

Succession Law Notes

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What property can form part of an 'estate'?

- A person's estate cannot include property which they do not own.
- Various types of property change ownership on death, but not because of succession law. If transmission takes place outside of succession law, the property does not form part of the deceased's estate, and can't be disposed of by their will, or on their intestacy (except in NSW)

How to structure an Assignment/Exam Response

DISTRIBUTION OF [TESTATOR]'s ESTATE

- Distribution turns on the validity of the [**latest e.g. amended 1990**] Will, the [**middle**] Will and [**earliest e.g. 1990**] Will, in this order.
- Distribution of [**testator**]'s estate turns on whether [**testator**]'s valid Will has been revoked, as well as the Will's operation.

Alternatively, intestacy provisions apply.

If told the Will is valid, intestacy may not need be discussed.

If the latest Will is valid, distributions occur as it describes. If the latest Will is invalid, the middle Will, if it is valid, will dictate how distributions should occur. If the middle Will is invalid and it is the last Will, intestacy rules will dictate how distribution should occur.

If the latest Will is valid, [**insert how distributions occur**].

Donatio Mortis Causa

[INSERT YEAR] WILL

Assume a particular requirement is uncontroversial, where not expressly mentioned.

Rectification

Validity

Mutual Wills

Formalities

Informal Will

Incorporation of Informal Documents

Mental Requirements

Testamentary Intention

Conditional Will

Testamentary Capacity

Knowledge and Approval

Undue Influence
Fraud

Republication

Revocation

If the Will was revoked, distribution will be made under [the PRIOR Will/full intestacy]
If not, distribution will be made under the Will.

Revocation by Court order

Revocation by Informal Will
Revocation by Statutory Will

Express revocation in later will or codicil

Implied revocation by another will or codicil

Revocation by writing (executed in accordance with formalities)

Revocation by destruction

Act of destruction
Intention to revoke
Presumption of Destruction

Revocation by dealing

Conditional revocation/ dependent relative revocation

Revocation by marriage

Revival (only applies if revocation of Will has occurred)

Intestacy

Single Will: If the Will is not admitted to probate, an intestacy would arise

Multiple Wills: ...

Revocation or gift fails: ...

Successful revocation: ...

Operation of [INSERT YEAR] Will

Clause [X]

Commission

Forfeiture

Revocation by divorce

Lapse

Exception: Statutory Anti-Lapse

...

Ademption

Exception: Contrary Intention

...

Construction and Interpretation

Children

Drafting

[Insert phrase e.g 'my child' 'Grandchildren' 'Spouse']

Family Provision Claim

[Insert Person]

Eligibility

Domestic partner

Spouse

A former [spouse/domestic partner]

Biological/adopted

Step-child

For a substantial period during [testator]'s life [applicant] believed that [testator] was his/her [father/mother] and was treated as a natural child

Registered caring partner

Grandchild

A spouse or domestic partner of [testator]'s child who has died within 1 year of [testator]'s death

A member of [testator]'s household at the time of [testator]'s death

Future member of the household

Moral Duty

Inadequate provision

Quantum: What provision should be made?

Personal Representative

...

Competing Burial Claims

POSSIBLE COURSES OF ACTION

New Will / Regaining Testamentary Capacity

Statutory Will

Topic 1A: Glossary

Ademption: The rule of ademption specifies that, when the subject matter of a specific gift to someone is no longer in the will-maker's estate at the date of death (because it has been sold or given away, for example), the beneficiary will receive nothing. In this case, the gift is said to have adeemed.

Administrator: A person appointed by the court under letters of administration to administer a deceased estate that has no executor. This may be because

- there is no will; or
- the will does not appoint an executor; or
- a named executor is unwilling or unable to act.

Beneficiaries: The persons who receive distributions of the deceased's property, under either the will or the intestacy rules

...

