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Red text = legislative provisions

Yellow highlighted text = illustrative cases

T = Testator

APA = Administration and Probate Act 1958 (Vic)

All legislative provisions refer to the Wills Act 1997 (Vic) unless otherwise specified.

## Jurisdiction

Supreme Court has twofold jurisdiction:

- Court of Probate (formal proof of the Will); and
- Court of Construction (to interpret the Will if necessary).

On death of testator, executor applies to Registrar of Probates to **prove** (establish validity of) the Will. If satisfied, Registrar **grants probate**. Usually no court appearance required.

If there is **intestacy** (no will) Registrar grants **Letters of Administration** granted to the person most interested in the will (usually next of kin).

## Characteristics of a valid Will

- Capacity
  - Intention
  - Prescribed form (in writing, signed in presence of 2 witnesses)
    - Court can dispense with formalities
  - Appoints person to act as executor
  - Disposes of property to beneficiaries
1. Wills are 'ambulatory' (flexible) and can be altered or revoked by testator at any time before their death. The beneficiaries therefore have no legal interest in the property until the testator's death.
  2. Wills are 'testamentary' - they only come into effect once the person dies
  3. There are prescribed formalities - must be witnessed in a certain way
  4. May do more than dispose of property - e.g. Funeral instructions. However, executor has discretion.
  5. May be comprised of several instruments - together are referred to as the Will.

## Compared to other transactions

1. Trusts *inter vivos* (creation of life interest) - interest is effective at the time the interest is created, unlike a Will that can be changed at any time.
2. Nominations under life insurance policy - contractual entitlement to payment upon your death.
3. Superannuation nominations - **Baird v Baird**. Contractual not testamentary. Often cannot put it in will.
4. Joint tenancy - not testamentary
5. Joint bank accounts - not testamentary

## Donatio Mortis Causa

Gifts made in contemplation of death may be exempt from ordinary will formalities. Three requirements:

- Must be made in contemplation of '**imminent**' but not '**immediate**' death.
- Cannot be an outright gift, must be condition on death. Will be revoked if they do not die.

## Testamentary capacity

Power to dispose of property is a right.

Testamentary capacity is the mental capacity needed to exercise a right to dispose of property by Will.

- Person must be of **sound mind, memory, and understanding** at the time of making the Will (signing) - **Banks v Goodfellow**.
- Delusions are only material to case if connected to dispositions in will. Despite being under impression he was pursued by spirits, held testator has capacity.

### Test for capacity (Cockburn J):

- Person must understand nature and effects of will making. Sufficient to show they knew they were making a will (with knowledge and approval of contents)
- Person must be aware of nature, extent and value of property being disposed of.
  - General knowledge of property sufficient
- Person must comprehend and appreciate any claims on estate by others
- Is person free from delusions that would affect their judgment?
  - **Timbury v Coffee** - Alcoholic T made four wills influenced by paranoid suspicions of wife's fidelity. In the last of the wills he cut wife out completely. HCA held T did not have sufficient capacity when making the fourth will, but had capacity when making the third. Delusion was more than suspicion and jealousy, it was an '**insane disorder of the mind**'.
  - **Kantor v Vosahlo** - T made several wills, last one granted estate to charity. Had earlier made will leaving part of estate to BIL. He argued T did not have capacity because of **dementia**. Last will held valid because made during 'lucid period'. Testamentary capacity compatible with dementia.
  - **Key v Key** - T relied on wife and was devastated when she died. T made new will giving all property to daughters. Court held T was suffering from **depression caused by bereavement**, and did not have capacity.
  - **Bull v Fulton** - Woman thought nephews defrauding her, excluded them from will. Court held **paranoia** may have influenced her will. Will invalid.

## Burden of proof for testamentary capacity

**Presumption** - Will that appears to be properly executed is valid. Burden lies with person saying the will is valid to show the person had capacity.

- Evidential burden passes to objector to raise doubt about capacity at the time the will was signed.
- If a real doubt is shown, evidential burden shifts back to propounder to establish capacity.

