LAWS 5187
Succession Law

SAMPLE EXTRACT

CONTENTS

Validity

VALID EXECUTION (WA s8)

(a) **in writing**;

(b) **signed by T** (or in their name by another person in their presence) in such a place **so that it is apparent on the face of the Will that they intended to give effect to it by the signature**;

(c) T makes/acknowledges the signature **in the presence of min 2 witnesses at the same time**; and

(d) witnesses attest & subscribe the Will in testator's presence (no publication/form necessary).

Document:

- Not required to be stapled or bound but that they are held together at time of execution.
- Judges may be more flexible today in application of these rules due to the capacity for informal Wills.

- 'Writing' = includes **printing, photography, photocopying, lithography, typewriting** & any other modes of representing or **reproducing words in visible form** (IA (WA) s5).

- *Ryan* [1955] Vic – witnesses signed a second sheet of paper & testator signed the dispositive page, the **pages were not held together**. Held: **insufficient**.

- *Jenkins* (1989) WA – Will wet at top & bottom causing ink to run on signature. Held: evidence accepted that the Will had been signed (**nature of the document & logical sequence of provisions**).

- The testator's **Will is the aggregate of the testamentary intentions expressed in any unrevoked testamentary documents** (*Douglas Menzies* (1908) UK; *Barndon* [2007] WASC).

Signing/Acknowledgement:

- Signature includes any mark made by the testator by which they intended to authenticate the document.
  - *Public Trustee v Smith* (1990) – T (ill) **could not sign but could print name**. Held: sufficient.

- T's signature should be at the end (otherwise look for evidence that it came last in time).
  - *Goods of Man* [1942] UK – Will inside envelope, T signed envelope. Held: **last effective signature**, sufficient.

  - *Kirton* [1963] NSW – Will consisted of a single sheet of paper folded lengthwise (created 4x pages), witnesses signed 1st page, T signed printed endorsement on 4th page. Held: although signature made with the intention of authenticating the document as a Will it was **not apparent on the face of the Will that T intended to give effect to dispositions on 1st page**.

Witnesses:

- Must be present at time of signature & acknowledgement (do not have to both see the mark/signature, only that they could have seen – also do not need to know what the document is).

Lost Will:

- May be admitted to probate provided it was executed IAW the formalities & a copy is accessible.

Incorporation by Reference:

- *Treacey v Edwards* [2000] NSWSC – T referred to audio tape in his Will. Held: **document incorporated does not have to be written**, audio tape satisfied the requirements:
  - Document must be referred to in the Will.
  - Reference to the document must be sufficient to identify it.
  - Document must be in existence at the time the Will was executed.

Proving a Will (*Kirs* (1990) SA; *Wheatley v Edgar* (2003) WASC):

- Solemn Form = main/sole question is whether the Will (whole/part) is a valid testamentary instrument.
- Common Form = validity uncontested & Court allows it to be admitted after hearing/motion/summons.

GENERAL VALIDITY (WA s20)

(1) Properly executed **if execution conforms to the internal law in force** in the place:
   (a) where it was executed;
   (b) that was T's domicile or habitual residence (at time of execution or death); or
   (c) of which T was a national (at time of execution or death).

(2) Also properly executed:
   (a) on board vessel/aircraft in conformity with internal law in force in the place with which the vessel/aircraft may be taken to have been most closely connected having regard to its registration & other relevant circumstances;

   (b) re disposal of immovable property, if in conformity with the internal law in force at the place where the property is situated;

   (c) re revoking a Will or provision executed (or taken to be executed) IAW this Act, if the later Will has been executed in conformity with any law by which the earlier Will or provision would be taken to have been validly executed;

   (d) so far as it exercises a power of appt, if in conformity with the law governing the essential validity of the power.

ASCERTAINING SYSTEM OF LAW (WA s21)

(1) If more than one system of internal law in force applies then:
   (a) if a rule in force indicates which system of the internal law applies, that rule must be followed;
   (b) if no rule, the system of internal law that T was most closely connected, either:
      (i) at time of death, if matter to be determined by reference to circumstances at their death; or
      (ii) in any other case, at the time of execution of the Will.

(2) Regard must be had to the formal requirements of the internal law at the time of execution, but account may be taken of a later alteration of that law if it enables the Will to be treated as properly executed.

(3) If a law in force outside WA is applied to a Will, a requirement of that law that special formalities must be observed by particular Ts or that witnesses must have certain qualifications, is to be taken to be a formal requirement only, despite any rule of that law to the contrary.

Presumptions & Testamentary Capacity

PRESUMPTIONS

Presumption of Due Execution:

- *Hassold* [2018] SA – Will signed by T & two witnesses, unable to prove identity of witness. Held: due execution presumed, **Court will look at all of the relevant circumstances** (document has a hallmark of a professionally prepared Will, signed by T, each signature in different handwriting, conventional attestation clause, held by Public Trustee for many years), no evidence raising suspicion of fraud or UI.

- **Weak presumption that T did not intend to die intestate if they have a testamentary instrument** (Courts try to give effect to a testamentary instrument) [weak presumption against intestacy].

Three Presumptions:

- *West v Smith* [2018] WASC – Held: **if Will appears to be duly executed on its face** then the three presumptions arise (if challenged/solemn form then must be evidence of due execution):
    1. **Testamentary intention**.
    2. **Testamentary capacity**.
    3. **Knowledge & approval of the contents of the Will**.

