

MLL318 SUCCESSION LAW

Table of Contents

MLL318 SUCCESSION LAW	1
TOPIC ONE: INTRODUCTION TO SUCCESSION LAW	5
What is Succession Law?	5
Justifications for Succession Law	5
Freedom of Testation	5
Historical Context	6
The Family and Succession	6
Indigenous Perspectives	7
Comparative Perspectives	7
Modern Challenges & Law Reform	7
Key Terms and Concepts	8
Relevant Victorian Legislation	8
Key Institutions	8
Duty of Care	8
TOPIC TWO: WILLS	10
2.1 CAPACITY TO MAKE A WILL	10
AGE	10
TESTAMENTARY CAPACITY	10
STATUTORY WILLS (FOR PERSONS LACKING CAPACITY)	11
TESTAMENTARY INTENTION	11
KNOWLEDGE AND APPROVAL	12
UNDUE INFLUENCE	12
<i>Nicholson & Ors v Knaggs & Ors</i> [2009] VSC 64	13
FRAUD	13
2.2 FORMALITIES TO MAKE A WILL	13
FORMALITIES FOR A VALID WILL (s 7 <i>Wills Act 1997</i>)	13
ELECTRONIC EXECUTION AND REMOTE WITNESSING (s 8 <i>Wills Act 1997</i>)	14
INTERNATIONAL WILLS	15
INFORMAL WILLS AND THE DISPENSING POWER (s 9 <i>Wills Act 1997</i>)	15
<i>Re Nichol</i> [2017] QSC 220	16
STATUTORY WILLS (s 21 <i>Wills Act 1997</i>)	16
2.3 CONSTRUCTION OF WILLS AND REVOCATION	17
ROLE OF THE COURT	17

GENERAL PRINCIPLES OF CONSTRUCTION	17
SUBSIDIARY PRINCIPLES OF CONSTRUCTION	18
ADMISSIBILITY OF EVIDENCE	18
KEY CASES	19
VOLUNTARY REVOCATION.....	19
REVOCATION BY OPERATION OF LAW	19
AMENDMENTS AND ALTERATIONS TO A WILL	20
IMPLIED REVOCATION AND ALTERATIONS.....	20
LOST WILLS AND CONDITIONAL REVOCATION	20
2.4 GIFTS IN WILLS	20
TYPES OF GIFTS	21
ASSETS THAT CANNOT BE GIFTED BY WILL	21
FAILURE OF GIFTS	22
OTHER KEY POINTS	23
Republication	23
Residuary Clauses	24
Executor Duties.....	24
Attorney/Executor Overlap.....	24
TOPIC THREE: PROBATE AND ADMINISTRATION	25
3.1 LPRS AND GRANTS	25
LEGAL PERSONAL REPRESENTATIVES (LPRS)	25
Executors (LPRS).....	25
Capacity to Act (LPRS)	26
Assuming or Renouncing Role (LPRS)	26
Administrators (LPRS).....	27
Discharge and Removal	27
GRANTS OF REPRESENTATION	27
Types of Grants	28
Common Form & Solemn Form.....	28
Foreign Jurisdictions (Resealing)	28
THE GAP BETWEEN DEATH AND THE GRANT	29
Payment/Remuneration.....	29
3.2 INTESTACY	29
Background and Policy	30
Statutory Framework	30
Entitlements on Intestacy (Victoria).....	31

