

LAW4311 Succession Law

WA = Wills Act 1997

APA = Administration and Probate Act

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Topic 4: Mental requirements

Requirements for a valid will

A valid will requires:

- proper execution (topic 5), and
- the testator must: (topic 4)
 - have **sufficient age**
 - have **mental capacity** to make a will
 - must **intend** it to operate as their will

must **know and approve of contents** of will.

Age

Generally, a will made by a minor is **not** valid (s 5 WA).

Exceptions:

- Per s 6 WA, a minor can make a will in contemplation of marriage. If marriage contemplated does not take place, the will is deemed to be no effect.
- Per s 20 WA, The court may make an order authorising a minor to make a will in specific terms.
 - Court must approve of will and it must be reasonable.
 - Reasons why minor would not want parents to take in an intestacy.

Mental capacity

Banks v Goodfellow TEST

The testator must have a 'mental capacity' to make a will, which means he or she shall: (Banks v Goodfellow)

- a) understand the nature of the act and its effects;
- b) understand the extent of the property of which he is disposing;
- c) be able to comprehend and appreciate the claims to which he ought to give effect;
- d) not suffering from any disorder of the mind or insane delusion that would result in a disposition that a sound mind would not have made.

The test is a legal test, not a medical test.

Onus of proof

There is presumption of capacity arises where will is rational on its face and duly executed.

Burden of proof lies with the person who is propounding the will to show 'on the balance of possibilities', there is doubt as to capacity.

Element a) Understand the nature of the act and its effects	The testator understood he or she was making a will. No need to understand every single clause.
Element b) Understand the extent of the property	The testator have a general knowledge of the nature of their property, do not need to recollect every item or its precise value.
Element c) Comprehend and appreciate the claims	<p>Consider: whether the testator excluded someone because of his mental incapacity or his will?</p> <p>If P is [T's only child etc] who would "normally be expected" to be the recipient of T's asset...</p> <p>Here, [FACT], it more likely because the testator was unable, through mental illness or because of delusion to comprehend and appreciate the claim.</p>

	<ul style="list-style-type: none"> Therefore, it indicates the testator's mental incapability in making his will. <p>Here, [FACT], it is more likely because the testator was simply exercising testamentary freedom to exclude that person because of eccentricity, spite or capriciousness, or preference for other claimants.</p> <ul style="list-style-type: none"> Therefore, it indicate the testator have a mental capacity to make a will.
Element d) Insane delusions	<p>An insane delusion is different to a mental illness. If there is an insane delusion, no need to prove a mental illness.</p> <p>It is a fixed and incorrigible false belief which the victim could not be reasoned out of. (<i>Bull v Fulton</i>)</p> <p>It is 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." (<i>Re Estate of Hodges</i>)</p>



CASES

Re Griffith	<p>Claim the will was "inofficious" because no provision was made for her only child. Issue: a "harsh, unreasonable judgement of character" vs "morbid aberration" affected her capacity to make a valid will.</p> <ul style="list-style-type: none"> Relationship break down between the two – don't speak to each other – mother really dislike the son; son take care of the mother for a long time. The testator was intelligent and rational / but in her behaviour to her son, she is aggressive and irrational. No evidence of delusion. <p>The court found the testator was not have the capacity to make her will.</p> <p>However (dissenting): Kirby P noted that "freedom of testamentary disposition includes a freedom to be unfair, unwise or harsh with one's own property". => a harsh or unreasonable decision ≠ incapacity...</p>
Greer	
Timbury v Coffee "Delusion"	<p>Tim Timbury suffered from alcoholism, a delusion about his wife's infidelity. Delusions can come and go. The testator might have capacity if will made during a lucid interval.</p> <ul style="list-style-type: none"> The court concluded that the delusion (distrust toward the wife) is a consequence of drinking – causal connection. The delusion affected Mr Timbury's decision making at the time he making the will. – October will is impacted, August will is not. <p>HCA held that October will was impacted by delusions but the one made previously was not.</p>
Re Keys	<p>Testator's wife of 65 years had recently died. The grief and depression one week after his wife's death was an effective disorder. While he has the capacity to understand what his property is, he may not have the mental energy to make any big decisions.</p> <ul style="list-style-type: none"> The solicitor did not obtained medical opinion before preparing the will. The will was a radical departure from his last previously expressed testamentary intentions. The testator is in an "extreme passive suggestibility". <p>Invalid will.</p>