Intestacy

Acronyms

Administration and Probate Act 1958 (Vic) = *A&P Act*

Relationships Act 2008 (Vic) = *Relationships Act*

- A person can dictate how their property should be distributed when they die by executing a valid will.
- If a person dies and has not made a valid Will then the deceased has died **intestate**. An **intestacy** has occurred.
- If there is a valid will, but all of the property is not disposed of by the will, a **partial intestacy** has occurred. This can occur if there is no residue clause in the will.
- Intestacy rules determine how a person's property is to be distributed when they die intestate or partially intestate.
- The Victorian laws of intestacy are embodied in the statutory provisions of the *Administration and Probate Act 1958* (Vic).
- Intestate estates are administered by an 'administrator' appointed by the court, as opposed to an 'executor' who is ordinarily appointed under a testator's will

Introductions

Model introduction:

- Single Will: If the Will is not admitted to probate, an intestacy would arise
- Multiple Wills: If none of [**deceased**]'s Wills are admitted to probate, an intestacy would arise.
- Revocation or gift fails: If the Will has been revoked or the gift of [**testator**]'s estate fails, an intestacy arises.
- Successful revocation: If I am wrong and the presumption of revocation is not rebutted, [**deceased**]'s estate is distributed under the intestacy rules.¹

¹ *Administration and Probate Act 1958* (Vic) ('A&P Act').

Does [beneficiary] fall within the definition of an individual who is entitled to [deceased]'s estate under intestacy?

Note: Whether a person is considered a [partner] or [child] in the following discussion, relates to whether they constitute a [partner] or [child] for the purposes of receiving a distribution as a [partner] or [child] under the intestacy provisions. This is separate to a discussion of whether a person is a 'child', 'grandchild' or 'spouse' for the purposes of a specific gift being made (i.e. topic 8)

Is [partner] a surviving partner? - start here for intestacy

[**Partner**] will be entitled to distributions if [**s/he**] is legally [**deceased**]'s partner.

'Partner' means

- (i) a domestic partner²
- (ii) registered caring partner³
- (iii) a spouse

at the time of [**intestate**]'s death.⁴

Domestic partner - start here for family provision

Model introduction: 'Domestic partner' includes

1. Option 1.1: registered domestic partner⁵

² See *Administration and Probate Act 1958* (Vic) s 3 (definition of 'domestic partner') ('A&P Act').

³ See *Administration and Probate Act 1958* (Vic) s 3 (definition of 'registered caring partner') ('A&P Act').

⁴ See *Administration and Probate Act 1958* (Vic) s 70B (definition of 'spouse')

⁵ See A&P Act s 3(1) (definition of 'domestic partner').

2. Option 1.2: unregistered domestic partner,⁶ who is someone who was living with **[intestate/testator]** at the time of their death as a couple on a genuine domestic basis⁷ and either:⁸

- had done so continuously for at least 2 years immediately before **[intestate/testator]**'s death;⁹ or
- is the parent of an underage child of **[intestate/testator]**¹⁰

Option 1.1: Registered Domestic partner

Sample shutdown:

...

Sample satisfaction: **[Registered domestic partner]** was at the time of **[testator]**'s death, in a registered domestic relationship with **[testator]** within the meaning of the *Relationships Act 2008* (Vic).¹¹ This is because **[registered domestic partner]** and **[testator]** are 'two adult person who are not married to each other', **[registered domestic partner/testator/both]** provides **[personal/financial] commitment and support of a domestic nature** for the material benefit of **[registered domestic partner/testator/the other]**'.¹²

Mention if relevant: If domestic partner and testator are different genders/living under different roofs

1. Their different genders ...
2. Them not living under the same roof ...

does not impact their relationship being a registered domestic relationship.¹³

⁶ See *A&P Act* s 3(1) (definition of 'unregistered domestic partner').

⁷ See *A&P Act* s 3(1)(a) (definition of 'unregistered domestic partner').

⁸ See *A&P Act* s 3(1) (definition of 'unregistered domestic partner').

⁹ See *A&P Act* s 3(1)(b)(i) (definition of 'unregistered domestic partner').

¹⁰ See *A&P Act* s 3(1)(b)(ii) (definition of 'unregistered domestic partner').

¹¹ See *A&P Act* s 3(1) (definition of 'registered domestic partner').

¹² See *Relationships Act 2008* (Vic) s 3(1) (definition of 'registered domestic partner').

¹³ See *Relationships Act 2008* (Vic) s 3.

Re Bertine [2019] VSC 228 (11 April 2019) indicates that the registration of registered domestic partner can be set aside for intestacy purposes. Therefore, the previously entitled registered domestic partner may no longer be entitled.