Multiple Partners.....	32
Partner’s Additional Rights	32
Indigenous Persons’ Estates	32
Hotchpot	33
Applicable Law (Private International Law).....	33
Re Gunn; Thomas v Gunn [2019] VSC 772	33
3.3 FAMILY PROVISION CLAIMS	33
Legislative Framework	34
Eligibility to Claim	34
Time Limits	35
The two-stage test (“twin tasks”).....	35
Criteria for Entitlement	35
Factors Considered (s 91A AP Act)	36
Statutory formula (what the court is empowered to do).....	36
Property Subject to Claims	36
Types of Order (s 97(2))	37
Contracting Out	37
Defending Claims.....	37
Pavlidis v Pavlidis [2023] VSC 92	37
Practical translation points	37
3.4 ADMINISTRATION OF DECEASED ESTATES	38
Role of the Legal Personal Representative (LPR)	38
Grants of Representation	38
Funeral and Body	38
Protecting and Collecting Assets.....	39
Assets Available for Debts	39
Debts and Expenses	39
Taxation	40
Distribution of Estate.....	40
Powers of LPR	40
Rights of LPR.....	40
Liabilities of LPR.....	41
Accountability.....	41
TOPIC FOUR: POWER OF ATTORNEY AND GUARDIANSHIP	42
Decision Making Capacity.....	42
Enduring Powers of Attorney (EPOA)	42

Principal	43
Attorney(s)	43
Formalities	43
Commencement.....	43
Revocation & Resignation	43
Duties of Attorneys	44
Liability.....	44
Supportive Attorneys	44
General Non-Enduring Power of Attorney	44
Medical Treatment Decision Makers (MTDMs)	44
VCAT's Role.....	45
If no POA & principal loses capacity:.....	45
<i>YPO (Guardianship) [2022] VCAT 377</i>	45
GLOSSARY	47
PROBLEM QUESTION SUGGESTED STEPS	49
Week 7: Suggested Approach to INTESTACY Problems.....	49
Week 8: Suggested Approach to FAMILY PROVISION CLAIM Problems	49

TOPIC ONE: INTRODUCTION TO SUCCESSION LAW

What is Succession Law?

Succession law is the body of law that deals with the **legal consequences of a person's death** on their property.

It determines how a person's assets are distributed after death, through:

- Wills (testate succession)
- Intestacy (statutory distribution if no valid will),
- Probate and administration of estates

Succession law is sometimes referred to more plainly as “wills and estates”

Mackie & Bennett-Histed: Succession law encompasses not just wills, but intestacy, inter vivos gifts with a death-purpose effect, and the actual mechanics of distribution.

Croucher & Vines: Succession law is fundamentally about the relationship between death and property. It is a hybrid of private law (property, equity) and public law (tax, welfare, procedural regulation).

*Succession law is also deeply people-focused –

- Involving grief, conflict, and interpersonal dynamics.
- Much like family law, it often involves managing people more than just documents or property.

Justifications for Succession Law

Succession law reflects a **liberal, property-owning democracy** model: **individuals acquire use, and transfer property with autonomy**, subject to limited intervention.

Respect for Autonomy: Law recognises a person's wishes after death through testamentary freedom.

Protection of Dependants: Via intestacy rules or family provision legislation.

Administrative Certainty: Legal frameworks assist in resolving disputes and distributing estates.

Freedom of Testation

Australian law strongly protects the **right to dispose of property by will**, subject to family provision rules.

- Testators can generally leave property to anyone for any reason, including non-family or discriminatory reasons, though courts can intervene under family provision laws
- The **Australian model** (based on NZ's 1900 Act) allows **freedom of testation**, but with **discretionary court power** to ensure dependants are not left without adequate provision.

Comparative Note: Some countries (e.g., France) have **forced heirship** rules with mandatory shares for children/spouses

- USA: spousal elective shares, homestead protection, family allowances
- Australia: Freedom of testation with family provision backstop.

Edwards v Edwards [2009] VSC 431: The ability to make a will is a basic right – not expressly conferred by statute, but fundamental in nature.

Clauses that attempt to “disinherit” beneficiaries for challenging a will (e.g., “no contest” clauses) are generally ineffective under Australia law, as they conflict with the right to bring family provision claims.

Historical Context

Realty v Personality

- Wills of land (realty) not allowed until the **Statute of Wills 1540**
- Personality governed by ecclesiastical courts (1/3 to wife, 1/3 to children, 1/3 “dead part” as testator’s discretion).