Capacity is a legal question for the Court, not for experts to decide.

The following factors do not automatically establish incapacity:

- Alcohol or drug dependence
- Old age
- Onset of dementia
- Eccentricity, extreme views
- Contemplation of suicide

## Formalities

Writing with formalities is the traditional method of ascertaining the deceased's intentions.

**S7** - Must be:

- **(1)(a)** - In writing
  - **Re Goods of Adams** - Will written in pen and pencil. Pencil writing obliterated. Court held only the writing in ink should be admitted into probate, as the pencil writing was intended to be superseded by pen.
- **(1)(b)** - Signature made with intention
  - **Re Goods of Hornby** - T executed handwritten will. Signed halfway down page, some property disposed above, some below. Was signature made with intention of executing the whole will? Court held was valid as signature intended to give effect to will. Signature does not have to be at bottom.
- **(1)(a)** - Signed by or at the direction of the testator
  - **Re Goods of Clark** - T too weak to sign, requested priest to sign for him. 'Signed for and on behalf of T by me...' Admitted into probate. Does not have to be in T's name as long as it is by T's direction.
  - **In re Male** - T ill in hospital, asked nurse to complete will and details read back to her. Pen given to T, but could not sign complete name. Witnesses attested execution. Court held valid, mark was made by her with intent to sign.
- **(1)(c)** - Signed in the presence of two witnesses at the same time
  - **Re Colling** - Before T completed signature, witness called away. Witness returned later and attested. Court held not valid because witness was not present for execution.
- **(1)(d)** - Witnesses attest will in testator's presence

## Judicial dispensing power

**S9** - Court can dispense with formalities and admit to probate a document as a will if the person intended that document to be their will. Three requirements:

- There must be a **document** - **s38 Interpretation of Legislation Act** definition - broad interpretation.
- Document must record **testamentary intention**
- Document must have been intended by deceased to **be their will** - i.e. Not a draft.
  - **Lindsay v McGrath** - Document could not be admitted to probate as final will. Not enough that doc has testamentary intention, document was notes or instructions for the making of a will. Implied that the will was another document. Dispensary power can only remedy document, not intention.

**Re Bateman** - T terminally ill, agent came to take instructions for preparation of will. Draft will prepared and sent to him signed by witnesses but not T. T went to hospital and spoke to staff about the will he had made. Court held valid as will as he intended that particular document to be his will. It was a document that recorded his testamentary intention, and he intended that document to be his will.

**Re Will of Trethewey** - File on work computer contained file named 'will' that divided assets. Name and date typed at end of doc. Document includes electronic data, upheld as will.

## Construction

Court of probate will only determine the validity of the will – capacity, formalities, etc.

The Court of construction will interpret words of the will. Strict rules of evidence to be used to ascertain intention.

- When words are ambiguous or uncertain, courts can use evidence.

Must look at sections in the context of the whole document, not in isolation.

- **Perrin v Morgan** (1943) - uncertain meaning of 'all money of which I die possessed to my nieces and nephews'. Did money mean notes and coins? Or money include everything in popular sense and include property, all assets, financial assets?
  - Held: Look at word 'monies' in wide aspect. Either she intended to die intestate or monies included all of her property - so must be interpreted broadly to give effect to intention. Context suggested all personal property.
  - **Must give effect to testator's intentions.**

## Principles of construction

**Court must sit in the testator's 'armchair' to view circumstances from their perspective and learn their intentions given what they know. Will must be construed to give effect to that intention - **Perrin v Morgan**.**

- But cannot make fresh will for testator
- If intention is clear, no rules of construction should interfere

## Rules

1. Look at ordinary or usual meaning
2. Look at secondary meanings (dictionaries and surrounding circs) if from the whole will it seems they appear to use the word in a different sense
3. Words with more than one meaning
4. Custom and technical words - specialised meaning prima facie applicable. E.g. Trade or religious group - **Shore v Wilson**.
5. Omissions - **Fell v Fell** - Listed beneficiaries but did not specify the property given away. Court inferred that T had intention to give whole estate to named beneficiaries. Court can only read in words if the omitted words are clear on the face of the will as a whole.
6. Changing and transposing words (putting them in different places) - **Aboud v Aboud**.

