

LAW 2523 Succession
Course Notes

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INTRODUCTION TO SUCCESSION

Lecture Notes

To be covered in the course:

- Wills
- Intestacy
- Family provision
- Probate and administration
- Estate planning, superannuation and taxation

Succession legislation:

- *Wills Act 1936 (SA)*
- *Administration and Probate Act 1919 (SA)*
- *Inheritance (Family Provision) Act 1972 (SA)*

Glossary:

- Codicil – an amendment or addition to a will
- Testator (testatrix) – person who makes a will
- Intestacy/intestate – person who dies with no will
- Beneficiary – someone to whom property is left in a will, or takes it under intestacy rules
- Estate – the aggregate of the deceased's property to be administered and distributed
- Devise (devisor/devisee) – usually used for land left by will
- Bequest – usually used for personal property left by will
- Legacy – a monetary bequest
- Inter vivos (gift or disposition) – made during the owner's lifetime
- Probate – proving that the will is valid as a will
- Letters of administration – authority for an administrator to act in relation to an intestate estate
- Executor – the personal representative/s authorised by the will to administer the estate
- Administrator – the person granted letters of administration to administer the estate – usually on intestacy
- Personal representative – can cover executor or administrator once appointed

GENERAL NATURE OF A WILL

Lecture Notes

Definition of a will:

- A will is a declaration of intention of a person's wishes in relation to what happens to the person's estate on death
- Documents in which those wishes are expressed

Effect of a will:

- It is testamentary
 - Intended to take effect at the time of death and only on death
- It is revocable
 - Operates only as a declaration of intention at the time it was made
 - Can be revoked in whole or in part
- It is ambulatory
 - Property acquired after making of the will may be covered by it
 - Conversely, testator can (unless has become bound not to) dispose of property inter vivos after making will
 - So, those mentioned as recipients under will are not beneficiaries with any right to property, until testator dies with will unrevoked (*Re Walker* [1905] 1 Ch 160 at 172)
- Usual contents of a will
 - Distribution of property
 - All real estate or personal estate to which a person is entitled at law or in equity at the time of their death, may be disposed of by will (s 4 *Wills Act*)
 - Time of death, not time will was made is important
 - Mere expectancy not property
 - Will does not have to dispose property
 - Appointment of executors
 - Maybe other wishes
 - E.g. disposal of body, funeral arrangements, general wishes or statements
 - No property in the human body or its parts (*Williams v Williams* (1882) 20 Ch D 659)
 - Not binding on executors
 - 'Precatory words'

Situation and terms that arise:

- Where deceased leaves a will and appoints an executor:
 - Executor applies for probate
 - Armed with probate, then collects deceased's estate and distributes according to will
- Where deceased leaves a will but it doesn't appoint an executor
 - Grant is called 'letters of administration with the will annexed'
 - Probate Court appoints someone to carry out provisions of the will ('administrator')
- Where deceased dies intestate, an administrator must be appointed
 - Granted letters of administration
 - Administrator distributes estate among the family according to a statutory scheme

Non-testamentary dispositions:

- “What can only be accomplished by a will is the voluntary transmission on death of an interest which up to the moment of death belongs absolutely and indefeasibly to the deceased’ (*Russell v Scott* (1936) 55 CLR 440 at 454)

Trusts inter vivos:

- Succession post-mortem is not the same as testamentary succession – *Russell*
- If x transfers property to a trustee to hold for x for x’s life and then after x’s death to y,
 - The death of x will have a bearing on y’s interest as it will convert it from an interest by way of a vested remainder to an interest in possession
 - But because y’s interest has been created during x’s lifetime, the arrangement is not testamentary

Life insurance and superannuation:

- If the insured has a policy on own life, can nominate who benefits on death
- Not testamentary as no property interest to dispose of
- If no nomination, on death the proceeds will form part of the estate passing under will or intestacy
 - Same with super (*Baird v Baird* [1990] 2 AC 548)

Transfer into joint ownership:

- If x transfers property to themselves and y as joint owners, and x dies first,
 - Y becomes the sole owner on x’s death by way of principle of survivorship
- This is not testamentary as a joint owner acquires interest at time of transfer

Contracts:

- A person may make a contractual promise that they will make a will, or a contract that they will not revoke a will
- Will is revocable and ambulatory
 - Unless the contract also provides a term that the promisor will not dispose of the property in lifetime, can still do so
- Binding against the other party (privity of contract) and enforceable against the estate of the deceased if breaches promise during lifetime
- Remedy for breach in damages – a claim against the estate

Mutual wills:

- A promise by two people to make wills in identical or substantially similar terms, and each promise to not revoke without the other’s consent
- An equitable recognition of the mutual promises to not revoke
- Problem is where survivor reneges on the promise by making another will inconsistent with that

Donationes mortis causa:

- A gift made
 - In contemplation of death
 - Intended to take effect on death