Option 1.2: Unregistered Domestic partner

When to use this response: This Script can be used when determining if an applicant is an unregistered partner for the purpose of **intestacy** AND being an **eligible person for a family provision claim** (under s90(a))

LAW

To be an unregistered domestic partner,

- **[partner]** needs to have been living with **[deceased]** ‘as a couple on a genuine domestic basis’ ‘at the time of [his/her] death’ (*A&P Act s 3(a) definition of unregistered domestic partner*) AND either
 - had done so ‘continuously for ... at least 2 years immediately before **[deceased’s]** death’ (See *A&P Act s 3(b)(i) definition of unregistered domestic partner*) OR
 - is a parent, at the time of **[deceased]**’s death, of an underage child of **[deceased]** (See *A&P Act s 3(b)(ii) definition of unregistered domestic partner*);

If *intestacy* response: **[Partner]** will receive distributions if she was **[deceased]**’s unregistered domestic partner under ss 70B and 3(1).¹⁴

Option 1: Relationship more than two years ((b)(i) satisfied)

Script: Their relationship lasted more than 2 years.¹⁵ —>See s3(a)

¹⁴ See *A&P Act*.

¹⁵ See *A&P Act s 3(1)(b)(i)* (definition of ‘unregistered domestic partner’).

Option 2: Relationship less than two years ((b)(i) not satisfied; consider (b)(ii))

Two common issues: When did the parties start living together? Was the relationship over when the deceased died?

Script:

As their relationship

1. **Common issue 1:** lasted less than 2 years,
 2. **Common issue 2:** was over when [testator] died,
- [partner] must prove that [partner] is a parent, at the time of [deceased]'s death, of an underage child of [deceased].¹⁶

Step 1: Is [child] an underage child of testator?

...

Step 2: Was [partner] a parent, at the time of [deceased]'s death, of this underage child of [deceased]?

...

Is s 3(a) satisfied?

Section 35(2) of the *Relationships Act 2008*

The s35(2) factors are used to determine whether the applicant was living with deceased at the time of his/her death as a couple on a genuine domestic basis (for the purposes of [A&P Act s3\(a\) definition of 'unregistered domestic partner'](#))

Mention if testator and partner are same gender. Section 3(a) is not limited to different gender couples.

¹⁶ See *A&P Act* s 3(1)(b)(ii) (definition of 'unregistered domestic partner').

Perfect introduction: **[Testator]** and **[partner]**'s circumstances must be examined to determine whether they were living as a couple *on a genuine domestic basis*.¹⁷

Alternate phrases for framing in exam
<ul style="list-style-type: none"> • Factors against a domestic relationship include • However, the following factors indicate otherwise
Arguably, [partner] and [deceased] [were/were not] unregistered domestic partners as [insert facts] .

Note: If 'not applicable', write 'not applicable'

(a) the degree of mutual commitment to a shared life¹⁸: **[insert facts]**

- **[Partner]** and **[testator]**'s commitment to marriage that they had expressed to their friends and family¹⁹
- they were engaged
- **[deceased]** did not contact **[partner]** when they became sick

(b) the duration of the relationship:²⁰ **[insert facts]**

...

(c) the nature and extent of common residence:²¹ **[insert facts]**

• ...

- **[Partner]** and **[testator]** 'had decided the relationship would continue and were working to that end'.²²

¹⁷ See *A&P Act* s 3(3) (definition of 'unregistered domestic relationship'); *Relationships Act 2008* (Vic) s 35(2).

¹⁸ See *Relationships Act 2008* (Vic) s 35(2)(a)

¹⁹ See *Relationships Act 2008* (Vic) ss 35(2)(a); (h).

²⁰ See *Relationships Act 2008* (Vic) s 35(2)(b).

²¹ See *Relationships Act 2008* (Vic) s 35(2)(v).

²² See *Dow v Hoskins* [2003] VSC 206 [33]; [35].

- **[Partner]** moved out.
 - they maintained distinct households and only occasionally visited the other.²³
- However, Cummins J
- warned against a 'narrow, formal, pedantic or merely geographical' view of the phrase 'living with.'
 - opted for a broader view, considering 'the human reality of the personal, emotional and cultural complex'
- as **[partner]** and **[testator]** did intend to live together.²⁴ Hence, **[Testator]** and **[partner]** need not be living together/physically in the same house to be genuine domestic partners.²⁵

In *Dow*, even though the parties had split up, being physically apart due to an intervention order, 'the parties had decided the relationship would continue and were working to that end' (at [33]). Hence, 'the plaintiff was the domestic partner of the deceased at the time of his death' (at [35]).