## Subsidiary principles of construction

1. Avoid intestacy - obviously not intended (Golden rule)
2. Better to preserve than to destroy (*ut res magis valeat quam pereat*)
3. A partly false description will not invalidate a gift (*falsa demonstratio non nocet, cum de corpore constat*).
4. A specific gift follows the nature of a class gift (*ejusdem generis*) - in a list of things 'and others', the specific elements define the general. E.g. all my chairs, tables, etc.
5. Ambiguous words do not control a clear gift
6. Inconsistent clauses - the later prevails over the earlier clause (rule of despair)

## Gifts by wills

### Descriptions of persons

Identity of donees to be ascertained at **date of will**.

- Where person meets description of donee at date of will, they will take the gift
  - **Amyot v Dwaris** (1904) - T left estate to eldest son of sister. Sister's two sons predeceased him. She then had another which survived T. Held gift had lapsed.
- Subject to contrary intention.

### Descriptions of property

**S34** - Opposite of rule identifying beneficiaries. To be ascertained from **date of death**. (not date of signing).

- E.g. Gift of 'all my shares' includes shares I had at date the will was made, plus any shares subsequently acquired.
- Subject to contrary intention.

### Relationships

Take it literally.

- Relations means blood relations (not those by marriage) unless specified.
- 'My nieces' means my brothers/sisters children NOT wife's brothers/sisters children.

### Class gifts

Class gifts are those to individuals connected by a common tie so the T was looking at the body rather than the members as individuals - **Re Mitchell**.

### Class-closing rules

Classes of donees close upon T death or at the earliest opportunity to vest - **Andrews v Partington**

- E.g. If T leaves estate to grandchildren, then two grandchildren are born after T's death, those two new grandchildren are excluded.
- E.g. If T leaves estate to 'my grandchildren who attain 21 years old' the class closes when the first grandchild attains 21.

If a class gift is postponed by life interest, the class closes at date of death for the person with the life interest.

- E.g. To my wife for life then to my nephews. Class closes at wife's death - any nephews before after T death but before wife's death are within the class.

### Rule against perpetuities

Rule against remoteness - interest in property must be certain to vest to be valid.

## Family provision

1. Is the applicant an eligible person?
2. Will the Court make family provision order?
  - a. Did the deceased have a responsibility to make provision for the applicant?
  - b. Was the provision (if any) adequate for proper maintenance and support of applicant?
  - c. What provision ought to be made?
3. Should the Court exercise discretion to not make an order?

Family provision provides a limit on freedom of testation.

- Where no or insufficient provision is made for the maintenance of persons for whom the deceased ought to provide

Three stages - two jurisdictional questions and remedial discretion.

**Governed by Administration of Probate Act.**

### Is the applicant an eligible person?

**S90A of APA** - Application for family provision can only be made by or on behalf of an eligible person.

**S90** - definition of 'eligible person':

- (a) - Spouse or domestic partner of deceased
- (b) - Child of deceased under 18
  - Or child aged 18-25 who is a full-time student.
  - Or child with disability
- (c) - Stepchild of deceased under 18
  - As above (full time student or disability)
- (d) Person under 18 who thought (for substantial period) that deceased was parent and treated as natural child
  - As above
- (e) Spouse of former spouse who has or could have commenced claim under Family Law Act 1975.
- (f) Adult child
- (g) Adult person who thought (for substantial period) deceased was parent and was treated as natural child
- (h) Registered caring partner of deceased
- (i) Grandchild of deceased
- (j) Spouse or domestic partner of child or stepchild who dies within 1 year of deceased
- (k) Persons who would likely have become a member of deceased's household had deceased not died