Statute of Distribution 1670: codified intestate succession to personality

Statute of Tenures 1660: all land held in **socage tenure** → freely devisable.

Succession law’s evolution reflects property system reforms in England, but also colonial transplantation to Australia.

Australian Position:

- NSW abolished primogeniture in 1862
- Uniform Succession Law project seeks national harmonisation (Wills Acts, intestacy, family provision)
- Despite attempts at uniformity, each Australian state/territory still has its own rules – leading to eight diverging systems
- Victoria focuses only on Victorian law – differences in interstate intestacy rules (e.g., NSW vs QLD) are noted but not examinable.

The *Wills Act 1997* (Vic), *Administration and Probate Act 1958* (Vic), and *Trustee Act 1958* (Vic) govern most matters post-death.

Supreme Court (Administration and Probate) Rules 2024 (Vic) regulate probate applications.

Courts

- Probate Jurisdiction: Validity of wills, appointment of executors/administrators
- Construction Jurisdiction: Interpretation of Wills, Estate Administration
- Supreme Court has exclusive jurisdiction over probate and related matters in Victoria.

The Family and Succession

Succession law has always reflected the family unit as the default recipient, especially under intestacy.

- Intestacy rules priority **spouse, children, and next of kin**
- **Debate:** *Should family always take priority? Should testators be free to exclude family entirely?*
- **Australian solution:** flexible court-based family provision, not fixed shares.
- This recognises the diversity of modern family structures – including stepchildren, cohabitants, same-sex partners, etc
- But risks include, uncertainty, litigation costs, and interpersonal conflict.

*Litigation often arises from claims by people who feel they were entitled to more, formally known as family provision claims.

- Estates with adult children and blended families are increasingly vulnerable to litigation, especially as inheritance are received later in life.

Will disputes may also invoke challenges to conditions or terms imposed in a will (e.g., religious or relationship-based conditions) on public policy grounds.

Indigenous Perspectives

Mabo v Queensland (No 2): Recognises **native title**, overturning terra nullius.

Customary law may govern succession to native title land

ALRC Report 1989: recommended reforms for Aboriginal intestate estates.

NT, WA, QLD, NSW, TAS have varied degrees of implementation.

Cultural concerns:

- Difficulty naming deceased
- Low will-making rates due to bureaucracy and cultural mismatch
- No state or territory has legislated a parallel succession system for First Nations Australian, unlike Canada
- Western succession law often fails to reflect kinship and community-based understandings of family and land.

Comparative Perspectives

Civil law countries (e.g., France, Germany): Forced shares for family

USA: spousal elective shares, homestead protection, family allowances

Australia: Freedom of testation with family provision backstop

Some migrant clients may assume Australian law resembles their home system – lawyers should explain different

Modern Challenges & Law Reform

Changing family forms: blended families, de facto partners, same-sex couples

Superannuation: now often the largest assets

- Superannuation law governs many death benefits → not part of estate unless paid to estate.
- Is governed by trust deed and super law.

Ageing population: increasing issues around:

- Mental capacity
- Undue influence
- Statutory wills
- Reverse mortgages and depleted estates

HECS/HELP debts die with the deceased – but other debts (e.g., credit cards, car loans) are paid from the estate.

Uniform succession laws: project aims to harmonise wills, intestacy, probate, and family provision laws nationally

- Reform must balance legal certainty with flexibility to reflect changing societal realities.
- Drafting delays by solicitors may give rise to negligence if the client dies before execution (e.g., *White v Jones*).
- File management policies should include diarising will turnaround time and retaining original will and instruction records indefinitely
- Some firms apply the 'four-eyes' rule (second reviewer) and detailed file notes to minimise drafting errors.