Topic 10: Family Provision

Overview

Court can only make a FP orders when:

- **STEP 1** an applicant is an eligible person s91(2)(a);
- **STEP 2** at the time of death, the deceased had a moral duty to provide for the eligible person's proper maintenance and support; s91(2)(c) and
- **STEP 3** the distribution of the deceased's estate fails to make adequate provision for the proper maintenance and support of the eligible person. (see s 91 (2)(d))

s 91(4)(a) & (b) in determining the quantum of any provision, the Court must take into account:

- the degree to which, at the time of death, the deceased had a moral duty to provide for an applicant and
- the degree to which the distribution of the estate fails to make adequate provision for the proper maintenance and support of an applicant.

s 91(5)(a) the amount of provision must not provide for an amount greater than is necessary for an applicant's proper maintenance and support.

In addition, extra considerations apply for particular eligible persons: s91(2)(b)

Time Limit

LIMIT

Per s.99(1), an application must be made within **6 months** after the grant of probate of the will or of letters of administration.

EXTENSION

Per s.99(2) Court has **discretion to extend** period for making an application.

- Application for extension of time must be made **before** final distribution of the estate. (s.99(3))
- Final distribution has not occurred while assets are still held by personal representative, even if they are holding on a trust established by the will (**Easterbrook**).

Ask: whether the court will grant extension?

- Applicant bears onus
- An extension of time will interfere with administration of estate, so sufficiently compelling grounds are required. (factors)
 - Relevant circumstances
 - Length of delay
 - Explanation for delay (eg. Knowledge of right to apply, Negligent legal advice, Ignorance of size of estate)
 - Strength of case for provision
 - Extent that estate has already been distributed
 - Prejudice / hardship to other beneficiaries
 - e.g. change of position, inequality caused by distributions already made
 - Whether parties have been in negotiations

Winter-Cooke v Winter-Cooke	<p>Deceased died April 2007. Probate granted April 2009. Time limit October 2009.</p> <p>Large estate (approx. \$6.6m), left to wife for life, and then to eldest son.</p> <p>Small legacy to applicant (who had been residuary benef of his grandmother's estate).</p> <p>Will stated reason why no more provision (\$ tied up in farming partnership; he received \$ from grandmother and life distributions)</p> <p>Applied in Dec 2014 to extend time. McMillan J refused and on appeal, VCA said questions were:</p> <ul style="list-style-type: none"> o does plaintiff have arguable case? o what is period of delay/explanation for it? o is there any prejudice to other benefs if time extended? <p>No reasonable explanation of delay (complex facts).</p>
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STEP 1: Who is eligible? (s 91(2)(a))

The obvious group	<p>Spouse and children</p> <p>Per s 90, [applicant] is eligible because she is:</p> <ul style="list-style-type: none"> (a) Spouse or domestic partner at time of death. (b) Child (incl adopted) under 18 yrs, full time student under 25 yrs, or with a disability. (c) Step-child (under 18 yrs, full time student under 25 yrs, or with a disability) (d) Someone who believes they were a child of deceased (under 18 yrs, full time student under 25 yrs, or with a disability) (e) Former spouse or domestic partner (subject to limitation) <p>'disability' is defined in s 90.</p> <p>Definition of spouse or domestic partner (for s 90(a))</p> <ul style="list-style-type: none"> • Spouse – defined s 3 (1)- married at time of death • Domestic Partner -same definitions as for intestacy • Section 3 (1): definitions of domestic partner, registered domestic partner, unregistered domestic partner • Unregistered domestic partner: <ul style="list-style-type: none"> o living as couple on genuine domestic basis (regardless of gender) and o either (i) had lived with person for 2 yrs prior to death or (ii) is a parent with deceased of child under 18. o What is "genuine domestic basis"? <p>Limitation on former partner (for s 90(e))</p> <p>A former spouse will be an eligible claimant if they would have been able to issue proceedings under the Family Law Act 1975 and have either:</p> <ul style="list-style-type: none"> • not started those proceedings; or <p>is unable to finalise them because of your death.</p>
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