(d) whether or not a sexual relationship exists:²⁶ [insert facts]

- they have a sexual relationship
- They do not have a sexual relationship, but this is due to a lack of interest. Consequently, it does not detract from the legitimacy of their relationship.
- Presumably yes but query whether **[partner]**'s statement that **[partner]** is *almost certain* that **[deceased]** is the father. This might indicate that the relationship was not monogamous from **[partner]**'s point of view.
- Their unconsummated relationship

unconsummated = not made complete by sexual intercourse

Script: No sexual relations

²³ See, eg, *Re Gunn; Thomas v Gunn* [2019] VSC 772.

²⁴ See *Dow v Hoskins* [2003] VSC 206, [32].

²⁵ See, eg, *Estate of Sigg* (dec'd) [2009] VSC 47.

²⁶ See *Relationships Act 2008* (Vic) s 35(2)(d).

- Perhaps they were simply close friends. They never had sexual relations, which is relevant under s 35(2)(d).²⁷ However, in *Tsakirakis v Hatzidimitriou*²⁸ the two were found to not be partners even while having a sexual relationship. Arguably, their asexuality is thus not fatal, especially considering they shared beds.

(e) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties:²⁹ [insert facts]

...

(f) the ownership, use and acquisition of property³⁰

...

(g) the care and support of children:³¹

...

(h) the reputation and public aspects of the relationship³²

...

- They kept the relationship secret

Mention if there was a separation

²⁷ See *Relationships Act 2008* (Vic).

²⁸ [2007] NSWSC 400 [79].

²⁹ See *Relationships Act 2008* (Vic) s 35(2)(e).

³⁰ See *Relationships Act 2008* (Vic) s 35(2)(f).

³¹ See *Relationships Act 2008* (Vic) s 35(2)(g).

³² See *Relationships Act 2008* (Vic) s 35(2)(h).

Separation has likely occurred. Even though mere physical separation is insufficient,³³ [testator] indicated a clear intention to permanently end the relationship by [insert facts]. Therefore,

Conclusion for intestacy:

In my view [partner] [was/was not] [deceased]'s partner from when [insert time]

- [partner] moved houses in [insert date], which is over two years before [deceased]'s death.

Thus, [partner] is entitled to inherit under the intestacy provisions.

Spouse

RED FLAG: Widow

...

Registered caring partner

...

³³ See *Dow v Hoskins* [2003] VSC 206.

The Scenarios of intestacy

- Scenario 1: Deceased survived by a partner and no children or other issue
- Scenario 2: Deceased survived by a partner and at least one child or other issue
- Scenario 3: Deceased survived by multiple partners
- Scenario 4: 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.³⁴

Scenario 2: Deceased survived by a partner and at least one child or other issue

Scenario 2.1: There is a child who is also child of surviving partner

Partner when they die will distribute to the children presumably (or the child could make a family provision claim).

...

Scenario 2.2: There is a child who is NOT the child of surviving partner (child from a previous/other partner)

- This scenario applies where there is BOTH a child who is also child of surviving partner AND a child who is NOT (once there is a child who is not the biological child of the surviving partner, this scenario applies)

Green —>Option 1

Red —>Option 2

³⁴ See *A&P Act* s 70J.

Model application: [Testator] is survived by **his/her** partner [insert partner], and **his/her** children/child (who are/is not children of [insert partner]). Furthermore, [testator]'s estate is worth [less/more] than the statutory legacy (currently \$499,210)³⁵.

If Estate < Statutory Legacy (\$499,210) —> see Option 1

If Estate > Statutory Legacy (\$499,210) —> see Option 2

Option 1: Estate < Statutory Legacy (\$499,210)

Hence, [partner] is entitled to the whole of the estate (including the personal chattels of the intestate).³⁶

- See definition above of personal chattels

Option 2: Estate > Statutory Legacy (\$499,210)

[Partner's] distribution

As at least one of [deceased]'s children (i.e. [insert child with previous partner]) is **not** the child of [partner] **AND** the estate is worth more than the statutory legacy

Balance of the residuary = leftover estate

[Partner] will therefore be entitled to:³⁷

1. the personal chattels of [deceased].³⁸
2. \$499,210 plus interest on this amount from the time of [intestate]'s death to distribution;³⁹ and
3. half of the leftover estate.⁴⁰

³⁵ See A&P Act s 70N.

