestic partner of that person
- **Registered caring partner**
  - A person who, at the time of the person's death, was in a registered caring relationship with the person within the meaning of the [Relationships Act 2008](#);
- **Registered domestic partner**
  - A person who, at the time of the person's death, was in a registered domestic relationship with the person within the meaning of the [Relationships Act 2008](#);
- **Unregistered domestic partner**

- means a person (other than a registered domestic partner of the person) who, although not married to the person— [s 3\(1\)](#)
  - (a) was living with the person at the time of the person's death as a couple on a genuine domestic basis (irrespective of gender); **AND**
  - (b) either—
    - i. had lived with the person in that manner continuously **for a period of at least 2 years** immediately before the person's death; or
    - ii. is the parent of a child of the person, where that child was under 18 years of age at the time of the person's death
  
- [s.3\(3\)](#) *For the purposes of the definition of **unregistered domestic partner** in subsection [\(1\)](#), in **determining whether persons were unregistered domestic partners** of each other, *all the circumstances of their relationship are to be taken into account, including any one or more of the matters referred to in section [35\(2\)](#) of the **Relationships Act 2008** as may be relevant in a particular case.*
  - (a) *the degree of mutual commitment to a shared life;*
  - (b) *the duration of the relationship;*
  - (c) *the nature and extent of common residence;*
  - (d) *whether or not a sexual relationship exists;*
  - (e) *the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;*
  - (f) *the ownership, use and acquisition of property;*
  - (g) *the care and support of children;*
  - (h) *the reputation and public aspects of the relationship.**

➤ **“Living Together”**

- Cases suggest the courts **do not take a narrow, formal or pedantic** view about “living together” - [Hoskins](#)
  - Can be living together and not be domestic partners
  - Can be not physically living in the same house but still be domestic partners.
- *“Whether two people are “living together” should **not be construed on narrow, formal, pedantic or merely geographical criteria** but should be **considered taking into account** the human reality of the **personal, emotional and cultural complex**”* – Cummins J in [Dow v Hoskins](#)

### Definition of Spouse

- [s 3 APA](#) - **Definitions**
  - **spouse = a person who was married to the person at the time of the person's death**
- **As soon as a marriage is dissolved (by making of a divorce order) the parties cease to be married**
  - Married UNTIL divorce order made
  - **So an ex-spouse has no entitlement under an intestacy**
- **Note also – Family Law Proceedings**
  - **New proceedings cannot be commenced** under the Family law Act for property division **where one of the parties to a marriage (or relationship) has died**
    - Once someone dies, the Family Court does not have jurisdiction to hear an application for property settlement