Key Terms and Concepts

- **Executor:** manages the estate.
- **Beneficiary:** receives a benefit under the will.
- **Codicil:** a subsequent document that modifies a will; less used today due to ease of redrafting wills.
- **Intestate/intestacy:** dying without a will.
- **Will-maker** (preferred term over "testator").
- **Guardianship:** will can nominate guardians for minor children — not binding, but persuasive.
- **Trustee:** holds property on trust (e.g. if a child inherits but must wait until age 21).
- **Residuary estate:** the remainder of the estate after debts, expenses, and specific gifts are satisfied
- **Letter of wishes:** a non-binding document that can explain will-maker's motivations or preferences

Relevant Victorian Legislation

- Wills Act 1997 (Vic)
- Administration and Probate Act 1958 (Vic)
- Supreme Court (Administration and Probate) Rules 2024
- Powers of Attorney Act 2014 (Vic)
- Medical Treatment Planning and Decisions Act 2016 (Vic)
- Guardianship and Administration Act 2019 (Vic)
- Trustee Act 1958 (Vic)

Key Institutions

- **Probate Office (Supreme Court of Victoria):** manages probate and administration applications; maintains the register of wills and grants since 1852. Provides information but not legal advice.
- **Victorian Civil and Administrative Tribunal (VCAT):** hears matters relating to powers of attorney, guardianship, and administration. Less formal; self-representation common.
- **Office of the Public Advocate (OPA):** independent statutory office assisting vulnerable people with guardianship, medical decisions, and power of attorney issues.

Duty of Care

- Lawyers owe a duty of care not only to the will-making client, but also to intended beneficiaries.
- *Hill v Van Erp* (1997) 188 CLR 159: Solicitor held liable for allowing a beneficiary's spouse to witness the will, thereby invalidating the gift to the beneficiary.
- *White v Jones* [1995] 2 AC 207 (UK): Solicitor liable for 8-week drafting delay leading to client death before execution — negligence due to failure to complete task.

- **Queensland Art Gallery v Henderson Trout [1998] QSC 250:** No liability where will-maker hadn't made a definite decision to gift art; duty does not arise until intention is firm.
- Risk mitigation strategies include rapid turnaround for elderly clients, maintaining file notes, using checklists, and ensuring correct witnessing protocols.

TOPIC TWO: WILLS

2.1 CAPACITY TO MAKE A WILL

AGE

General Rule: Minimum age to make a will is **18 years** (s 5 *Wills Act 1997* (Vic))

Exceptions:

- **Minors who are married** may make a will (s 6)
- **Court-authorized Wills** under s 20 (e.g., if a minor has significant assets and intestacy would distribute them inappropriately)
- **Privileged wills** may be made by minors in some jurisdictions (e.g., soldiers or seamen)

*until the 1970s, the age of majority was 21; now it is 18.

TESTAMENTARY CAPACITY

A person must have mental capacity **at the time of giving instructions and at the time of execution**

- Solicitors should create detailed file notes at both points as key evidence in case of dispute

***Banks v Goodfellow* (1870) LR 5 QB 549 test:**

Will-maker must:

1. Understand the nature and effect of making a will
2. Understand the extent of their property
3. Appreciate the claims of potential beneficiaries
4. Be free from any disorder of the mind that affects dispositions

Powell JA in in ***Read v Carmody*** recast this as:

- Awareness of the act as a legal testamentary act
- General awareness of the nature, extent and value of the estate
- Awareness of those with reasonable claims and the basis of such claims
- Ability to evaluate and discriminate between claims

If suffering from a mental disorder (e.g., dementia), even if transient or treatable, capacity may be lack if it affects cognition, orientation, or judgment.

Presumption of Capacity

- **Presumption applies** once age and sound mind are established
- **Burden shifts** if suspicious circumstances or evidence of incapacity arise (***Re Hodges* (1988) 14 NSWLR 698**)

Clarifications:

- Need not understand each clause or recall every asset
- Must appreciate moral claims of close relations
- General understanding of estate is sufficient (***Kerr v Badran* [2004] NSWSC 735**)
- Disorders like old age, eccentricity, suicide contemplation, or depressive states **do not automatically negate capacity**