³⁶ See A&P Act s 70L(1)(a). See also A&P Act s 5 (definition of 'personal chattels').

³⁷ See A&P Act s 70L(1)(b).

³⁸ See A&P Act s 70L(1)(b)(i).

³⁹ See A&P Act s 70L(1)(b)(ii)–(iii).

⁴⁰ See A&P Act s 70L(1)(b)(iv).

As the surviving partner, **[partner]** may elect to acquire any property of **[testator]**'s estate. **[Partner]** may do this by making a partner's property election in writing,⁴¹ with reasonable particularity and notice to the other parties.⁴²

See definition above of personal chattels

If [insert child] is still alive: [Insert intestate's child]/Children's distribution

Further,

- if one child of deceased: **[insert deceased's child]** is entitled to the other half of the balance of the residuary estate.⁴³
- If more than one child of deceased:
 - All of **[testator]**'s children 'share' the other ½ of the residuary estate 'in equal shares'.⁴⁴

If [insert child] has deceased

Option 1: [Insert intestate's child] deceased prior to testator's death

As **[insert intestate's child]** has deceased, **[insert intestate's child]**'s share of the residuary estate

- if one child of deceased's child: will fall to **[insert intestate's grandchild/intestate's child's child]**.⁴⁵
- if more than 2+ children of deceased's child: 'is to be divided between' **[insert deceased's grandchild 1]** and **[insert deceased's grandchild 2]**.⁴⁶

⁴¹ See *A&P Act* s 70P.

⁴² See *A&P Act* s 70S.

⁴³ See *A&P Act* s 70L(2).

⁴⁴ See *A&P Act* s 70L(2).

⁴⁵ See *A&P Act* s 70L(3)(a).

⁴⁶ See *A&P Act* s 70L(3)(a).

Option 2: [Insert intestate's child] deceased **within 30 days** after testator's death

A person must survive the intestate for 30 days.⁴⁷ If not, the person is taken to have predeceased the intestate.⁴⁸ If the person is the intestate's child, the person's share will fall to their child.⁴⁹ Here, **[insert intestate's child]**'s share of the residuary estate

- if one child of deceased's child: will fall to **[insert intestate's grandchild/intestate's child's child]**⁵⁰
- if more than 2+ children of deceased's child: 'is to be divided between' **[insert deceased's grandchild 1]** and **[insert deceased's grandchild 2]**⁵¹

If [insert intestate's grandchild] has deceased

As **[insert intestate's grandchild]** has deceased, **[insert intestate's grandchild]**'s share of the residuary estate

- a) if one child of deceased's child: goes to **[insert intestate's great grandchild/intestate's child's grandchild]**⁵²
- b) if more than 2+ children of deceased's child: 'is to be divided between' **[insert deceased's great-grandchild 1]** and **[insert deceased's great-grandchild 2]**⁵³

Note, [s 70L\(3\)\(b\)](#)⁵⁴ states 'and so on until the entitlement is exhausted'. Hence, great great grandchildren will have distributions made to them.

⁴⁷ See *A&P Act* s 70C(1).

⁴⁸ See *A&P Act* s 70C(2).

⁴⁹ See *A&P Act* s 70L(3)(a).

⁵⁰ See *A&P Act* s 70L(3)(a).

⁵¹ See *A&P Act* s 70L(3)(a).

⁵² See *A&P Act* s 70L(3)(b).

⁵³ See *A&P Act* s 70L(3)(b).

⁵⁴ See *A&P Act*.

Scenario 3: Deceased survived by multiple partners

...

Scenario 4: Deceased not survived by a partner

...

Validity

The [insert year] Will is only valid if [testator] satisfied the execution requirements, had mental capacity and testamentary intention, and knew and approved of it.

...

Does [testator] have testamentary capacity?