    - If 'real doubt' re validity, court must exercise 'vigilant examination' of whole of evidence.
    - Always for the propounder to positively establish that there was testamentary capacity.

IF ONE OF THE PRESUMPTIONS ARE REBUTTED, THE WILL IS VOID.

TESTAMENTARY CAPACITY

- *Banks v Goodfellow* (1870) UK – Held: mental power may be reduced below the ordinary standard yet if sufficient intelligence to understand/appreciate the testamentary act in its different bearings power to make a Will remains, a **practical question of degree (does not depend on scientific/legal definition)**.
    - **Understand the nature & effect of a Will**.
    - **Understand the nature & extent of their property**.
    - **Comprehend & appreciate the claims to which they ought to give effect**.
    - **No disorder of the mind/insane delusion that would result in unwanted disposition**.

- *Sylvester v Tarabini* (1995) – Anderson J: **mere proof of a serious illness will not necessarily lead to a conclusion of want of testamentary capacity** (there must be evidence that the illness affected T's mental faculties to a degree sufficient to deprive T of testamentary capacity).

- *Power v Smart* [2018] WASC – Held: question is **whether T understood not whether they met the current criteria for a mental disorder** (diagnostic criteria inform but do not determine capacity), **expert medical evidence informs but does not determine** capacity.

- Suicide does not raise a presumption against capacity (*Hodges*).

- *Bailey* (1924) HCA – T (88) gave ins & answered questions sensibly to solicitor & showed intelligent appreciation of the facts, when asked to sign T told his solicitor he would do it later. Held: capacity (prima facie subject to contrary evidence), T's **Dr had known him for 5 years (exceptionally good position to detect incapacity) & did not identify any sign of mental weakness**, execution occurred after fully reading/explaining Will & when asked whether he understood T replied "yes", **unless it can**

be shown that beneath all this apparent quality of mind/memory/understanding there was the vitiating circumstance that T was merely mechanically speaking & acting in obedience to coercive will the Will should be given effect, **evidence of respondents consists entirely of weakened memory** (forgetting existence of neighbours who had died & extent of ploughed land).

- *In the Will of Ivory* (1995) Vic – M worked in T's family bakery & cared for T even before marrying her son, always a good relationship between M & T, M had nursed T on a number of occasions, T treated M like a daughter. Held: no capacity, **to have forgotten M altogether or her legitimate claim would demonstrate incompetence**, choosing to deliberately ignore M would be so at odds with the history of her relationship with T & the character of T as to be **explicable only by senility**.

Delusion:

- *Re Crooks* (1994) NSW – Held: 'insane' delusion means 'incorrigibility of a belief whose falseness is not amenable to appeals of reason'.
    - Delusion **must be tested by objective evidence as to it being fixed, false & incorrigible such that T could not be reasoned out of it** (no clinician ever tried to reason with T to see whether he unswervingly held the relevant ideas no matter what was put to him).
    - Mere suspicion or finding something could be a delusional idea which could possibly have an effect on the Will insufficient to lead the Court to find that in all the circumstances the Will cannot be admitted to probate.

- *Bull v Fulton* (1942) HCA – T's nephews (solicitors) helped her draft her Wills, nephews were always included in the Wills up until she formed the false belief that certain documents were not signed by her & the nephews had committed deceit/forgery (despite overwhelming proof of falsity). Held: invalid Will, the **belief amounted to a delusion (memory failure or paranoia) which was of such a character as to have a direct bearing on the provisions of the Will**, propounder failed to show that the delusion did not affect those provisions.

- *Griffith* (1995) NSWCA – T & son had a troubled relationship, T presented to the world as an intelligent & rational woman, son a beneficiary in all of T's Wills except the last one. Held: no capacity (burden to overturn the doubt raised re capacity not discharged), **no need to make a positive finding of delusion in order to raise doubt as to capacity** (nor necessary to bring evidence raising doubt re capacity under delusion), evidence of the relationship must be considered in combination, the **evidence of the psychiatrist added weight** towards the conclusion that there was a mental disturbance rather an a judgement that could merely be characterised as unfair.

KNOWING & APPROVING CONTENTS

- *Roebuck v Smoje* [2000] WASC – T had impaired hearing/eyesight, made Will with R (neighbour), R's de facto partner was a witness & a guarantor for the debts owed by R. Held: knowledge/approval, **must be a reasonable suspicion that the Will did not accord with T's intention**, medical practitioners assessed T as an **intelligent man able to engage in normal conversation (capable of executing an important but short legal document)**, T of strong & independent character & could be **prickly & obstinate** (unlikely his will would be easily overborne), Will comparatively **short & simple (easy to understand)**, exclusion of T's family can be explained by their estrangement.
    - T was elderly, living alone, no regular communication with family circle or others who might have given counsel re management of affairs, in regular contact with R (principal beneficiary), R instrumental in making arrangements for execution & both witnesses had a connection to R – **clear against this background to exercise special vigilance in assessing the evidence**.

- Suspicion aroused in the following circumstances:
    - Where solicitor prepares a Will & the solicitor is a beneficiary (*Nock v Austin*).
    - Where person prepares a Will & they (or their child) are a beneficiary (*Roebuck v Smoje*).