A testator must have sound mind, memory and understanding to execute a Will.⁵⁵ This is a legal, not medical, test.⁵⁶ 'It follows that medical evidence, though in some instances probative as to questions of capacity, is not essential or determinative'.⁵⁷

Presumption: Is the Will rational on its face and duly executed?

1. If the Will is not 'rational', no presumption applies, and mental capacity must be proved by [propounder].
2. If the Will is rational, [contradictor i.e. person alleging a lack of capacity] can undermine the presumption by leading evidence contradicting capacity (of which there is sufficient quantity). The onus then reverts to [propounder] to prove mental capacity on the balance of probabilities.

RULE: 'Where a will is rational on its face and is proved to have been duly executed, it is presumed that the testator was mentally competent. That presumption is displaced where there are circumstances that raise a suspicion about the testator's capacity.' ([Veall](#) at [202]).

⁵⁵ See *Banks v Goodfellow* (1870) LR 5 QB 549, 561 (Cockburn CJ for the Court).

⁵⁶ See especially *Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197, [65] (Hodgson JA). See also *Kerr v Badran* [2004] NSWSC 735 [49].

⁵⁷ See Gino Dal Pont, *Law of Succession* (LexisNexis Butterworths, 3rd ed, 2020) [2.3].

Note:

Duly executed = signed by the testator and signed by the witnesses properly.

Be rational on its face = it hasn't left money to the men on mars or something like that

'[P]roof that a will was properly executed is *prima facie* evidence of testamentary capacity'.⁵⁸

Yes—>See “Knowledge and Approval”

No—> See “Elements of *Banks* Test”

Option 1: **Yes** (and not displaced)

The [insert year] Will is duly executed and appears rational on its face in providing [insert distribution e.g. **equally for his children**]. Therefore, the presumption of capacity applies.⁵⁹ Consequently, the ‘evidentiary burden then shifts to the party impeaching the will to point to circumstances that raise a suspicion that the testator was not mentally competent’.⁶⁰ There is no suggestion of a lack of capacity (SEE KNOWLEDGE AND APPROVAL)

Option 2: **Yes (but presumption is displaced)**

...

Option 3.1: **No because duly executed BUT not rational on its face**

...

Option 3.2: **No because not duly executed AND not rational on its face**

⁵⁸ See *Boreham v Prince Henry Hospital* (1955) 29 ALJ 179, 180 (Williams, Fullagar and Kitto JJ).

⁵⁹ See *Veall v Veall* (2015) 46 VR 123, 174 [167] (Santamaria JA, Beach JA agreeing at [232], Kyrou JA agreeing at [233]) (*‘Veall’*), cited *Tobin v Ezekiel* (2012) 83 NSWLR 757, 771 [45] (Meagher JA, Basten JA agreeing at [1] and Campbell JA agreeing at [19]) (*‘Tobin’*). See also Gino Dal Pont, *Law of Succession* (LexisNexis Butterworths, 3rd ed, 2020) 54 [2.17].

⁶⁰ *Veall*, 173 [167].

...

Elements of *Banks* Test

Testators must have sufficient mental capacity to make a valid will. To satisfy capacity, the following requirements must be met at the time of execution.⁶¹

Element 1: Understand the nature of the act and its effects

Model introduction: Firstly, **[testator]** must understand the nature and effects of the Will.⁶² It only need be shown that 'testator understood he or she was making a will'.⁶³ It is not necessary to show that the testator understood each and every clause of the Will.

Script:

[As/If]

- **[party e.g. lawyer]** did, in fact, explain the Will clause by clause to **[testator]**, and **[testator]** understood **[party e.g. lawyer]**'s explanations
- had previously discussed will-making with another lawyer
- had multiple contacts with **[insert lawyer]**

this requirement is met.

Script: Testator perceives Will-making as bad luck

[Testator] belief that making a Will was 'bad luck' likely proves **she/he** understood what a Will is because **she/he** associated will-making with impending death.

⁶¹ See especially *Banks v Goodfellow* (1870) LR 5 QB 549, 565 (Cockburn CJ for the Court).

⁶² See *Banks v Goodfellow* (1870) LR 5 QB 549, 565.

⁶³ See Gino Dal Pont, *Law of Succession* (LexisNexis Butterworths, 3rd ed, 2020) [2.6].

Element 2: Awareness of the nature, extent and value of the estate

...

Element 3: 'Be not suffering a disorder of mind OR insane delusion'

Where possible, argue that the testator had a mental disorder AND an insane delusion that deprived her/him of capacity

Thirdly, [**testator**] must not have been suffering from any disorder of the mind or insane delusion which rendered **his/her** incapable of exercising her testamentary powers.⁶⁴

Mental disorder

...

Testator misremembers something

...

Insane delusion

[**Testator**]'s belief that [**insert belief** e.g. Mary was stealing from her] may constitute an insane delusion. This belief is likely not true as [**insert reasons**].

On proper analysis, [**testator**]'s belief constitutes an insane delusion as it was a (pick one)

⁶⁴ See *Re Robustelle (No 2)* [2023] VSC 72 [19] cited *Gardiner v Hughes (No 2)* [2019] VSCA 198, [48] (Kyrou, McLeish & T Forrest JJA); *Timbury v Coffee* (1941) 66 CLR 277, 283 (Dixon J). See especially *Banks v Goodfellow* (1870) LR 5 QB 549, 565.

1. 'fixed and incorrigible false belief which [he/she] ... could not be reasoned out of'.⁶⁵
2. 'a belief which is not true to fact, which cannot be corrected by an appeal to reason, and which is out of harmony with the individual's education and surroundings'.⁶⁶
3. a belief that is 'not capable of rational explanation or amenable to reason and that is not explicable by reference to the subject's education and culture'⁶⁷
4. fixed false belief or idea that would not be considered possible or probable by other persons of the same race, creed and level of education⁶⁸

Simple explanation: An insane delusion is one that is not true, in fact, but the testator can't be convinced, that it is not true. They are absolutely convinced that it's true and they haven't got any good reason to think that it's true.

Note: Koreans in North Korea believing the UN family are gods is in 'harmony with the individual's education and surroundings'. Hence, whilst this belief may not be true, it is not an insane delusion as it is in harmony with their education.

If the delusion had an operative effect on the Will, it will invalidate the Will.⁶⁹ Here the belief [**likely existed/did not**] at the date of the Will and likely influenced [**testator**]'s testamentary disposition to [**insert beneficiary**].⁷⁰ [**Testator**]'s belief [**likely/unlikely**] poisoned her/his affection towards [**insert beneficiary**] and perverted **her/his** 'sense of right' from providing reasonably for [**insert beneficiary**] to not doing so.⁷¹

...

⁶⁵ See *Bull v Fulton* (1942) 66 CLR 295, 339 (Williams J).

⁶⁶ See *Bull v Fulton* (1942) 66 CLR 295, 339 (Williams J).

⁶⁷ See *Re Estate of Hodges (deceased)* (1988) 14 NSWLR 698, 706.

⁶⁸ See *Florance v Shekelton-Barden* (unreported NSW Sup Court 1983).

⁶⁹ (See *Bull v Fulton* (1942) 66 CLR 295, 299 (Latham CJ), cited *Boughton v Knight* (1873) LR 3 PD 64; *Smee v Smee* (1879) 5 PD 84, 91; *Bailey* 570–1 (Isaacs J, Gavan Duffy and Rich JJ agreeing at 579). See also *Bull v Fulton* (1942) 66 CLR 295, 341 (Williams J).

⁷⁰ Ibid.

⁷¹ See *Banks v Goodfellow* (1870) LR 5 QB 549, 565.

Lucid intervals

Capacity can fluctuate.⁷² [Testator] was experiencing periods of [paranoia/delusions]. If the Will was made in a lucid period, mental capacity may be established.⁷³ On the balance of probabilities,⁷⁴ the Will [was not/was] made during a lucid interval because:

...

Element 4: Does [testator] comprehend and appreciate the claims to which they ought to give effect?

...

⁷² See, eg, *Re Menzies* [2019] VSC 179; *Timbury v Coffee* (1941) 66 CLR 277.

⁷³ See *Veall* 174 [167] (Santamaria JA, Beach JA agreeing at [232], Kyrou JA agreeing at [233]), cited *Kantor v Vosahlo* [2004] VSCA 235, [37] (Buchanan, Phillips JJA, Ormiston JA agreeing at [1]) ('*Kantor*').

⁷⁴ *Re Estate of Griffith (dec'd)* (1995) 217 ALR 284, 294–5 (Kirby P).